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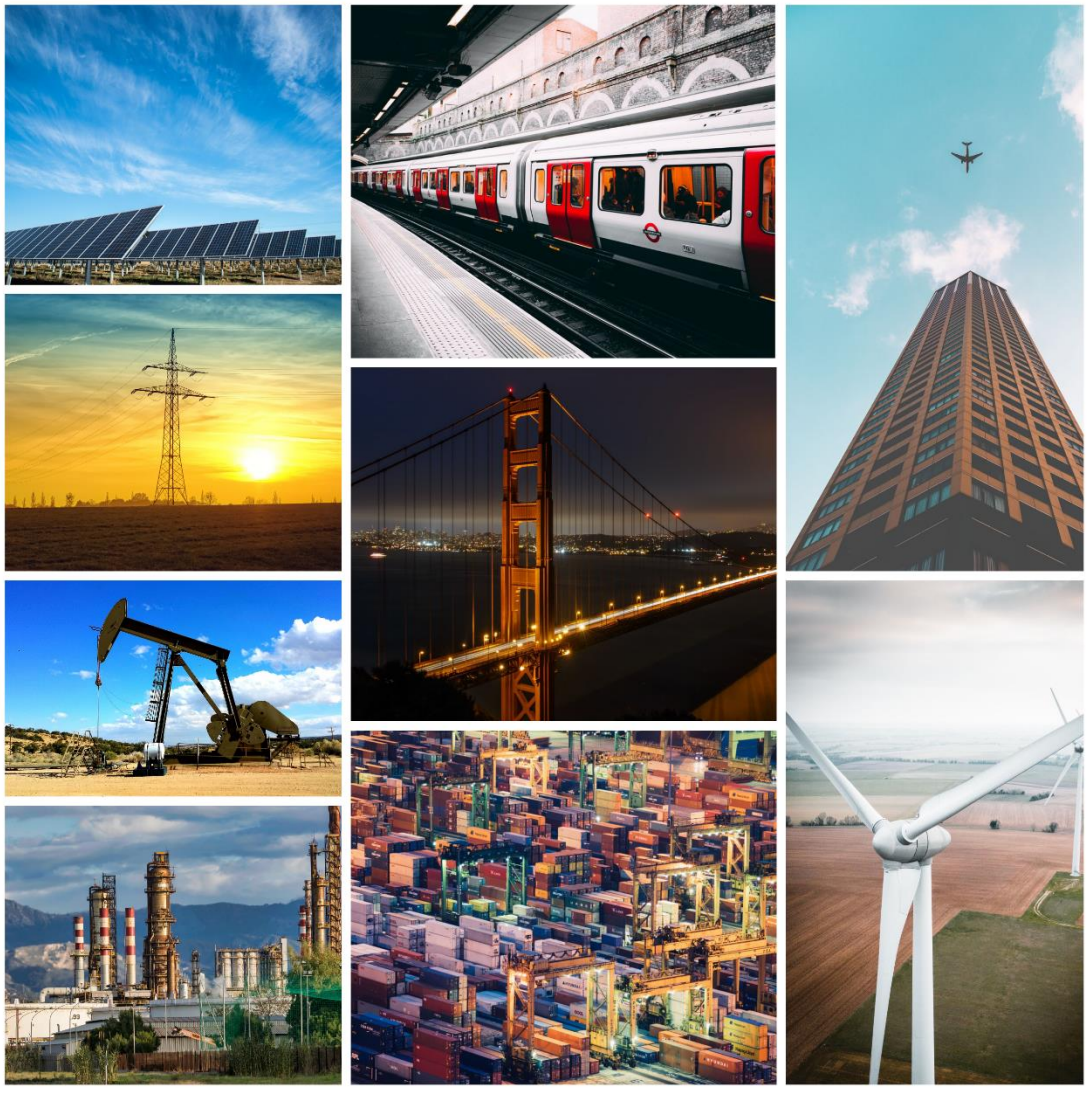
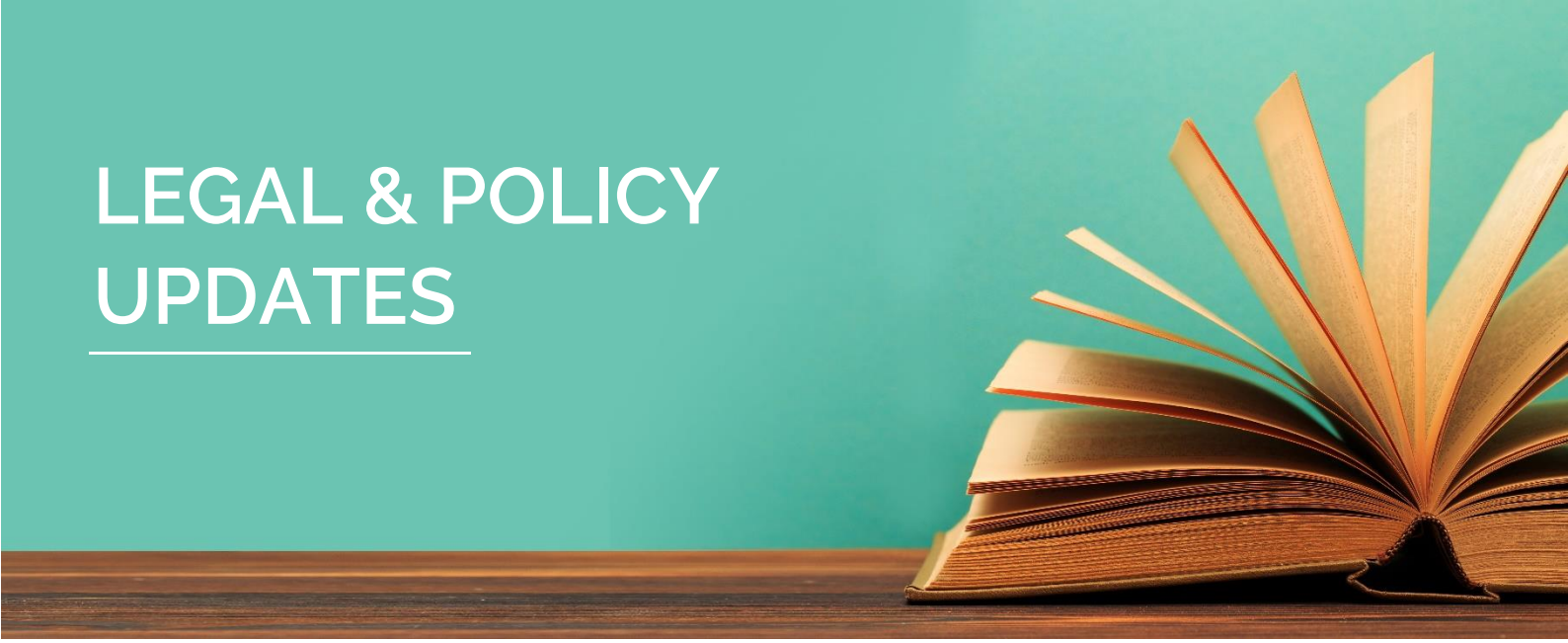
MONTHLY NEWSLETTER

MAY 2022



LEGAL & POLICY UPDATES



In this Section

CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

- On May 9, 2022, the Central Electricity Regulatory Commission (**CERC**) notified the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022 (**REC Regulations 2022**) in supersession of the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (**REC Regulations 2010**).
- The salient aspects of REC Regulations 2022 are:
  - The National Load Dispatch Centre (**NLDC**) is the designated nodal agency tasked with implementing the provisions of the REC Regulations 2022.
  - Regulation 4 of the REC Regulations 2022 extends the eligibility criteria for issuing Renewable Energy Certificates (**RECs**), which now includes renewable energy generating stations, captive generating stations (based on renewable energy sources), distribution licensees (Discoms) as well as open access consumers. The pre-conditions for issuing RECs have been provided as follows:
    - For renewable energy generators to issue RECs, their tariff should not have been determined or adopted under Section 62 or Section 63 of the Electricity Act, 2003 (**Electricity Act**) respectively or the electricity generated sold in any manner. Additionally, such energy generators should not have availed any waiver or concession of transmission charges or wheeling charges.
    - Renewable energy based captive generating stations must meet the requirements set for renewable energy generators in order to be eligible to issue the RECs. The certificates issued to such captive generating station, to the extent of self-consumption, shall not be eligible for sale.
    - Discoms and open access consumers that purchase electricity from renewable energy sources in excess of the Renewable Purchase Obligation (**RPO**), as determined by the concerned State Commission, shall be eligible for issuance of RECs to the extent of such excess electricity being purchased from the said sources.
  - According to Regulation 12, each REC shall represent 1 MWh of electricity generated from renewable energy sources.
  - Before the issuance of RECs, an entity must be accredited by the appropriate authority (State Agency for intra-State transmission system or RLDC for inter-State transmission system), after which it shall be granted registration as per the Procedure for Registration for Certificate, which are to be issued by the CERC as part of the Detailed Procedure, which has to be notified within three months from the notification of present REC Regulations 2022.

- Entities which have been granted registration under previous REC Regulations 2010 shall be deemed to have been granted registration under these regulations.
- The eligible entities can apply for the issuance of certificates to NLDC, which in-turn must either accept such application and issue certificates or reject the application within 15 days. The eligible entities must apply to NLDC within six months from the corresponding generation by the entity.
- NLDC is required to maintain a Registry of Certificates (**Registry**) as per Regulation 11 of the REC Regulations 2022. Further, Regulation 11 provides for the exchange of RECs through Power Exchanges/electricity traders upon the requirement that the number of certificates intended to be sold through electricity traders is informed to NLDC. Such RECs, which have been exchanged through Power Exchanges/electricity traders and used for compliance of RPO by the obligated entities, will be considered redeemed. NLDC will remove such redeemed REC from the Registry.
- Regulation 12 provides that that REC will be issued in multiple of the assigned Certificate Multiplier for 1 MWh hour of electricity generated and injected or deemed to be injected into the grid. The Certificate Multiplier once assigned to a renewable energy generating station shall remain valid for a period of fifteen years from the date of commissioning of renewable energy generator or renewable energy based captive generator.
- The Certificate Multiplier for the period of three years from the date of effect of the REC Regulations 2022 has been set at:
  - 1 for onshore wind and solar for Tariff Range <= INR 4/kWh
  - 1.5 for hydro for the Tariff Range between INR 4-6/kWh
  - 2 for municipal solid waste and non-fossil fuel-based cogeneration for the Tariff Range between INR 6-8/kWh
  - 2.5 for biomass and biofuel for three years for the Tariff Range between INR 8-10/kWh
- Price discovery of RECs is stated to be through Power Exchange or as mutually agreed between eligible entities and the electricity traders.

- RECs issued under this Regulation shall be valid until they are redeemed.

Draft Guidelines for Uniform Voltage Wise Allocation of Assets and Cost in Distribution Business, 2022

- Maharashtra Electricity Regulatory Commission (**MERC**) on April 18, 2022 issued draft Guidelines for Uniform Voltage Wise Allocation of Assets and Cost in Distribution Business, 2022 (**Guidelines**).
- By way of the said Guidelines, MERC seeks to achieve following objectives:
  - To design a uniform methodology of allocation of assets and cost to wire and supply business and subsequently the network/wire costs allocated into Extra High Tension (**EHT**), High Tension (**HT**) and Low Tension (**LT**) voltages.
  - To lay down the approach and methodology for identification/allocation of assets and cost to different voltage levels of distribution business.
  - To determine the fair and comparable wheeling charges so as to have justified recovery of wire charges from the consumers of that particular voltage level.
  - The need for voltage-wise allocation of cost is identified in order to allocate costs on consumers in a fair and justified manner, corresponding to their voltage of installation and consequent usage of network assets.
- Through the said Guidelines, MERC has identified and addressed the following issues:
  - Allocation of assets of Distribution Licensees into Wires Function, Supply Function and Common Assets (common to both Wires and Supply functions) and allocation of Common Assets over Wires and Supply functions.
    - The Distribution Licensees need to form three asset groups - Wires Function, Supply Function and Common to Business Function.
    - The Guidelines provide lists of Supply-dedicated assets and Common to Business assets, which are not exhaustive and are only indicative. The Distribution Licensees may propose inclusion of other assets and facilities within Supply-dedicated function or Common to Business function as the case may be, citing adequate reasoning and justification.
    - After identification and exclusion of Supply-dedicated and Common to Business assets, the remaining assets of the Distribution Licensees shall be classified under Wires-dedicated function.
    - As more and different type of assets get added in business, the Distribution Licensees shall analyse the primary nature of such assets and allocate them to any of the three asset groups, and present the same with adequate reasoning and justification during tariff determination process. Thereafter, the MERC, based on prudence check, shall appropriately consider those assets and facilities in corresponding functions.
  - Formation of purpose-based asset bundles for Wires assets:
    - The assets dedicated to Wires Function as identified shall be divided into three groups namely, assets that are Voltage Identifiable, Boundary Assets (assets that exist along the

boundary of two voltages), and Common to Voltage Assets (assets that belong to network/Wires business but are not specific to any voltage level and can be utilized across all or multiple voltage levels within the network).
    - The identified Wires-dedicated assets shall be bundled based on same-purpose. Bundling implies grouping of same-purpose assets into a single bundle.
    - The draft Guidelines provide an indicative list of individual same-purpose assets to be included in the corresponding bundle. The general guideline in this regard for Distribution Licensees is to bundle assets based on same location, same-purpose assets into a common bundle.
  - Identification/allocation of defined Wires asset bundles over different voltage levels:
    - The draft Guidelines also provide the three main asset groups for Wires function i.e., Voltage-identifiable, Boundary Assets, and Common to Voltage Assets, along with the basis of allocation of the same over different voltage levels.
  - Allocation of Common assets allocated to Wires function over different voltage levels:
    - The Guidelines prescribe the methodology for allocation of common assets allocated to Wires function over different voltage levels.
  - Determination of various asset ratios and attribution/allocation of Wires cost items to different voltage levels:
    - The Common to Business Assets, as identified from the total Fixed Asset Base of the Distribution Licensees, are required to be first allocated between Wires and Supply functions, as prescribed in the Guidelines.
    - Thereafter, the Common Assets so allocated to Wires Function would be further allocated to different voltage levels of distribution.
  - Aspects regarding implementation and general directions to Distribution Licensees:
    - The draft Guidelines recognize that their implementation would depend a lot on availability, quality and granularity of asset base data available with the Distribution Licensees. Therefore, the Distribution Licensees have been directed to update their records and systems to the extent possible, in order to achieve successful implementation of the Guidelines.
    - Distribution Licensees who do not have Enterprise Resource Planning Software (**ERP-SAP**), have been directed to immediately prepare a roadmap for acquisition of requisite hardware and software to transfer asset base data from the presently manual systems to ERP-SAP system.
- Considering the various data related issues and data organization required for implementation of these guidelines, these Guidelines shall come into force from April 1, 2025, i.e., from the commencement of the fifth Multi Year Tariff Control Period.

Ministry of Power invokes emergency provisions to tide over coal shortages in power plants

- On May 05, 2022, Ministry of Power (**MoP**) issued Directions under Section 11 of the Electricity Act, 2003 (**Electricity Act**) to imported coal-based thermal power plants (**Directions**), in an attempt to address the severity of energy deficit in the country due to shortage of domestic coal. By virtue of the Directions, all imported coal-based power plants have been directed to generate power at full capacity. It has further directed all States and domestic coal-based power generation companies to import at least 10% of the coal requirement for blending.
- The salient features of the Directions are as follows:
  - All imported coal-based power plants are to operate and generate power to their full capacity.
  - The power plants have been directed to supply power to Power Purchase Agreement (**PPA**) holders first, and any surplus power can be sold at the power exchanges.
  - In cases where the power plants have PPAs with multiple distribution companies, and any Distribution Company does not schedule any quantity of power according to its PPA, such power will be offered to other beneficiaries and remaining quantity will be sold through power exchanges.
  - While recognizing that the existing PPAs do not provide for complete pass through of high costs of imported coal, the rates at which the power will be supplied to PPA holders must be worked out by a Committee constituted by the MoP. The Committee will have representatives from MoP, Central Electricity Authority, and Central Electricity Regulatory Commission. Such rate is to be worked out to meet all the prudent costs of using imported coal, including the present coal price, shipping costs and O&M costs, and a fair margin, and is subject to review every 15 days considering the change in price of coal, shipping costs, etc.
  - In cases where generators/group companies own coal mines abroad, the mining profit would be set off to the extent of the shareholding of the generating/group company in the coal mine.

- The beneficiaries shall have the option to make payment according to the benchmark rate worked out by the Committee or at a rate mutually negotiated with the generating company, and such payments are to be made on a weekly basis.
- In case where a Distribution Company/beneficiary is unable to enter into a mutually negotiated rate and not willing to procure power at the benchmark rate set by the Committee, or is unable to make weekly payment, then such quantity of power shall be sold on Power Exchange and profit realised from the same shall be shared between the Generator and the Distribution Company/ beneficiary in the ratio of 50:50 on monthly basis.
- Benchmark rates worked out by the Committee will be reviewed every 15 days, considering the change in the price of imported coal and shipping costs.
- The above Directions are to remain valid till October 31, 2022.

- In continuation of the Directions, MoP on May 13, 2022, has forwarded the recommendations of the Committee constituted in terms of the Directions. The salient features of the recommendations are as follows:
  - The Energy Charges Rate (**ECR**) for six imported coal based power plants has been determined.
  - The Fixed Charge would be as per the PPAs, or as has been already agreed mutually between the generating company and the procurers.
  - In case of Coastal Generation Power Ltd, Mundra, the mining profit has been deducted from ECR.
  - The benchmark ECR determined by the Committee is subject to revision every week or every fortnight, if required, on the basis of the updated prices of imported coal and shipping charges.
  - In case any imported coal based plant is operating in the merchant mode and is selling in the exchange seeks to enter into a PPA with any Distribution Company, it may do so on a mutually agreed tariff or in the alternative request the Committee to fix the benchmark rates.

RECENT JUDGMENTS

In this Section

Directions by CERC to the Power Exchanges registered under the Power Market Regulations, 2021

APTEL | Judgment dated April 05, 2022 in O.P. No. 1 of 2022 and Batch

Background facts

- The CERC vide Order dated April 01, 2022 in Petition No. 4/SM/2022 (Suo-Motu Petition) had in exercise of powers under Regulation 51(1) of the Power Market Regulations 2021 (**PMR 2021**) directed the Power Exchanges to re-design with immediate effect, until further orders, the bidding software in such a way that members can submit their bids in the price range of INR 0/kWh to INR 12/kWh for Day Ahead Market (**DAM**) and Real Time Market (**RTM**).
- As per CERC, one of the key grounds for the intervention was the fact that 99% of the supply bids (for the period for which data had been analysed) were in the range of INR 12/kWh and only 1% of the supply bids were higher than INR 12/kWh.
- Thereafter, pursuant to passing of the Order in Petition No. 4/SM/2022:
  - Cleared volume in DAM registered a decrease of about 30% in the month of April 2022 as compared to March 2022, while that in RTM decreased by 16% during the same period.
  - Whereas, the volume traded in Term Ahead Market (**TAM**), Intra-day and Day Ahead Contingency (**DAC**) in the month of April 2022 witnessed an increase of about 120% over the volume traded in the month of March 2022.
  - Apart from the Generators, the Discoms were also selling in DAM/RTM and in TAM/Intra-day/DAC.

Issue at hand

- Whether there is a need to cap/regulate the price in the Power Exchange for the TAM and DAC market?

Decision of the Tribunal

- The CERC observed that:
  - Difference in ceiling price between DAM/RTM and TAM has led to shift in supply volume from DAM/RTM to TAM.
  - Representations have been received from some States highlighting that this is affecting their prospects of getting power from DAM/RTM segments of the Power Exchanges and they have to go to TAM segment for meeting their demand.
  - Some Discoms have also represented that the differential pricing between DAM/RTM and TAM/Intra-day/DAC market segments is influencing the behaviour of the sellers and have expressed concerns about the likely profiteering by sellers on account of the price differential in the two market segments in the Power Exchanges.

- The CERC relied on the Letter dated April 22, 2022 issued by West Bengal State Electricity Distribution Company Limited (**WBSEDCL**), wherein it was alleged that the sellers are circumventing CERC's Order dated April 01, 2022 by entering into negotiations and then conducting their transaction under TAM contracts. This is being done with a view to bypass regulatory measures put in place by this Commission.
- In regard to the above, CERC noted that during their investigation, some of the Discoms and other licensees in States were also engaged in selling power in TAM/Intra-day/DAC post the ceiling price of INR 12/kWh for DAM and RTM. In this regard, the CERC directed State Commissions to take appropriate action against such Discoms or Licensees.
- As per the data available on MERIT website, as maintained by the Ministry of Power, energy charge of the marginal generator is to be in the range of INR 9/kWh. In addition, if the expectation of recovery of part of the fixed cost and transmission charge are factored in, the ceiling price of INR 12/kWh seems reasonable.

- In exercise of the powers given under Regulation 51(1) of the PMR 2021 and to balance the interests of investors in terms of reasonable return and protecting consumer interests, CERC held as follows:
  - Power Exchanges, from the date of this Order till June 30, 2022, must redesign, with immediate effect, their software in such a way that members can quote price in the range of INR 0/kWh to INR 12/kWh in DAM (including GDAM), RTM, Intra-day, Day Ahead Contingency and Term-Ahead (including GTAM) Contracts
  - The contracts which have already been transacted till the date of issuance of this Order shall be delivered and settled as per the earlier terms and conditions. Application of the price ceiling for a limited period is based on the belief of the Commission that intervention in the market should not be prolonged unless absolutely necessary in public interest as in the existing circumstances prevailing in the country.

HSA
Viewpoint

This Order has determined the ceiling price of bids at INR 12/kWh for DAM and RTM markets. Thereafter, vide Order dated May 06, 2022 in 5/SM/2022 CERC has extended the said at INR 12/kWh even for Intra-day, Day Ahead Contingency and Term-Ahead (including GTAM) Contracts. The impact/effect of such capping of price of power across the trading platform shall be ascertained in due course of time.

Ordnance Factory, Itarsi and Anr v. MP Madhya Kshetra Vidyut Vitaran Co Ltd and Ors

Madhya Pradesh Electricity Regulatory Commission (MPERC) | Order dated April 20, 2022 in Petition No. 14 of 2021

Background facts

- The present Petition had been filed by the Petitioners seeking exemption from the levy and collection of Cross Subsidy Surcharge (**CSS**) and Additional Surcharge on wheeling of power by MP Madhya Kshetra Vidyut Vitaran Co Ltd (**Respondent No. 1/MPMKVVCL**).
- Petitioner No. 2, M/s Bharat Electronics Ltd (**BEL**), owned and founded by the Government of India (**GOI**), is in the business of manufacturing advanced electronic products for the Indian Armed Forces and is under the control of Department of Defence Production (**DDP**), Ministry of Defence (**MOD**).
- BEL has set up a 10 MW solar power plant in the premises of Petitioner No. 1, i.e., Ordinance Factory Board, Itarsi (**OFB**), as per the directions of DDP for supplying 100% power to OFB.
- Subsequently, a Power Purchase Agreement (**PPA**) was executed between BEL and OFB to the aforesaid effect and it was mentioned under the PPA that the power generated from the solar plant of BEL will be sold to OFB at the fixed tariff under the scheme of Jawaharlal National Solar Mission, Government of India.
- Thereafter, a Power Purchase and Wheeling Agreement (**PPWA**) was executed between OFB, BEL, MPMKVVCL & MP Power Management Company Ltd (**Respondent No. 2/MPPMCL**)
- The dispute between the parties arose when MPMKVCCL, on the basis of the opinion of its Company Secretary, by way of the impugned letters dated August 28, 2019 & August 20, 2019, conveyed to OFB that the petitioners shall not be eligible for exemption from CSS.
- Feeling aggrieved, the Petitioners challenged the impugned letters by way of the present Petition, and have sought refund of the amount levied and collected by MPMKVVCL against CSS and Additional Surcharge on the power supplied from the power plant of BEL to OFB.

- The Petitioners have contended that since Solar Power Plant of BEL is a captive power plant and OFB is captive user under Rule 3 of the Electricity Rules, 2005 (**Rule 3**), they are entitled for exemption from payment of CSS and Additional Surcharge.
- The Petitioners have also contended that BEL and OFB cannot be considered to be separate entities since both of them are owned by the Government of India (**GOI**) and about 51.14% shares of BEL are held by Union of India through DDP. Further it is also contended by the Petitioners that since OFB is fully owned by DDP, OFB have a proprietary interest and control over the generating plant of BEL, thereby fulfilling the conditions as mentioned under Rule 3 to qualify as a captive generating plant.
- As per Rule 3, the power plant in order to be considered as captive generating plant, should satisfy the following twin tests:
  - Not less than 26% of the ownership must be held by the captive user(s), and
  - Not less than 51% of the aggregate total electricity generated in the plant, determined on an annual basis, is consumed by the captive use

Issue at hand

- Whether the Petitioners hold captive status in terms of Rule 3 of the Electricity Rules, 2005 for exemption from CSS and Additional Surcharge on the power drawn by OFB from the solar plant of BEL?

Decision of the Commission

- In terms of the submissions made by the parties, the MPERC held as under:
  - The power plant has been set up by BEL, a company registered under the Companies Act, 1956, whereas OFB functions under the control of the Ordinance Factory Board, Kolkata and is functioning under the control of GOI; therefore, OFB and BEL are distinct legal entities.
  - The Petitioners' contention that OFB has ownership in the on-site functioning power plant of BEL has no merit and being a separate entity has neither equity share capital with voting rights nor proprietary interest and control over the generating station or power plant of BEL.
  - OFB has no ownership status in BEL in terms of Rule 3.
  - The PPWA provides for the payment of Wheeling Charges, CSS, Additional Surcharge on the wheeling and such other charges would be payable by the Petitioners.
- With such foregoing observations, MPERC held that CSS and Additional Surcharge are leviable and dismissed the petition.

HSA
Viewpoint

MPERC has delivered a reasoned order after adducing the requirements of captive generation plants in terms of Rule 3. The said order would serve as a cautionary tale to the entities attempting to evade payment of CSS.

Kasyap Sweeteners Ltd v. The Managing Director MP Paschim Kshetra Vidyut Vitaran Co Ltd

Madhya Pradesh Electricity Regulatory Commission (MPERC) | Order dated May 05, 2022 in Petition No. 53 of 2021

Background facts

- The present Petition had been filed by the Kasyap Sweeteners Ltd (**Petitioner/KSL**) seeking directions to MP Paschim Kshetra Vidyut Vitaran Co Ltd (**Respondent/MPPKVVCL**) against levy of Additional Surcharge on the Petitioner's 2000 kVA Steam Turbine Plant and 788kVA Biogas Engine.
- KSL is a leading corn processing company in India, who is an HT consumer of MPPKVVCL having a contract demand of 2850 kVA. The Petitioner has set up on-site captive power plants of 2000 kVA Steam Turbine Engine and 788 kVA Biogas Engine.
- The 2000 kVA Steam Turbine Engine installed by KSL utilizes potential energy of steam and 1600 kW of power is produced as a by-product, and the 788 KVA Biogas Engine serves to recover the cost of expenditure for installation of Effluent Treatment Plant by setting-off the cost of additional power requirement. The power supplied to 788 kVA Biogas Engine is connected to the Petitioner's own electrical system.
- There is no dispute as to KSL's 2000 kVA Steam Turbine Plant and 788kVA Biogas Engine being Captive Generation Power Plants (**CGPs**). The dispute is with respect to imposition of Additional Surcharge on the CGPs of KSL by MPPKVVCL.

- The reasoning given by MPPKVVCL for imposition of Additional Surcharge is that it has to bear the fixed cost (capacity charges) even when there is no off take of energy from the source. It is also contended by MPPKVVCL that whenever any person takes electricity from any source other than the Distribution Licensee of area, MPPKVVCL continues to pay Fixed Charges in lieu of its contracted capacity with Generators.
- With respect to levy of Fixed Charges, MPPKVVCL has contended that KSL is a consumer because a person who has set up a CGP has dual rule as a consumer as well as a Generator. As per the Electricity Act, Additional Surcharge is payable in the capacity of consumer and not a Generator.
- On the other hand, KSL has challenged the levy of Additional Surcharge on the following reasons:
  - There is no element of supply/sale involved in captive generation and consumption. Consumption of power under a captive arrangement (i.e., in terms of Rule 3 of the Electricity Rules, 2005) does not amount to 'supply of electricity' as contemplated under Section 42(4) of the Electricity Act.
  - Captive user is different from a consumer receiving supply of electricity on Open Access.
- The issue of levy of Additional Surcharge on the captive consumer is no more res-integra. The Supreme Court on December 10, 2021 in the matter of *Maharashtra State Electricity Distribution Co Ltd v. M/s JSW Steel Limited & Ors*[1] has clearly held that Additional Surcharge cannot be levied on captive power plants.

Issue at hand

- Whether the Additional Surcharge is applicable on captive use by the Petitioner under Section 42(4) of the Electricity Act on the quantum of power consumed by the Petitioner from its CGPs?

Decision of the Commission

- In light of the Supreme Court's judgment dated December 10, 2021 in the matter of *Maharashtra State Electricity Distribution Co Ltd v. M/s. JSW Steel Ltd & Ors* (*Supra*), MPERC has held that the Additional Surcharge is not applicable on captive use by the Petitioner under Section 42(4) of the Electricity Act on the quantum of power consumed by KSL from its CGPs. MPERC reiterated what has been held be the Supreme Court in its judgment and relied on the following principles while passing its order:
  - Section 42(4) of the Electricity Act shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the Distribution Licensee of his area and only such consumer shall be liable to pay Additional Surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has a statutory right.
  - The consumers defined under Section 2(15) of the Electricity Act and the captive consumers are different and distinct, and they form a separate class by themselves. Captive consumers incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a CGP and dedicated transmission lines. However, consumers defined under Section 2(15) of the Electricity Act do not to incur any expenditure and/or invest any amount at all. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Electricity Act, shall not be subjected to and/or liable to pay Additional Surcharge leviable under Section 42(4) of the Electricity Act.

HSA
Viewpoint

MPERC has cogently dealt with the issue in terms of the Judgment delivered by the Supreme Court. The order passed by MPERC would encourage more consumers to set up captive power plants and procure power through open access route to avoid levy of Additional Surcharge.

Maharashtra State Electricity Distribution Company Ltd (MSEDCL) v. Adani Power Maharashtra Ltd and Ors

MERC | Order dated May 04, 2022, in Case No. 84/2021

Background facts

- The present Petition was filed by MSEDCL before the MERC under Section 94(1)(g) of Electricity Act read with Regulation 105 and 106 of the MERC Multi Year Tariff Regulations 2019 (**MYT Regulations 2019**), and Regulation 92, 93 and 94 of MERC (Conduct of Business) Regulation, 2004 (**CoB Regulations 2004**) seeking directions to all Respondent Independent Power Producers (**IPPs**)

[1] Civil Appeal 5074-5075 of 2019

having long term Power Purchase Agreement (**PPA**) with MSEDCL for providing rebate in Fixed Charges, interest free deferment of Capacity Charges and reduced LPS on account of Covid-19 pandemic in view of notifications dated May 15, 2020 and May 16, 2020 issued by the Ministry of Power (**MoP**).

- It was MSEDCL's case that due to onset of Covid-19, the demand for supply of power by MSEDCL had crashed by about 4500-5000 MW than the expected projected demand and resultantly, the revenue cycle of the MSEDCL was badly hampered. As such, it became difficult for MSEDCL to adhere to its payment schedules.
- In the above background, the MoP vide its letter dated March 28, 2020, acknowledged the Force Majeure situation being faced by the Distribution Companies (**Discoms**) and issued directions under Section 107 of the Electricity Act to the CERC with regard to the Late Payment Surcharge (**LPS**) to be charged by the Generating Companies and Transmission Licensees.
- The CERC in its Order dated April 3, 2020, in Suo-Moto Petition No. 6/SM/2020, had stated that in case of any delayed payment by the DISCOMs to the Generating Companies and inter-State Transmission Licensees beyond 45 days from the date of the presentation of the bills falling between March 24, 2020, and June 30, 2020, the concerned Distribution Companies shall make the payment with LPS at the reduced rate of 12% per annum that translates into 1% per month.
- Thereafter, as per communique issued on May 15, 2020, and its corrigendum issued on May 16, 2020, the MoP decided to defer the Fixed Charges on power of Central Generating Companies, which was not scheduled for the lockdown period. Further, the same was to be repaid in three equal, interest free instalments in subsequent months.
- The Central Power Sector Units (**CPSUs**) had also been suggested to grant a rebate of 20-25% in Fixed Cost on power supply billed to Discoms and Inter-State Transmission Charges levied by Power Grid Corporation of India Ltd (**PGCIL**) for the lockdown period. The Discoms had been asked to pass on these cost savings to the end consumers, which will lead to reduction in electricity cost to end consumers.
- Further, in order to alleviate the financial stress on Discoms due to Covid-19, the MoP vide its letter dated August 20, 2020 & further clarification letter dated November 20, 2020 advised all the Generating and Transmission Companies to charge LPS at the rate not exceeding 1% per month on the principal due for all payments, which are due either from projects developed under Section 62 or Section 63 of the Electricity Act made by the Discoms under the Liquidity Infusion Scheme of Power Finance Corporation (**PFC**) & Rural Electrification Corporation (**REC**) under Atmanirbhar Bharat Scheme.

Issues at hand

- Whether the powers vested with the MERC under the relevant provisions of MYT Regulations 2019 and CoB Regulations 2004 can be invoked to amend the explicit terms of the PPAs entered under Section 63 of the Electricity Act?
- Whether the notifications dated May 15, 2020 and May 16, 2020, issued by MoP regarding rebate in tariff, are applicable to IPPs?
- Whether MSEDCL can claim reduction in LPS in light of the notifications issued by MoP on August 20, 2020 and November 20, 2020?

Decision of the Commission

- Considering the submissions advanced on behalf of the parties, the MERC observed as under:
  - **Issue No. 1**
    - The MERC observed that IPPs had executed PPAs with MSEDCL pursuant to competitive bidding process under Section 63 of Electricity Act and the said PPAs contained explicit provisions regarding components such as payment of Capacity Charges, rebate and LPS, which cannot be altered by it by using inherent powers under MYT Regulations 2019 or CoB Regulations 2004.
    - As regards the MoP notification dated March 28, 2020 and CERC Order dated April 3, 2020, MERC observed that for the Generating Companies whose tariff has been determined under Section 63 of the Electricity Act by CERC, relief in respect of LPS for payments made during the period between March 24, 2020 to June 30, 2020, may be claimed in terms of the Force Majeure provisions of the respective PPAs.
    - Further, the MERC observed that the Force Majeure provisions of PPAs under consideration in present case mandate the affected party to issue notice related to occurrence of Force Majeure. However, MSEDCL had not issued Force Majeure notice to its IPPs on account of Covid-19.
    - The MERC also noted that during Covid-19 pandemic, IPPs were performing their obligations by supplying power to MSEDCL and MSEDCL used such energy to supply its consumers. Thus, after utilizing such energy, MSEDCL cannot take shelter of Force Majeure clause for avoiding legitimate payment dues of IPPs and is not entitled for claiming any relief in this regard.

- **Issue No. 2**
  - As regards the applicability of notifications dated May 15, 2020 and May 16, 2020 issued by MoP to the IPPs, it was observed that by way of the said notifications, central Generating and Transmission Companies under MoP have been asked to provide rebate to Discoms of about 20-25% in Fixed Cost on power supply billed to Discoms and Inter-State Transmission Charges levied by PGCIL during lockdown period. However, MERC observed that the said notifications of MoP clearly state that rebate is to be offered by Generating and Transmission Companies of the Central Government and did not mandate IPPs to offer any such rebate. Thus, the MERC declined to grant any relief with respect to rebate in tariff to MSEDCL by the IPPs.
- **Issue No. 3**
  - As regards MSEDCL's claim qua reduction of LPS amounts, the MERC observed that notifications issued by MoP on August 20, 2020 and November 20, 2020 are applicable only to Discoms who have participated in Liquidity Infusion Scheme under Atmanirbhar Bharat Scheme. Considering that MSEDCL had not submitted or revealed the details of funds received under Atmanirbhar Bharat Scheme and payments made to IPPs from the funds received under the scheme, MERC held that the aforesaid notifications of MoP which specifically have considered allowing benefit of rebate in tariff and lower rate of LPS to Discoms participating in the said scheme, are not applicable to MSEDCL.

HSA
Viewpoint

The MERC has adjudicated the claims made by MSEDCL within the provisions made by MoP in its various notifications and rightly refused to grant any relief with respect to rebate in tariff and reduction of LPS.

Cogeneration Association of India v. Maharashtra Electricity Regulatory Commission and Ors

APTEL | Judgment dated May 02, 2022 in Appeal No. 381 of 2022

Background facts

- The present Appeal had been filed by the Cogeneration Association of India (**Appellant**) challenging the Order dated August 18, 2018 passed by the MERC in Case No. 204/2018 determining the tariff for the non-fossil fuel-based co-generation projects of the members of the appellant association for the control Financial Year (FY) 2018-19 (**Impugned Order**).
- By way of the Impugned Order, the MERC had returned a finding that though the tariff computed in terms of parameters set out in the Maharashtra Electricity Regulatory Commission (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2015 (**RE Tariff Regulations**) works out to INR 6.45 per unit, the tariff rate of INR 4.99 per unit being the one discovered through competitive bidding in the State of Maharashtra for such non-fossil fuel based projects, the lower tariff of INR 4.99 per unit deserved to be adopted and enforced as the generic tariff.
- It was stated that after the notification of RE Tariff Regulations, the MERC had passed generic Tariff Orders for FY 2015-16, 2016-17 and 2017-18 wherein no departure had been made from the mandate of Section 62 of the Electricity Act. However, in the Impugned Order, the MERC departed from the existing view and departed from the principles enshrined under Sections 61 and 62 of the Electricity Act.
- The Respondents, being the Distribution Licensees in the State of Maharashtra, submitted that the Regulatory Commission exercises plenary power in the matter of tariff determination. Further, it was stated that being responsible to take care of the consumer interest and having found the bid discovered tariff to be more realistic, use of such tariff as the benchmark cannot be questioned.

Issue at hand

- Whether the MERC, while determining the tariff in terms of Section 62 of the Electricity Act, could have applied the tariff discovered by bidding process under Section 63 as the benchmark?

Decision of the Tribunal

- The APTEL observed that under Section 61 of the Electricity Act, competition and interest of consumers should be balanced while ensuring reasonable return for the investors. This can be done by cost-plus route under Section 62 of the Electricity Act and tariff based on competitive bidding under Section 63.

- Further, it was observed that the MERC had fallen into serious error in taking a decision on the subject of tariff determination under Section 64 of the Electricity Act by using parameters outside the Tariff Regulations framed under Section 61. Emphasis in this regard has been placed on the observations of the Supreme Court in *PTC India Ltd v. CERC*[2].
- APTEL observed that by making an assessment based on various parameters set out in the RE Tariff Regulations (including technology, capital cost, indexation mechanism, plant load factor, auxiliary consumption, station heat rate, operation and maintenance expenses, fuel mix, use of fossil fuel, calorific value, fuel cost, etc.), the MERC had itself concluded that the tariff deserves to be fixed was INR 6.45 per unit. Considering that the RE Tariff Regulations do not include the bid discovered tariff of Section 63 as one of the benchmarks, the use of such benchmark demonstrated that its decision was articulated by extraneous consideration falling outside the RE Tariff Regulations which had been framed by it and which it was duty bound to follow.
- Further, the APTEL observed that in the present case there was no vacuum in the RE Tariff Regulations, for which the MERC could have looked elsewhere to find a fair solution. The RE Tariff Regulations, 2015 had been in force and complied with scrupulously in the preceding three control periods and there was no justification for any departure from such dispensation or foray outside the extant framework of the RE Tariff Regulations.
- In view of the above observations, APTEL modified the Impugned Order to the extent challenged and set aside the determination of generic tariff for non-fossil fuel based cogeneration projects at INR 4.99 per unit. Further, considering that the MERC had found the tariff computed on the basis of principles set out in Section 62 of the Electricity Act read with RE Tariff Regulations at INR 6.45 per unit, the said rate of INR 6.45 per unit shall be applied as the generic tariff for the said category for FY 2018-19.
- APTEL also held that the Appellant would be entitled to raise invoices for the differential which the beneficiaries of supply by the Appellant would be duty bound to honour by requisite payment in terms of the respective contractual obligations.

HSA
Viewpoint

By way of this Judgment, APTEL has rightly held that the tariff discovered through competitive bidding process could not be used as a benchmark for tariff determination in the process prescribed under Section 62 of the Electricity Act. These provisions are distinct and independent of each other and there cannot be an overlap between the two, as has also been settled by Courts previously.

Himachal Pradesh State Electricity Board v. NRSS XXXI (A) Transmission Ltd & Ors

APTEL | Judgment dated May 09, 2022 in Appeal No. 343 of 2018

Background facts

- The present Appeal had been filed by M/s Himachal Pradesh State Electricity Board (**HPSEB**) challenging the Order dated September 18, 2018 passed by the Central Electricity Regulatory Commission (**CERC**) in Petition No. 104/MP/2018 (**Impugned Order**), whereby the CERC had held that HPSEB was liable to pay about 84.5% of the Transmission Charges on bilateral basis to NRSS XXXI (A) Transmission Ltd (**Respondent No. 1**), an inter-State Transmission Licensee, till the commissioning of the downstream asset by HPSEB, while the balance 15.5% were to be included in the Point of Connection (**PoC**) Charges as per the CERC (Sharing of Transmission Charges and Losses) Regulations, 2020 (**Sharing Regulations**).
- Briefly, in terms of various discussions, the establishment of the transmission system (Kala Amb Transmission System), following elements were taken up under a tariff based competitive bidding process under Section 63 of the Electricity Act and were envisaged to be developed as an integrated system for strengthening of the northern region grid by the Respondent No. 1:
  - 400/220kV sub-station at Kala Amb in the State of Himachal Pradesh
  - LILO of both circuits of Karcham Wangtoo - Abdullapur 400kV D/c line at Kala Amb
  - 40% Series Compensation on 400kV Karcham Wangtoo - Kala Amb D/c line
- Further, the downstream network required for catering the load of State of Himachal Pradesh was proposed to be built by the State Utility separately.
- In terms of the above, Respondent No. 1 and the beneficiaries of the Kala Amb Transmission System signed the Transmission Service Agreement dated January 02, 2014 (**TSA**).

[2] [(2010) 4 SCC 603]

- After the delay in completion of the downstream network by the HPSEB, the matter was deliberated before the Technical Coordination Committee (**TCC**) and the Northern Regional Power Committee (**NRPC**), wherein, the beneficiaries had agreed to the request of HPSEB for sharing of the Transmission Charges under PoC mechanism for the completion of Kala Amb Transmission System.

Issue at hand

- Whether the CERC has rightly levied the Transmission Charges to the tune of 84.5% of the total Transmission Charges to be recovered by the Transmission Service Provider, being Respondent No. 1, for the Kala Amb Transmission System, from the Appellant?

Decision of the Tribunal

- The APTEL observed that since Transmission Charges for the said transmission system are to be levied in accordance with the signed TSA, the rights and obligations are frozen in the TSA in entirety. Further, after the adoption of transmission tariff by the CERC, the levying of Transmission Charges shall be as per the statutory guidelines issued by the Government of India under Section 63 of the Electricity Act and the TSA signed between Respondent No. 1 and the beneficiaries.
- It was observed that Article 10 of the TSA provisioned that beneficiaries/Long Term Transmission Customers (**LTTCs**) shall pay the monthly Transmission Charges as per the methodology specified under PoC mechanism. Further, there is no provision under the TSA where only single entity can be levied upon with 100% Transmission Charges for certain elements.
- As regards the extant regulatory framework, the APTEL observed that the Sharing Regulations clearly spelt out the mechanism to be followed for determination of share of each beneficiary i.e., LTTC, presently under PoC mechanism, and the Regulations do not find a mention of downstream or upstream network matching condition under which specific LTTC can be penalized.
- The APTEL thus held that by way of the Impugned Order, the CERC had continued with the practice of deciding contrary to its own Regulations, which is irrational and unjustified. Further, the CERC has been directed to approach the Central Government, if it decides, in favour of such approach, for amending the relevant bidding guidelines issued under Section 63 of the Electricity Act.
- It was held that the decision of the TCC, duly vetted and approved by the NRPC, is not a subject matter of challenge before the CERC, and the decision of the NRPC is taken only after detailed deliberations amongst the members on technical and commercial merit. As such, the comments made by the CERC have been stated to be uncalled for as the two committees decide and resolve the issues only after examining the technical and commercial implications.
- In view of the above observations, the APTEL has held that the Transmission Charges for the subject Inter-State Transmission System should be recovered under the express provisions of the TSA read with Sharing Regulations.

HSA
Viewpoint

While adjudicating this matter, APTEL has harmonized the provisions of the concluded contract (the TSA) and the Sharing Regulations to say that the provisions from both of these documents are to be applicable while deciding the liability to pay Transmission Charges. APTEL's decision, in line with the settled principles of law, upheld the position that where a Commission has framed the Regulations, it is bound to act in consonance with the provisions under the said Regulations.

Jaipur Vidyut Vitran Nigam Ltd & Ors v. JSW Energy (Barmer) Ltd

APTEL | Judgment dated April 21, 2022 in Appeal No. 58 of 2022

Background facts

- The present Appeal had been filed by the Distribution Licensees operating in the State of Rajasthan challenging the Order dated May 30, 2019 passed by the Rajasthan Electricity Regulatory Commission (**RERC**) and the Order dated January 15, 2020 passed in the Review Petition (**Impugned Orders**).
- By way of the Impugned Orders, RERC had granted in-principle approval to the Generator, to upgrade/modify Electrostatic Precipitators (**ESPs**) and the Lime Handling System in terms of recommendations of Central Electricity Authority (**CEA**) whose advise was sought by RERC.
- It was contended by the Appellants that there was no need for such additional handling system to be brought in at that stage since sulphur levels were not rising to the extent projected.
- The Appellants were primarily aggrieved because of the additional burden in the cost of electricity that the addition of Lime Handling System would bring in. It was the Appellants' case that it would

have been appropriate, just and fair had RERC not examined the need for such augmentation of the handling system on its own and had simply followed CEA's advice.

Issue at hand

- Whether the RERC ought to have independently examined the consequences of introduction of the additional Lime Handling System?

Decision of the Tribunal

- The APTEL observed that the RERC had not independently examined the need for such augmentation of the Lime Handling System and had simply chosen to follow the advisement of the CEA. Further, it was observed that though the opinion of CEA carries weight, in an adversarial situation, adopting the recommendation as decision of the Commission might not be a correct approach.
- Considering that the Impugned Order was conspicuously silent on the scrutinization of the requirement of such augmentation, APTEL set aside the Impugned Order to the extent it had the effect of granting in-principle approval for the additional Lime Handling System and remanded the matter to the Commission for fresh consideration
- Further, after remanding the matter back to the RERC, the APTEL directed RERC to pass a fresh decision in accordance with law by a reasoned Order, after affording an effective opportunity of hearing to both sides and examine the issue with open mind uninfluenced by the decision taken earlier.

HSA
Viewpoint

By way of this Order, APTEL has rightly held that though the recommendations of the CEA carried weight, RERC is under an obligation to independently examine the requirement of such augmentation of Lime Handling System, which is bound to cause additional cost implications on the parties.

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AT A GLANCE

FULL-SERVICE CAPABILITIES

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- COMPETITION & ANTITRUST
- CORPORATE & COMMERCIAL
- DEFENCE & AEROSPACE
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