

PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER

MARCH 2022



LEGAL & POLICY UPDATES



In this Section

Ministry of Power issues Green Hydrogen Policy, 2022

MNRE to give three months' relief in SCD of wind energy projects

Amendments to the Guidelines for short-term procurement of power by Distribution Licensees through tariff based bidding process

Ministry of Power issues Green Hydrogen Policy, 2022

- The Ministry of Power, Government of India has notified the Green Hydrogen and Green Ammonia Policy through Notification No. 23/02/2022-R&R dated February 17, 2022 (**Policy**). The Policy aims at boosting the domestic production of green hydrogen to 5 million tonnes by the year 2030, reducing dependence on fossil fuels and import of crude oil, and making India an export hub for the clean fuels such as green hydrogen (**H₂**) and green ammonia (**NH₃**).
- The incentives provided under the Policy are as follows:
 - Green H₂/NH₃ manufacturers may purchase renewable power from the power exchange or set up renewable energy capacity themselves or through any other developer.
 - Open access for sourcing renewable energy will be granted within 15 days of receipt of application.
 - The green H₂/NH₃ manufacturer can bank his unconsumed renewable power for up to 30 days with distribution company and take it back when required.
 - Distribution Licensees can also procure and supply renewable energy to the manufacturers of green H₂/NH₃ in their states at concessional prices, which will only include the cost of procurement, wheeling charges and a small margin as determined by the State Commission.
 - Waiver of inter-state transmission charges for a period of 25 years will be allowed to the manufacturers of green H₂/NH₃ for the projects commissioned before June 30, 2025.
 - The manufacturers of green H₂/NH₃ and renewable energy plant shall be given connectivity to the grid on priority basis to avoid any procedural delays.
 - The benefit of Renewable Purchase Obligation (**RPO**) will be granted as an incentive to the H₂/NH₃ manufacturer and the Distribution Licensee for consumption of renewable power.
 - Connectivity, at the generation end and the green H₂/NH₃ manufacturing end, to the ISTS for renewable energy capacity set up for the purpose of manufacturing green H₂/NH₃ will be granted on priority.
 - Manufacturers of green H₂/NH₃ will be allowed to set up bunkers near ports for storage of green NH₃ for export/use by shipping. The land for the storage for this purpose shall be provided by the respective Port Authorities at applicable charges.
 - Further, in order to ensure ease of doing business, a single portal will be set up by the Ministry of New and Renewable Energy for all statutory clearances and permissions required for setting up of green H₂/NH₃ production in a time bound manner, preferably within 30 days from the date of application.

MNRE to give three months' relief in SCD of wind energy projects

- The Ministry of New and Renewable Energy (**MNRE**) has decided to give an additional three-month extension of time in achieving commissioning date of wind power projects for which the power purchase agreements were signed and orders for wind turbine generators were placed before June 15, 2021, and the projects could not be commissioned in time due to the second wave of Covid-19 and also the onset of monsoon.
- Earlier, the MNRE had allowed time extension for period of disruption from April 1, 2021 to June 15, 2021 to renewable energy projects that are being implemented through agencies designated by MNRE or under various schemes of MNRE.

Amendments to the Guidelines for short-term (i.e. for a period of more than one day to one year) procurement of power by Distribution Licensees through tariff based bidding process

- On February 21, 2022, Ministry of Power (**MOP**), Government of India notified the amendment to the Guidelines for short-term (i.e. for a period of more than one day to one year) procurement of power by Distribution Licensees through tariff based bidding process dated March 30, 2016 (**Bidding Guidelines**). The Bidding Guidelines was also amended earlier on December 30, 2016.
- In the present amendment, the issue of sale of power by generators in the market without the consent of procurer is addressed. The present amendment is effective from the date of this notification.
- Vide the present amendment, a new clause i.e. Clause 6.4 (vi)(g) is added after Clause 6.4 (vi)(f) of the Bidding Guidelines. The Clause 6.4 (vi)(g) – ***Consequences on sale of contracted power to third party without the consent of the procurer*** states that:
 - In case the seller sells the power to any other party without the consent of the procurer, then the procurer shall be entitled to claim damages from the seller for an amount equal to the higher of: (a) twice the tariff as per the PPA for the corresponding contracted power; and (b) the entire revenue accrued from third parties on account of sale of this contracted power.
 - These damages shall be in addition to liquidated damages as per Para 6.4(e) of existing Bidding Guidelines, for failure to supply the instructed capacity.
 - In case of a complaint by the procurer to the concerned load dispatch centre regarding the sale of power by generator to third party, then the seller shall be debarred from participating in power exchanges and also from scheduling of the power in any short term/medium term/long term contracts from that generating station for a period of three months from the establishment of default mentioned in the complaint. Further, the period of debarment shall increase to six months in case of second default and shall be one year for each successive default.

RECENT JUDGMENTS



In this Section

Ecoren Energy India Pvt Ltd v. State of Andhra Pradesh & Batch [WA No. 383 of 2019 & Batch]

Solar Energy Power and Energy Pvt Ltd v. Solar Energy Corporation of India Ltd & Anr

Indian Energy Exchange Limited v. Power System Operation Corporation

NRSS XXXVI Transmission Ltd and Ors v. UP Power Corporation and Ors

Tata Power Company Ltd - Transmission v. Maharashtra Electricity Regulatory Commission & Ors

M/s Maharashtra State Electricity Distribution Company Ltd (MSEDCL) v. M/s ACME Solar Holdings Ltd and Anr

Ecoren Energy India Pvt Ltd v. State of Andhra Pradesh & Batch [WA No. 383 of 2019 & Batch]

2022 SCC Online AP 601, Andhra Pradesh High Court Order dated March 15, 2022

HSA Advocates partners **Shreshth Sharma** and **Hemant Sahai** represented **Tata Power (both solar and wind)** and **Acme Power (solar)**.

Background facts

- The High Court of Andhra Pradesh (**High Court**) in the Order dated March 15, 2022 in WA No. 383 of 2019 & Batch (**Common Order**) has dealt with 4 issues raised by wind and solar power generators and Andhra Pradesh State Load Despatch Centre (**SLDC**):
 - **Group A:** Writ Appeals filed by Wind and Solar Power Generators (**RE Generators**) challenging the directions passed by Single Judge instructing interim tariff at INR 2.44/2.43 per unit for solar/wind generators respectively, till adjudication of disputes by the Andhra Pradesh Electricity Regulatory Commission (**APERC**).
 - **Group B:** Writ Appeals filed by the RE Generators challenging the Order passed by Single Judge re maintainability of OP No. 17/2019 (wind) and OP No. 67/2019 (solar) preferred by the Distribution Licensee (**Discom**) before the APERC for seeking reduction in tariff.
 - **Group C:** Writ Appeals filed by SLDC against the finding of the Single Judge on the issue of curtailment of power, wherein SLDC was directed to give Notice to Re Generators when the action of curtailment is undertaken for Re Generators, except in the case of grave and sudden emergency.
 - **Group D:** Petitions filed by SLDC seeking review of the Order dated January 27, 2020 passed in WA No. 433 of 2019 & Batch, wherein the Hon'ble Court has directed POSOCO to submit its report on ascertaining the reasons for curtailment undertaken by SLDC from the RE Generators, in terms of the Statute/Regulations and Policies for the Must Run status granted to the RE Generators.

Issues at hand

- Whether the Single Judge in the judgment dated September 24, 2019 in WP No. 9844 of 2019 & Batch has correctly directed the Discom to pay pending and future bills of the RE Generators at the reduced tariff, contrary to the explicit provisions of the PPA and after quashing of GORT No. 63 and resultant communiques?
- Whether the APERC be allowed to entertain OP No. 17 of 2019 which is filed by the Discom, inter alia on the issue of retrospective revision of normative parameters of APERC Tariff Regulations 2015 and OP No. 67 of 2019 filed subsequent to the Judgment dated September 24, 2019?
- Whether Single Judge in judgment dated September 24, 2019 has erred in directing SLDC to not take any coercive steps with regard to the curtailment of power, except after giving due notice to the RE Generators? (This was challenged on behalf of SLDC).

Decision of the Court

- **For the issues raised in Group A Appeals, the High Court has:**
 - Set aside the directions of the Single Judge re payment of interim tariff for all pending/future bills of RE Generators.
 - Directed Discom to make payment of all pending/future bills at the 'rate mentioned in the PPAs' and directed that payment of arrears/pending bills shall be made within a period of six weeks from date of passing of the Common Order.
 - The High Court while passing the direction for payments observed as under:
 - Terms of the PPA cannot be altered either by the parties or the Court.
 - Financial difficulty of Government or Discom is no ground to avoid the contract or reduce tariff.
- **For the issues raised in Group B Appeals, the High Court has:**
 - Disagreed with Single Judge remanding matter for APERC to adjudicate its own jurisdiction.
 - Quashed the proceedings of O.P. No(s). 17/2019 (wind) and 67/2019 (solar) pending before the APERC.
 - In this regard, the High Court observed:
 - Tariff of wind project fixed prior to March 31, 2017 is determined for 25 years as per the parameters of APERC Tariff Regulations, 2015 and shall continue to govern the PPAs entered into before the said date.
 - APERC cannot retrospectively amend the parameters of the APERC Tariff Regulations, 2015 as the said Regulations itself does not allow any amendment after its expiry and in law (based on relevant judgments).
 - Prayers made in OP 17 of 2019 are not maintainable and when prayers as sought are in excess of APERC's jurisdiction, the same cannot be acted upon; hence, proceedings of OP 17 of 2019 deserves to be quashed.
 - Solar PPAs are binding contract for 25 years and their tariff having been determined under Section 63 of Electricity Act, 2003 cannot be interfered with through OP No. 67 of 2019.
- **For the issues raised in Group C Appeals, the High Court has:**
 - Dismissed the Writ Appeals filed by SLDC for having no merit and held that Single Judge has not committed any illegality in directing that the SLDC to not to take any coercive steps of any nature including curtailing generation/stopping evacuation except after due Notice to the Generators.
 - In this regard, the High Court observed:
 - There is no material placed by SLDC substantiating that there was any threat to the grid security or safety of any equipment or persons on the occasions when curtailment was done for the RE Generators.
 - There was no such threat in existence, for the simple reason that the amount of power curtailed from RE Generators was purchased from thermal power stations, as alleged by RE Generators and same was not refuted by the Discom.
 - If that be so, SLDC violated the Must Run principle, which provides for priority in evacuation of power from RE Generators and therefore SLDC has also violated the provisions of Indian Electricity Grid Code.
- **For the issues raised in Group D Petitions, the High Court has:**
 - Held that since curtailment issue has already been dealt in 'Group C' by the High Court, prayer for review of the interim Order dated January 27, 2020 (wherein the High Court has directed POSOCO to submit its report on ascertaining the reasons for curtailment undertaken by SLDC from the RE Generators) has become infructuous and is accordingly dismissed.



HSA **Viewpoint**

The High Court in the Common Judgment has upheld the cause of RE Generators on all fronts and has emphasized the core tenet of State's undeniable responsibility towards policy certainty, sanctity of binding PPAs and jurisdictional scope of APERC to entertain any retrospective amendment to Regulations. This Common Judgment resets the narrative on the setback received to the RE Generators due to the uncertainty and reduction in the tariff, and will boost investor confidence in India's renewable sector.

Solar Energy Power and Energy Pvt Ltd v. Solar Energy Corporation of India Ltd & Anr

CERC Order dated February 28, 2022 in Petition No. 70/MP/2019

Background facts

- The Solar Edge Power and Energy Pvt Ltd (**Petitioner/SEPEPL**) filed a Petition seeking (i) declaration of Goods and Service Tax (**GST**) as a Change in Law (**CIL**) event and (ii) compensation arising out of the additional expenditure incurred due to the imposition of GST laws.
- The Petition was heard by the Central Electricity Regulatory Commission (**CERC**) on June 04, 2020, wherein SEPEPL and Solar Energy Corporation of India Ltd (**SECI**) sought liberty to reconcile the CIL claims in terms with the MNRE's letters dated March 12, 2020 and March 23, 2020. The matter was reserved for Orders on November 09, 2021.
- In the meanwhile, on October 22, 2021, the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (**CIL Rules 2021**) were notified and pursuant to this, CERC re-heard the present matter on January 11, 2022 wherein SEPEPL submitted that:
 - There is a dispute with respect to the claims of the Petitioner towards the GST invoices qua the buying utility, i.e., Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**), in the present case.
 - Parties ought not to be directed to follow the procedure prescribed in the CIL Rules.

Issue at hand

- Whether the Petitioner is entitled to seek relief and compensation as per terms of the PPA signed or the mandate of Electricity (Timely Recover of Costs due to Change in Law), Rules 2021, which is notified pursuant to the CIL event and the Petition filed before the CERC?

Decision of the Commission

- CERC observed that the contracting parties are yet to settle the claims as on date of the hearing and as per the provisions of CIL Rules 2021, on occurrence of a CIL event, the affected parties are to settle the CIL claims among themselves and approach the Commission only in terms of Rule 3(8) of the CIL Rules 2021. In this regard, the CERC noted that the CIL Rules 2021 provides for:
 - Quantification of claims and a process and methodology for recovery of mutually agreed claims relating to impact of CIL event.
 - If there is a formula in the agreement for adjusting and recovering the amount of the impact of CIL, it shall be applied, otherwise the formula as prescribed in the CIL Rules 2021 is to be applied.
 - Time bound mechanism for settlement of such claims.
- CERC held that:
 - CIL Rules 2021 are in the nature of procedural law and until and unless any substantive rights are being taken away, it has to be applied retrospectively in all pending proceedings.
 - Petitioner may approach the procurer for settlement of CIL claims among themselves in terms of the CIL Rules 2021 and approach the Commission only in terms of Rule 3(8) thereunder.



HSA Viewpoint

The present Petition was filed prior to the notification of the CIL Rules 2021. However, CERC has retrospectively applied the mandate of CIL Rules 2021 to the present case. It is noteworthy that the present Order is passed subsequent to Ministry of Power's clarification dated February 21, 2022 to the CIL Rules 2021, wherein it is categorically stated that the CIL Rules 2021 will not be applicable to the Change in Law events which have occurred prior to the notification of CIL Rules 2021 and the same shall be dealt in accordance with the prevalent dispensation/rule position at the time of occurrence of the said event.

In our understanding, the view taken by CERC is not cogent and the said clarification as issued by Ministry of Power is a testament to this effect. CERC has gone beyond the scope and ambit of the CIL Rules 2021 to give them a retrospective effect, which is not only contrary to the said clarification by Ministry of Power but also to the explicit provisions of Section 176 of the Electricity Act, 2003, which do not provide for any retrospective application of the Rules framed thereunder.

Indian Energy Exchange Ltd v. Power System Operation Corporation

CERC order dated February 24, 2022 in Petition No. 169 of 2021

Background facts

- On March 08, 2019 the Ministry of Power (**MoP**) had set a target of installation of additional 30000 MW hydro capacity by the year 2030. In this regard, the MoP notified Hydro Purchase Obligation (**HPO**) as a separate category to Non-Solar RPO and declared Large Hydro Power Plants (**LHPs**) with the installed capacity > 25 MW as a renewable energy source.
- In continuance of the efforts towards the growth of hydel power sector in the country, Indian Energy Exchange Ltd (**IEX**), the Petitioner herein, proposed Hydropower Contracts in addition to existing Solar & Non-Solar Contracts in Green Term-Ahead Market (**GTAM**) on its platform for exclusive trading of hydro energy.
- In the present Petition, IEX also impleaded POSOCO as a part to the Petition and invited comments from stakeholders as per the direction of CERC during the hearing on August 27, 2021. Pursuant to the same, POSOCO raised the following issues:
 - In case of portfolio sale by hydro-rich States, the power is sold from a mix of generators, and it becomes difficult to identify and tag such power as hydropower. Further, the point of injection from where the Discoms are selling power is also difficult to ascertain.
 - To ease such difficulty, SLDCs may be directed to provide the point of injection in the NOCs themselves so that the source of power can be traced, and non-transparency can be avoided.

Issue at hand

- Approval for introduction of proposed Hydropower Contract in GTAM market on IEX platform.

Decision of the Commission

- CERC observed that the introduction of Hydropower Contracts in existing GTAM at the power exchange will provide an additional avenue to the existing and prospective Hydro Generators to sell the power at the exchange platform and obligated entities to fulfill their HPOs, and in the long-term, promote hydro capacity.
- Further, CERC addressed the issues raised by the stakeholders and POSOCO as follows:
 - **Regarding HPO fulfillment through Hydropower contracts in GTAM**
 - CERC agreed with the proposal of the Petitioner to introduce separate window for Hydropower Contracts in existing GTAM since a dedicated window for Hydro Contracts in GTAM will facilitate the matching of hydro buy bids with hydro sell bids.
 - CERC noted that the obligated entities procuring power through Hydropower Contracts shall be eligible for meeting their HPO, since only hydropower with green attributes shall be available for sale through such window.
 - Further, as the transactions through GTAM are bilateral in nature with clear identification of corresponding buyers and sellers, there will not be any difficulty in accounting for HPO.
 - **Regarding type of contracts**
 - As regards the duration of contracts, as the proposed Hydropower Contracts are on the same lines as the existing contracts under GTAM, CERC allowed the Petitioner to introduce Intraday Hydro Contract, Day Ahead Contingency Hydro Contract, Daily Hydro Contract and Weekly Hydro Contract in GTAM.
 - CERC approved IEX's proposal for 15-minute contracts or combination thereof, in the same manner as currently being offered for Solar and Non-Solar windows of GTAM.
 - **Regarding price discovery methodology and matching rules**
 - CERC agreed with IEX's proposal for price discovery methodology and matching rules for the Hydro GTAM Contracts, since it is the same as followed in the existing Term Ahead Market.
 - **Portfolio sale by Discoms**
 - CERC observed that details of source and quantum etc. are being mentioned in the NOCs issued to RE Generators by the respective SLDCs/RLDCs.
 - With regard to eligibility, the respective RLDC/SLDCs can ascertain the same whilst issuing the NOC/Eligibility Certificate and to facilitate this, CERC directed SLDCs/RLDCs to provide the point of injection in the NOC itself so that the source of power and actual dispatch from that source can be traced in a transparent manner.
 - **Waiver of ISTS charges and losses**
 - CERC held that the provisions of CERC (Sharing of Inter-State Transmission Charges and Losses Sharing) Regulations, 2020 regarding ISTS waivers will be applicable to the entities subject to the conditions specified under the same.

– **Sequence of curtailment**

- On the issue of sequence of curtailment based on source of generation i.e., the inter-se priority of curtailment between Solar, Non-Solar and Hydro transactions and between Renewable and Conventional bilateral transactions, the CERC held that the same shall be governed by CERC (Open Access in inter-State Transmission) Regulations, 2008 or the CERC (Indian Electricity Grid Code) Regulations, 2010.

– **In light of the above, CERC held that:**

- IEX's Proposal for the introduction of Hydropower Contracts in GTAM is approved subject to IEX's compliance with CERC's direction to incorporate appropriate provisions in its Bye-laws, Rules, and Business Rules concerning the introduction of Hydropower Contracts in GTAM, and the same is to be submitted to the CERC for records within two weeks from the date of this order.



HSA
Viewpoint

The introduction of Hydropower Contracts in existing GTAM at the power exchange is a welcome step to boost and encourage the development of hydro power, wherein the hydro generators will now be able to sell the power at the exchange platform and the obligated entities will also be able to fulfil its Hydro Power Obligations by buying the hydro power through the exchange.

NRSS XXXVI Transmission Ltd and Ors v. UP Power Corporation and Ors

CERC Order dated March 08, 2022 in Petition No. 267/MP/2021

Background facts

- NRSS XXXVI Transmission Company Ltd (**NRTL**), a fully owned subsidiary of Essel Infraprojects Ltd (**Essel Infra**), was selected as a successful bidder under Section 63 of the Electricity Act, 2003 (**Act**) to establish the transmission system for 'System Strengthening Scheme in Northern Region along with LILO of Sikar-Neemrana 400 KV D/C line at Babai' on Build, Own, Operate and Maintain (**BOOM**) basis and to provide power to the Long Term Transmission Customers (**LTTCS**) of the project.
- On January 13, 2016, Transmission Service Agreement (**TSA**) was executed between NRTL and LTTCS of the Project and Letter of Intent (**LOI**) was issued to Essel Infra on March 28, 2016 and in accordance with the bidding documents, Essel Infra acquired 100% of the shareholding in NRTL on August 22, 2016.
- The Central Electricity Regulatory Commission (**CERC**) vide Order dated December 07, 2016 in Petition No. 267/MP/2021 granted Transmission License to NRTL for inter-State transmission of electricity.
- NRTL received financial assistance from PTC India Financial Services Ltd (**PIFSL**) to the extent of INR 306 crore as Rupee Term Loan for construction, development, and implementation for its project as per the terms and conditions in the Common Facility Agreement dated November 07, 2017 and Security Trustee Agreement dated November 07, 2017 (**STA**) signed between them. As per the STA, PIFSL was authorized to act as 'Security Trustee' for the benefit of lender and its novate, assignee and transferee.
- CERC by its order dated March 08, 2018 in Petition No. 266/MP/2017 accorded in-principle approval for allowing NRTL to create security interest in favour of PIFSL. CERC also observed that in case of default by NRTL in debt repayment, the licensee, lender, security trustee nominee may jointly approach the CERC for approval for assignment of Transmission Licence to the nominee of lender.
- Thereafter, with the deteriorating financial condition of Essel Infra, the Project came to a standstill with NRSS XXXVI making continuous default in its debt repayment to its lenders. This forced PIFSL to exercise their Substitution Rights in terms of Article 15.3 of the TSA, to revive the Project (for assigning the Transmission License to the nominee of the Lenders). Pursuant to this, in 2020-2021, the lenders conducted a global competitive bidding wherein Resurgent Power Venture Pvt Ltd (**RPVPL**) emerged as the successful bidder.
- Accordingly, NRTL filed this Petition seeking prior approval of the CERC for transfer of 100% shareholding/any other securities held by Essel Infra or its affiliate in NRTL in favour of the lender – PIFSL's nominee i.e. RPVPL.

Issue at hand

- What are the conditions under which a Transmission Licensee can be allowed to transfer entire shareholding to lender's nominee?

Decision of the Commission

- The CERC observed that:
 - Section 17 of the Act read with Article 15.3.1 and 15.3.2 of TSA allow change in assignment of Transfer Licence to the nominee of the lender if such nominee fulfils the qualification requirements under the provisions of the Transmission Licence Regulations.
 - Essel Infra vide its Board of Directors Resolution dated June 16, 2020 had agreed to initiate process of appointment of new nominee.
 - NRTL had granted 'No Objection' for substitution of nominee by way of letter dated September 21, 2020.
 - The bidding process was conducted in a transparent manner.
 - RPVPL and its affiliate Tata Power Company Ltd had considerable experience in development of high-stake projects and strong track record of turnaround of stressed assets.
- In view of the above, Ld. CERC held that since all parties were in concurrence to the change in nominee, which had been determined through a transparent bidding process and RPVPL had demonstrable experience in managing such a project, the transfer of shareholding of NRTL from Essel Infra to RPVPL was approved subject to the following conditions:
 - On the occurrence of such transfer, NRTL shall become fully owned subsidiary of RPVPL.
 - The Transmission Licence held by NRTL shall not be assigned or transferred in any manner in favour of RPVPL without approval of the Commission.
 - RPVPL shall ensure that NRTL complies with all its obligations under the various agreements in force and subsequent agreements to be entered, including the obligations towards its lenders and LTTCs.
 - RPVPL shall not divest any of its interest in NRTL or otherwise part with this company without the prior approval of this Commission.
 - As committed by RPVPL, there shall be no change in the transmission charges being paid/to be paid by the beneficiaries of NRTL pursuant to this process, which shall continue to be governed as per the TSA.



HSA Viewpoint

The conditions laid down by CERC regarding the transfer of Transmission License from the defaulting entity to lender's nominee protects the financial interests of the lenders as well as the consumers, since delay in setting up of the transmission lines in a way attracts more costs, which can be mitigated by way of the process of transfer of Transmission License, as done in the present case.

Tata Power Company Ltd - Transmission v. Maharashtra Electricity Regulatory Commission & Ors

APTEL Judgment dated February 18, 2022 in Appeal No. 280 of 2021

Background facts

- The present Appeal had been filed by the Appellant against the Order dated March 21, 2021 passed by the Maharashtra Electricity Regulatory Commission (**MERC**), granting the Transmission Licence for the proposed 1000MW HVDC link between 400kV MSETCL Kudus and 220kV AEML Aarey EHV Station (**HVDC Transmission Project**) to Adani Electricity Mumbai Infra Ltd (**AEMIL**).
- In view of the Partial Grid Disturbance in Mumbai, the HVDC Transmission Project was conceived to bring additional quantum of electricity to Mumbai at a place called Aarey. Accordingly, on August 11, 2011, the MERC had granted the Transmission Licence to Reliance Infrastructure Ltd (**R-Infra**), predecessor of Adani Electricity Mumbai Ltd - Transmission (**AEMIL-T**). Further, the State Transmission Utility also granted its approval for the Transmission Project, subject to compliance with various conditions.
- Subsequently, the MERC also granted in-principle approval to R-Infra for the DPR for the erection of the proposed Transmission Project. However, in the meanwhile, the STU started entertaining doubts regarding advisability of use of HVDC technology and came with a revised scheme for Transmission Project based on HVAC technology.
- Thereafter, the National Tariff Policy, as revised in 2016, laid emphasis on competition in the matter of new arrangements for procurement of power and the Central Government had called upon the State Governments to adopt the TBCB route for new intra-State transmission projects

but given to them the discretion to decide on the minimum threshold limit in matter of project costs.

- Meanwhile, the reply of STU was awaited in context of change of its view about advisability of utility or feasibility of the technology recommended earlier and objections raised by R-Infra in this regard and as such, the MERC cancelled the in-principle approval granted earlier. Further, R-Infra was acquired by AEML-T and the MERC directed AEML-T to file the Petition for amendment of its Transmission Licence.
- Thereafter, pursuant to submission of revised Detailed Project Report (**DPR**) to STU for the HVDC Transmission Project by AEML-T, the AEMIL was incorporated on January 03, 2020. Further, on September 21, 2020, AEMIL and AEML-T filed Petition before the MERC for development of the Transmission Project based on HVDC technology.
- After taking into consideration the recommendations of the Central Electricity Authority (**CEA**) and the STU, the MERC granted Transmission Licence to AEMIL to develop the HVDC Transmission Project under Section 62 of the Electricity Act, 2003 (**Act**). Notably, despite confusion regarding the technology, the STU had accepted the HVDC technology recommended by the original proponents of the subject Project.
- The Impugned Order dated March 03, 2021 was challenged by the Appellant on the premise that it violated the principle of competition and efficiency as enshrined in the Act and MERC proceeded with the adjudication of the Transmission Application filed by AEMIL while the recommendation of the Empowered Committee formed vide Government Resolution dated January 04, 2019 for the HVDC Project was pending consideration to be awarded through the Tariff Based Competitive Bidding (**TBCB**) route, which is impermissible in law.
- Further, the Appellant contended that MERC had failed to appreciate that the HVDC Scheme was admittedly a new scheme as there was a change in point of connectivity, line length, network configuration, load flows from the original scheme implemented in the year 2011. It was alleged that the MERC had violated its statutory duty under Section 86(3) of the Act which stipulated that Commission is bound to act in a transparent manner.

Issues at hand

- Whether TBCB under Section 63 of the Act is the predominant way for procurement of transmission services?
- Whether the grant of Transmission Licence to AEMIL and AEML-T in violation of Section 15 of the Act?
- Whether the TBCB route was better for implementation of HVDC Scheme?

Decision of the Tribunal

- In terms of the submissions made by the parties, the APTEL held as under:
 - **Issue No.1**
 - After reiterating the scheme of the Act, the APTEL observed that provisions contained in Sections 62 and 63 of the Act have absolutely no element of ambiguity, both exist parallelly and offer alternative choices to the regulators and planners or allied agencies. Further, it was observed that the legislation does not even remotely hint at the dominance of Section 63 over Section 62.
 - APTEL also observed that the Regulated Tariff Mechanism (**RTM**) route is expressly recognized and provided under Section 62 of the Act. Thus, it was held that entire argument of the Appellant that TBCB route under Section 63 of the Act is the dominant route is premised on a fundamental flaw in reading the provisions of the Act, which nowhere contemplate reducing Section 62 to a position subservient to the former provision.
 - **Issue No.2**
 - Regarding the contention of the Appellant that the grant of Transmission Licence was in violation of Section 15(5) of the Act, which requires the Commission to publish a notice in two daily newspapers and consider all suggestions or objections and recommendations of the Central Transmission Utility/State Transmission Utility, the APTEL observed that it was factually wrong on the Appellant's part to state that the procedure under Section 15 was not followed by the MERC as there was no consent by the STU before public proceedings.
 - Further, the APTEL observed that the STU by way of its letter dated December 10, 2020 had confirmed that the revised Detailed Project Report for 1000 MW Kudus-Aarey Scheme had been submitted by AEML-T and had been technically vetted by it and submitted to the MERC for further needful action, the consent of STU being inherent in this communication.

– Issue No.3

- It was observed that based on an independent analysis of facts, coupled with historicity, the MERC had rightly decided to award the transmission project under Section 62 of the Act by granting transmission licence under Section 15 of the Act which cannot be faulted.
 - Further, while relying upon the principles of law as laid down by the Supreme Court, the APTEL held that the Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place.
 - The APTEL also held that Section 62 does not entail any higher burden for the end-consumer since the State Commission would in any case carry out prudence check of the costs incurred by the entity executing the project and sufficient safeguards had been put in place by the MERC in the Impugned Order.
- Thus, the APTEL was satisfied that the MERC had granted the transmission licence to AEMIL for reasons properly articulated based on a detailed analysis of facts and materials, which were duly conferred by the CEA and STU. Further, it was observed that merely being guided by the views of CEA and STU, did not imply that the decision was vitiated since such inputs were not extraneous material.
 - The APTEL also observed that it was not correct to assail the decision on the ground that AEMIL, a new company, could not be awarded the Transmission Project under Section 62 of the Act, the said entity being a wholly owned subsidiary of the original proponent set up as a SPV company in line with the accepted power industry practice followed particularly in relation to transmission projects.



HSA Viewpoint

The APTEL has applied the well settled principles of law and underlying scheme of the Act while upholding the decision of the MERC to award a transmission contract on a nomination basis to AEMIL. Further, the said decision sets a benchmark for cases where award of transmission projects is done under Section 62 of the Act.

M/s Maharashtra State Electricity Distribution Company Ltd (MSEDCL) v. M/s ACME Solar Holdings Ltd and Anr

MERC Order dated March 11, 2022 in Case No. 10 of 2022

Background facts

- The present petition has been filed by Maharashtra State Electricity Distribution Co Ltd (**MSEDCL**) seeking adoption of tariff discovered for long-term procurement of 500 MW inter/intra-State solar power through competitive bidding under the Guidelines for the tariff based competitive bidding process for procurement of power generated from grid connected solar power projects dated August 03, 2017 and to accord approval for draft Power Purchase Agreement (**Draft PPA**) and signing of the Draft PPA with successful bidders at discovered tariff.
- On May 06, 2021, MSEDCL issued Request for Selection for procurement of power on long-term basis through a transparent and competitive bidding process (followed by reverse e-auction) from 500 MW Inter/Intra-State Grid connected Solar PV Power Projects (**Phase-VI**) under Section 63 of the Electricity Act, 2003 (**RfS**)
- In terms of the RfS, various Bidders participated in the bid for e-reverse auction and M/s ACME Solar Holdings Ltd (**ASHL**) and M/s Renew Solar Power Pvt. Ltd. (**RSPPL**) were declared as successful bidders on the basis of the e-reverse auction. The tariff discovered in the tender for 500 MW Intra-State Solar Power projects are INR 2.42 P.U for ASHL and INR 2.43 P.U. for RSPPL.
- Ministry of Finance (**Department of Revenue**) vide its Notification No. 08/2021 – Integrated Tax (Rate) dated September 30, 2021 has amended its earlier Notification No. 01/2017- Integrated Tax (Rate) dated June 28, 2017 (as amended from time to time) in order to adhere to the recommendations of 45th GST Council meeting held on September 17, 2021, and thereby has increased the applicable GST rate on the solar modules and solar cells as well as other solar power generator equipment, from 5% to 12% (**GST Notification dated September 30, 2021**).
- ASHL contended that issuance of GST Notification dated September 30, 2021 has resulted in change in Project cost has occurred subsequent to last date of bid submission. ASHL, at the time of submitting the bid, was in no position to foresee such additional capital expenditure. Further, Article 9.2 of the Draft PPA provides for the relief available to the affected party against the consequences of a Change in Law event at the tariff adoption stage. Accordingly, the change in rates of GST on import of solar modules and other solar equipment from 5% to 12% clearly qualifies as a Change in Law event.

Issues at hand

- Whether Competitive bidding process is in accordance with the Guidelines notified under Section 63 of the Electricity Act, 2003?
- Whether tariff discovered through competitive bidding is in accordance with market condition and guiding principle under Section 61 of the Electricity Act, 2003?
- Whether Change in Law event can be recognized during tariff adoption proceedings?

Decision of the Commission

- The Commission allowed the present petition by holding that:
 - **Issue No. 1**
 - The Commission observed that MSEDCL has conducted transparent bidding process in accordance with the Guidelines for the Tariff Based Competitive Bidding Process for procurement of power generated from grid connected solar power projects.
 - **Issue No. 2**
 - The tariff discovered in the bidding process is below the tariff adopted by this Commission in previous tariff orders and tariff discovered is reflective of the current market trend. Therefore, the Commission deems fit to adopt and approve tariff of INR 2.42-2.43 P.U. for 500 MW solar power.
 - Further, there is a huge gap of around five months between the conclusion of the bidding process and filing of this present petition. Therefore, the parties are required to sign the PPA within 15 days from the pronouncement of this order.
 - **Issue No. 3**
 - In the present matter the ASHL have not signed the PPA which recognizes a performance obligation, rights and liabilities. Article 9.2.2. of the Draft PPA clearly provides for recognition of Change in Law at the time of adoption of tariff.
 - A provision of recognition of Change in Law at a tariff adoption stage is a part of the bid document and thus, in order to maintain the sanctity of bidding process, the same needs to be honored. After perusal of the Article 9.2.2 of the Draft PPA it is evident that the GST Notification dated September 30, 2021 is a Change in Law event, and the generators shall approach this Commission at a later stage for claiming the additional expenditure on account of Change in Law event.



HSA **Viewpoint**

The issues pertained to the contractual construct and in particular the recognition of Change in Law at tariff adoption stage. The Commission has lent further clarity on the recognition of Change in Law event at a tariff adoption stage after considering the sanctity of bidding process. This should bring relief to various Generators who are seeking declaration of Change in Law claims at a tariff adoption stage.

CONTRIBUTIONS BY

Shreshth Sharma | Partner
Shefali Tripathi | Associate
Utkarsh Singh | Associate
Aditya Jain | Associate

Molshree Bhatnagar | Associate Partner
Nishant Talwar | Associate
Avdesh Mandloi | Associate

Saurobroto Dutta | Associate
Nehul Sharma | Associate
Neel Rahate | Associate

HSA AT A GLANCE

FULL-SERVICE CAPABILITIES



BANKING & FINANCE



DEFENCE & AEROSPACE



INVESTIGATIONS



PROJECT FINANCE



RESTRUCTURING & INSOLVENCY



COMPETITION & ANTITRUST



DISPUTE RESOLUTION



LABOR & EMPLOYMENT



REAL ESTATE



TAXATION



CORPORATE & COMMERCIAL



ENVIRONMENT, HEALTH & SAFETY



PROJECTS, ENERGY & INFRASTRUCTURE

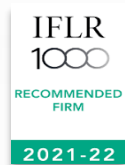


REGULATORY & POLICY



TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

GLOBAL RECOGNITION



CONTACT US



www.hsalegal.com



mail@hsalegal.com



HSA Advocates

PAN INDIA PRESENCE

New Delhi

Email: newdelhi@hsalegal.com

Mumbai

Email: mumbai@hsalegal.com

Bengaluru

Email: bengaluru@hsalegal.com

Kolkata

Email: kolkata@hsalegal.com