

PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES



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Draft Electricity (Amendment) Rules, 2023

- The Ministry of Power, Government of India (**MOP**) on April 20, 2023 notified the Draft Electricity (Amendment) Rules, 2023 (**Amendment Rules**).
- MOP has incorporated provisions of 'Subsidy Accounting & Payment' and 'Framework for Financial Sustainability' (prior to the amendment, no specific framework for financial sustainability was present in the Rules).
- The amendment substitutes Rule 15 of Electricity Rules, 2005, inserts Rule 20 and re-numbers existing rule 20 to 21. The substitution and insertions made in Rule 15 and 20 are provided below:
 - The amendment has substituted Rule 15 of Electricity Rules, 2005 to add sub-Rules 2, 3 and 4.
 - Sub-Rule 2 provides for a quarterly report to be issued by the State Commission for each Distribution Licensee regarding findings on the accuracy of subsidy demand raised by Distribution Licensee based on account of energy consumed by the subsidized category, consumer category wise per unit subsidy declared by State Government, the actual payment of subsidy in accordance with Section 65 of the Act and the gap in subsidy due and paid along with other relevant details.
 - Sub-Rule 3 provides the deadline for submission of quarterly report within 45 days from end of respective quarter.
 - Sub-Rule 4 provides for consequences of non-compliance in the form of appropriate action by the Commission.
 - Prior to the amendment, Rule 15 was silent on the procedure and was merely referring to Standard Operating Procedure issued by Central Government in this regard.
 - The Amendment has inserted Rule 20 and re-numbered earlier Rule 20 as 21, thus introducing the Framework for Financial Sustainability.
 - The amendment provides for a loss reduction trajectory to be adopted by the State Commission in accordance with trajectory agreed by the respective State governments and approved by the Central government.
 - All prudent costs incurred by the Distribution Licensee for supply of electricity and for meeting requirement of Resource Adequacy plan under Electricity (Amendment) Rules, 2022 shall be taken into consideration while determining the loss reduction trajectory.
 - The prudent costs incurred for asset creation to maintain and develop the distribution system, according to Clause (d), shall be pass-through subject to fulfilment of conditions under the proviso.

- The losses accrued due to deviation from AT&C loss reduction trajectory shall be shared between the Distribution Licensee and consumers. Two third of the profit must be passed on to consumers and one third can be retained by the Distribution Licensee. Further, half of the losses shall be borne by the Licensee and half shall be passed on to the consumers in tariff.
- The amendment in this rule also provides under Clause (g) for Return on Equity (RoE) to be permitted by the states.

Scheme for pooling of tariff of thermal power plants whose PPAs have expired

- The Ministry of Power (**MoP**) has notified the Scheme for Pooling of Tariff of those plants whose PPAs have expired. The scheme's goal is to use the power-generating capacity of thermal power plants older than 25 years old whose PPAs have ended but are still in good condition for operation.
- According to the government, the strategy might lessen the creation of new long-term PPAs and eliminate the need for substantial investments to build up these power plants.
- As per the Scheme, the government has mandated creating a central sector Genco-wise common pool of thermal power generating stations (coal and gas-based) where their PPAs had already expired. It also proposed that any Genco competing with their PPAs should be automatically added to this pool.
- The scheme also includes the development of a single-window system. Within 15 days of the creation of the common pool, the states or DISCOMs may submit their willingness for power allocation through the window. The plan also stipulates a five-year minimum requisition time for authority obtained via the common pool. Power distribution from the common pool to the states and DISCOMs will be based on new PPAs with the pool and the Gencos under the new system.
- The rules of the scheme recommend that the total capacity of the pool be calculated by adding the charging capacities of each station in the pool in accordance with the Central Electricity Regulatory Commission's (CERC) tariff regulations. A uniform capacity fee based on the overall capacity charge and percentage allocation of electricity from the common pool will be billed to the states and DISCOMs under this.
- The scheme addresses a number of additional issues, Inter alia, the implementation of merit-order dispatch, the bundling of renewable energy, and the distribution of benefits and roles and duties among stakeholders.

DERC (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) (First Amendment) Regulations, 2023

- The Delhi Electricity Regulatory Commission (**DERC**) notified that the Delhi Electricity Regulatory Commission Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) (First Amendment) Regulations, 2023 will be applicable from April 01, 2023 onwards. By way of the said Amendment, the following changes have been brought about:
 - The definition of 'Consumption' has been amended to:
 - In case of Distribution Licensees, % of total sale of power to its retail consumers in its area of supply
 - In case of Open Access Consumers, the total energy recorded by the meter for the whole year
 - The Renewable Purchase Obligation (**RPO**) in India requires meeting wind and hydro power targets for energy consumption, with specific timelines for commissioning projects and thresholds for excess energy utilization.
 - Any shortfall in the RPO can be compensated by excess energy consumed from eligible projects, and Renewable Energy Certificates can be used to calculate the remaining shortfall. Importation of hydro power from outside India is not considered for meeting targets.
 - This amendment provides for certification of purchase of electricity from renewable energy sources in excess of RPO for all eligible entities and computation of quantum of RPO compliance & excess renewable purchase for non-obligated and obligated entities.
 - Prior to the amendment the value of BG/FDR and the weighted average price of renewable energy certificate at Power Exchange (**IEX**) for the past relevant year, now the existing provision has amended the provision to the past 3 months.
 - The amendment brought in a change in provision where the REC cost was to be considered as per Central Electricity Regulatory Commission (Terms and Conditions for Renewable

Energy Certificates for Renewable Energy Generation) Regulations, 2022 as amended from time to time and shall be trued-up.

- Prior to this the REC cost was to be calculated at Floor Price, if the floor price was zero the REC was to be calculate at an average of floor price and Forbearance price as determined by CERC, for such shortfall of units which shall be trued up subsequently.
- Earlier the penalty for non-compliance of RPO was calculated based on 10% of the weighted average Floor Price of Solar and Non- Solar Renewable Energy Certificate. The same has now been amended so that the penalty is calculated at the rate of 10% of weighted average REC price discovered at IEX for the relevant year, for quantum of shortfall in RPO.

Delhi Electricity Regulatory Commission (Business Plan) Regulations, 2023

- The Delhi Electricity Regulatory Commission (**DERC**) notified the Delhi Electricity Regulatory Commission (Business Plan) Regulations, 2023. Key aspects:
 - The targets for Renewable Purchase Obligation (**RPO**) shall be computed as a percentage of the total sale of power, to its retail consumers in its area of supply, excluding procurement of hydropower, but not excluding hydropower eligible under fulfilment of Hydro Purchase Obligation (**HPO**).
 - The target for RPO shall be met through the purchase of power from various renewable energy sources or the purchase of Renewable Energy Certificates (**REC**)
 - On achievement of Other Non-Solar RPO compliance as specified in sub-Regulation (1) to the extent of 85% and above, the remaining shortfall (if any) can be met by excess solar energy/solar REC/eligible hydro energy purchased beyond Solar RPO or HPO for that particular year.
 - On achievement of HPO compliance to the extent of 85% and above, the remaining shortfall (if any) can be met by excess solar or other non-solar energy consumed beyond the specified Solar RPO or Other Non-Solar RPO for that particular year.
 - The Distribution Licensee may purchase power from various renewable energy sources, RECs, HECs or combinations, for any shortfall in meeting their total RPO targets for any financial year within three months from the date of completion of the relevant Financial Year.
 - HPO benefits may be met from the power procured from eligible LHPs (> 25 MW) including pumped storage projects i.e. those commissioned on and after March 08, 2019 and up to March 31, 2030 in respect of 70% of the total generated capacity for a period of 12 years from the date of commissioning.
 - Further to facilitate compliance with HPO, the Hydro Energy Certificate mechanism is available to be utilized by Distribution Licensees.
 - The HPO trajectory shall be trued up on an annual basis depending on the revised commissioning schedule of hydro projects. The amendment also clarifies that hydro power imported from outside India shall not be considered for meeting HPO obligations/targets.

Issuance of RFP for North Eastern Region Expansion Scheme

- The Ministry of Power (**MoP**) in its notification date April 19, 2023 issued documents related to the initiation of the bidding process for the Inter-State Transmission System (**ISTS**) project under the North Eastern Region Expansion Project-XVI scheme.
- It comes after the REC Power Development and Consultancy Ltd (**RECPDCL**), a subsidiary of the MoP, sought global bids for setting up the ISTS under the scheme on March 29, 2023. The tender notice had allowed the bidders to seek clarification from the REC by the end of April 18. However, after the completion of the period, the said notice was issued, where the ministry added more details on the project.
- The document by the Ministry discusses the 'transmission service agreement,' which included information on the terms, development, and construction of the project as well as a number of other details pertaining to the connection, project commissioning, insurance, billing, and payment of transmission fees, among other things.
- The RECPDCL stated in the tender that only online bids will be accepted. The bidders for this project would be chosen by REDPDCL through Tariff-Based Competitive Bidding (**TBCB**) and the Build, Own, Operate, and Transfer (**BOOT**) principle will be used to award the contract to the successful bidders.
- The deadline for submitting proposals has been set by RECPDCL for May 31, 2023. But according to the tender, interested parties could get the Request for Proposal (**RFP**) documents every working day and one day prior to the bid submission by paying the INR 5 lakh non-refundable fee.

Bidders may also obtain the RFP from the RECPDCL website subject to submission of INR 5 lakh for submission of responses to the RFP.

- The MoP claimed that project is being undertaken to strengthen the overall transmission network in the North-Eastern Region.

Ministry of Power terms collection of taxes and cess by States on power generation as 'illegal and unconstitutional'

- The Ministry of Power (**MoP**) has issued an Order dated April 26, 2023 asking the States to take appropriate steps for withdrawing any such orders which are imposing tax on power generation in the guise of levying tax on water usage/water cess.
- The Order comes after some States like Himachal Pradesh and Uttarakhand levied water cess on hydro projects, leading to a spar with some of the neighbouring states, which anticipated rise of power rates.
- The Ministry's Order said that Article 286 of the Constitution explicitly prohibits states from imposing any tax or duties on the supply of goods and services or on both where the supply occurs outside the State.
- The Order also clarified that as hydropower projects do not consume water to produce electricity and it is produced with turbines, thus there was no rationale for imposing any water tax on air tax for imposing any water tax on air tax for such projects. The Ministry has directed the State to withdraw any such order if existing in any State.

RERC (Terms and Conditions for Determination of Tariff) (Second Amendment) Regulations, 2023

- On February 28, 2023, Rajasthan Electricity Regulatory Commission notified RERC (Terms and Conditions for Determination of Tariff) (Second Amendment) Regulations, 2023 by way of which all new intra-State transmission projects costing INR 250 crore or more are required to be developed through Tariff Based Competitive Bidding in accordance with the guidelines issued by the Central Government.
- The proviso to these Regulations provides that while considering a project, the transmission system including all connected upstream/downstream transmission systems, shall be considered as a single project for inviting bids for development of project through Tariff Based Competitive Bidding.
- In addition to the Regulations made by RERC, power procurement by any Distribution Licensee shall be in accordance with the National Tariff Policy issued by Central government.

Karnataka Electricity Regulatory Commission imposes Wheeling Charges on renewables

- The Karnataka Electricity Regulatory Commission (KERC) on April 25, 2023 released the Wheeling and Banking Agreement Format for renewable energy projects under the KERC (Terms and Conditions for Green Energy Open Access) Regulations, 2022.
- The Regulations allow monthly energy banking for renewable energy generators with the aim of ensuring better grid stability and improved energy demand management.
- The new format also includes Wheeling Agreements for renewable energy projects under its green energy open access regulations.

RECENT JUDGMENTS



In this Section

Gujarat Urja Vikas Nigam Ltd & Ors v.
Renew Wind Energy (Rajkot) Pvt Ltd

GMR Warora Energy Ltd v. Central
Electricity Regulatory Commission & Ors

Avaada Sunce Energy Pvt Ltd v.
Maharashtra State Electricity Distribution
Co Ltd

Dollar Industries Ltd v. Tamil Nadu
Generation and Distribution Corporation Ltd

Ayana Renewable Power One Pvt Ltd v.
Solar Energy Corporation of India Ltd & Anr

Gujarat Urja Vikas Nigam Ltd & Ors v. Renew Wind Energy (Rajkot) Pvt Ltd

Supreme Court of India | Judgement dated April 13, 2023 | Civil Appeal No(s). 3480-3481 of 2020

Background facts

- On January 29, 2010, the Central Electricity Regulatory Commission (**CERC**) issued the Terms and Conditions for Recognition and issuance of Renewable Energy Certificate (**REC**) for Renewable Energy Generation Regulations, 2010 (**REC Regulations 2010**).
- On March 29, 2021, a Power Purchase Agreement (**PPA**) in terms of the REC Regulations 2010, was entered into between the Gujarat Urja Vikas Nigam Ltd (**GUVNL**) and the wind power developers (**WPDs**) including Renew Wind Energy (Rajkot) (**Renew**) for a ceiling on tariff at INR 2.64 per unit for 25 years.
- In addition to the tariff, WPDs were eligible for the issue of RECs for each unit of electricity generated and supplied by them to GUVNL. The alternate route available for the WPDs at the time of entering into the PPA was to sell electricity at a promotional tariff of INR 3.56 per unit, as determined by the State Commission. By choosing the option, the WPDs were ensured tariff at INR 2.64 per unit plus tradable RECs whose price was determined on the basis of the 'weighted average pooled price'. Distribution licensees were enabled to adjust such quantum of power purchased towards RPO specified under Section 86(1)(e) of the Act. Thus, the interests of both segments of the industry were taken care of.
- On July 11, 2013, CERC amended the REC Regulations 2010 and replaced 'at a price not exceeding pooled cost of the power purchase' with 'at the pooled cost of power purchase' along with the relevant statement of reasons for the said amendment. It was clarified in the amendment that PPAs already executed prior to this amendment at a tariff lower than APCC would not be affected.
- The first two Respondents (i.e. Renew and Wind Independent Power Producers) were aggrieved by the order of the CERC. They filed a petition before the State Commission arguing that the terms of the PPA had to be changed in view of the change in the REC regulations. This petition was allowed by the State Commission directing that the order of the CERC was general and was therefore applicable to all similarly situated wind power generators.
- Aggrieved by the order of the State Commission, GUVNL had preferred an appeal before APTEL. This appeal was rejected by APTEL vide its order dated December 06, 2018. The Appellants preferred review petition against APTEL's order rejecting their appeal against State Commission's order; that too was dismissed by APTEL vide its order dated July 24, 2020. Hence, the present appeal before the Supreme Court (**SC**).

- It was argued by GUVNL that governing regulations for the PPAs in question were the CERC Regulations 2010. Therefore, the State Commission had no jurisdiction to decide the tariff contrary to the agreement.
- Further, CERC itself has clarified by the amendment in REC Regulations 2010 that in respect of PPAs entered into prior to July 11, 2013, tariffs mutually agreed upon between the parties would be valid for the entire duration of the PPA (i.e. 25 years) and they could not be substituted or re-determined by the State Commission.
- The terms of the PPA were binding and enforceable, unaffected by the in REC Regulations 2010 which applied prospectively. GUVNL also submitted that the plea of coercion or duress or unequal bargaining etc, raised by the WPDs was patently erroneous.
- The Respondents submitted that State Commission has the jurisdiction. Placing reliance on Section 86(1)(b) of the Electricity Act, they argued that the provision specifically vests the State Commission with the power to regulate the electricity purchase and procurement process of Distribution Licensees including the price at which electricity shall be procured from the generating companies.

Issues at hand

- Did the PPA in the present case, require prior approval of the State Commission?
- Whether change in the REC Regulations obliged revision of the PPA in this case?
- Applicability of the Amendment in REC Regulations, 2010 to pre-existing contracts?
- Were the Respondents coerced into entering into PPAs?

Decision of the Court

- **Re the first issue:**
 - The SC observed that that there was never any provision which mandated prior approval by the State Commission of PPAs entered into by parties in exercise of their free choice in relation to renewable energy sources.
 - As a matter of fact, in the case of renewable power, the State Commission had approved a model PPA. Further, the tariff terms and conditions to the extent decided are by the Central Commission and not by the State Commission. These are incorporated in the model PPA.
 - Neither the Commission nor the contesting Respondents, during the hearings in the present appeals, were able to point out any provision in the PPA in the present case which conflicted with any provision of the model PPA or any express regulation.
 - Thus, the Court held that the findings of APTEL, not based on any stipulated obligations under provisions of the State regulations requiring approval of the State Commission for its operation, cannot be sustained.
- **Re the second issue:**
 - The SC observed that the PPA was entered into by the parties on March 29, 2012, within the control period stipulated in the Tariff Order of 2010. The change in the REC Regulations 2010, whereby the Explanation to Regulation 5 was amended resulted in a change.
 - The pre-existing clause that the power would be ‘at a price not exceeding pooled cost of the power purchase’ was altered to ‘at the pooled cost of power purchase’. This change, was through the Second Amendment (to the REC Regulations), carried out on July 10, 2013.
 - It is a matter of record that for the period between March 29, 2012 and July 10, 2013, and indeed, after the Second Amendment, no difficulty was experienced in the pricing mechanism agreed by the parties under the PPA. It was on December 10, 2013 that the respondent WPD approached the State Commission for re-determination of tariff.
 - Clearly, this was an opportunistic attempt to derive advantage from the change, brought about by the Second Amendment, and seek to have it applied to an existing contract, which cannot be countenanced.
 - In view of these reasons, it is held that the reasoning of APTEL, and the State Commission cannot be upheld.
- **Re the third issue:**
 - It was held that agreements such as the PPAs in the present case, entered into voluntarily by the parties before the Amendment in REC Regulations, 2010, were not affected by its terms. The findings to the contrary in the impugned order are set aside.
- **Re the fourth issue:**
 - The Court held that APTEL, in the most cavalier fashion, virtually rubber stamped the State Commission’s findings on coercion in regard to the entering into the PPA by the parties. There was no shred of evidence, nor any particularity of pleadings, beyond a bare allegation of coercion alleged against GUVNL.

- The findings regarding coercion are, therefore, wholly untenable. The SC was also of the opinion that the casual approach of APTEL in not reasoning how such findings could be rendered, cannot be countenanced.
- As a judicial tribunal dealing with contracts and bargains which are entered into by parties with equal bargaining power, APTEL is not expected to casually render findings of coercion, or fraud without proper pleadings or proof or without probing into evidence.
- The findings of coercion are therefore, set aside.



HSA
Viewpoint

This verdict will have far-reaching ramifications for the energy sector in India, as it underlines the significance of procedural fairness and the rule of law in quasi-judicial proceedings. It also provides guidance to quasi-judicial bodies to ensure that their decisions are based on facts and evidence, rather than mere assumptions and allegations. Moreover, the judgment further highlights that decisions by quasi-judicial bodies must be made in a transparent and impartial manner, giving due importance to the principles of natural justice.

GMR Warora Energy Ltd v. Central Electricity Regulatory Commission & Ors

Supreme Court of India | Judgement dated April 20, 2023 | Civil Appeal No. 11095 of 2018

Background facts

- 11 Cross Appeals were preferred before the Supreme Court (SC) by various generators and Distribution Companies (DISCOMs) against the judgment passed by the Appellate Tribunal for Electricity (APTEL). The Generators filed the Appeal to the extent that compensatory benefits were denied to Generators on certain components on the ground of Change in Law that was accrued when the government introduced New Coal Distribution Policy (NCDP), 2013, and DISCOMs filed the appeal challenging the decision of APTEL accepting the claim of Generators on certain issues and holding the same to be Change in Law.
- The following three common issues in the present appeals are already settled by the SC vide its judgment dated March 03, 2023 in the case of *Maharashtra State Electricity Distribution Company Ltd v. Adani Power Maharashtra Ltd (MSEDCL v. APML)*:
 - Whether Change in Law relief on account of New NCDP 2013 viz. as against 100% of normative coal requirement assured in terms of NCDP, 2007 or restricted to trigger levels in NCDP, 2013 viz. 65%, 67% and 75% of ACQ?
 - Whether for computing Change in Law relief, the operating parameters should be considered on actuals or as per technical information submitted in bid?
 - Whether Change in Law relief compensation is to be granted from April 1, 2013 (start of Financial Year) or July 31, 2013 (date of NCDP 2013)?
- In MSEDCL V. APML, the SC held that *'The first issue was answered by this Court, holding that the Change in Law relief for domestic coal shortfall should be on 'actuals', i.e. as against 100% of normative coal requirement assured in terms of the NCDP, 2007. Insofar as the second issue is concerned, it was held that the Station Heat Rate ('SHR' for short) and Auxiliary consumption should be considered as per the Regulations or actuals, whichever is lower. The third issue was answered holding that the Start date for the Change in Law event for the NCDP, 2013 is 1 April 2013.'*

Issues at hand

- Whether the following components could be considered as Change in Law events:
 - Busy Season Surcharge & Development Surcharge and Port Congestion Surcharge
 - Ministry of Environment and Forest (MoEF) Notification on coal quality
 - Shortfall in linkage coal due to Change in NCDP
 - Forest Tax
 - Add on Premium price
 - Evacuation Facility Charges (EFC)
- Whether various taxes/charges imposed by various State Governments would also fall under Change in Law events or not?
- Whether at what rate the Generators would be entitled to Carrying Cost?

Decision of the Court

- In terms of the submissions made by the parties, the SC held as under:
 - The SC delved into the discussion of what qualifies as Change in Law for the purpose of availing compensatory benefits. It observed while referring to the definition of law in the concerned Power Purchase Agreements (PPAs) that the definition of the term 'Law' itself would clearly show that the term would mean all laws including Electricity Laws in force in India and any statute, ordinance, regulation, Notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. It would further reveal that the term 'Law' shall also include all applicable rules, regulations, orders, Notifications by an Indian Governmental Instrumentality.
 - The SC concluded that all additional charges which are payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the state, after the cut-off date, will have to be considered to be Change in Law events and the Change in Law events have to be accrued from the date on which such Rules, Orders, Notifications are issued by the State instrumentalities.
 - In light of the discussion of what constitute change in law, the SC scrutinized each claimed component individually to ascertain if it qualifies as a Change in Law issued by the Instrumentalities of the State.
 - The SC also went into the discussion of Concurrent Findings of Central Electricity Regulatory Commission (CERC) and APTEL, and observed that where concurrent findings exists in such situations the Courts would rarely interfere.
 - Late Payment Surcharge (LPS) cannot be equated with Carrying Cost or actual cost incurred for the supply of power. DISCOMs have a contractual obligation to make timely payment of the invoices raised by the power generating companies.
 - The SC observed that the DISCOMs have a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject to scrutiny and verification of the same and rejected the contention that the funding cost was much lesser than the rate of LPS.
 - The Courts cannot rewrite a contract which is executed between the parties and cannot substitute its own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed.
 - The SC reiterated that once Carrying Cost has been granted, it cannot be urged that interest on Carrying Cost should be calculated on simple interest basis instead of compound interest basis.
 - The argument that there is no provision in the PPAs for payment of compound interest from the date when the Change in Law event had occurred, has been specifically rejected by the SC.
 - Finally, the Court upheld the judgment of APTEL while appealing to the Ministry of Power to evolve a mechanism so as to ensure timely payment by the DISCOMs to the Generating Companies, which would avoid huge Carrying Cost to be passed over to the end consumers and accordingly dismissed the appeal.



HSA Viewpoint

Supreme Court's findings set an important precedent for Change in Law circumstances arising out of PPAs. The findings are in line with the settled position of law that where the change in law is effected by any State Instrumentalities, it ought to be compensated. Further, an important principle of non-interference with respect to situations where concurrent findings of CERC and APTEL are present has been propounded by the Court.

Avaada Sunce Energy Pvt Ltd (ASEPL) v. Maharashtra State Electricity Distribution Co Ltd (MSEDCL)

Supreme Court of India | Civil Appeal No. 7129 of 2021.

Background facts

- Avaada Sunce Energy Pvt Ltd (ASEPL) by way of the captioned Petition sought compensation on account of Change in Law as provided under the Power Purchase Agreement (PPA) dated June 26, 2019 signed with Maharashtra State Electricity Distribution Co Ltd (MSEDCL) due to the increase in capital expenditure on account of imposition of Safeguard Duty on imports of Solar Cells/Modules and increase in Goods and Service Tax (GST) on Solar Panels/Modules vide

Notifications Nos. 02/2020-Customs (SG) dated July 29, 2020 (**SGD II**) and Notification No. 8/2021-Central Tax (Rate) dated September 30, 2021 respectively in terms of Article 9 of the PPA.

- Article 9.3.1 of the PPA required ASEPL to issue notice to MSEDCL of any event being in the nature of Change in Law within 7 days after becoming aware of the same. In this regard, ASEPL issued notice claiming Change in Law for SGD on September 20, 2022 and for GST on September 21, 2022 while the events being claimed as Change in Law took place with effect from the date of Notification i.e., July 29, 2020 and September 30, 2021.
- On account of the same, MSEDCL has objected to such claims of Change in Law on the grounds that ASEPL has not complied with the requirement of giving Change in Law notice within 7 days from the date of Change in Law affecting ASEPL which was issued after a delay of about 26 months for SGD II and over 12 months for GST.
- Per contra, ASEPL has argued that non-issuance of notice within 7 days cannot preclude it from Change in Law claim under the PPA since the intimation/issuance of a notice under Article 9.3 to MSEDCL was a mere formality which has been complied with by ASEPL. Further, such notice has the objective of apprising and intimating the parties of a fact or event to ensure that the other party is not unaware of the possible effect of such event. Since MSEDCL is already aware that imposition of SGD II and GST are events being claimed as Change in Law by several generators, it cannot claim that due to non-issuance of notice under Article 9.3 of the PPA, MSEDCL had no knowledge of the Change in Law events cited by ASEPL. In submitting the same, ASEPL relied on the legal principle of constructive notice.
- The parties have also argued on the obligation under Article 9.3.1 being mandatory in nature. MSEDCL has submitted that the use of the word 'shall' has been interpreted to prima facie place a mandatory obligation on parties in a contract. On the other hand, ASEPL has contended that 'shall' can be interpreted as 'may' in light of the larger context of such terms.

Issues at hand

- Whether 'shall' can be interpreted as 'may' in the concerned clauses of PPA?
- Whether ASEPL can claim constructive notice of Change in Law?
- Whether the condition of issuing notice within 7 days is mandatory?

Decision of the Court

- After considering the submissions of both parties, MERC held as under:
 - The decision dated June 30, 2021 of the Appellate Tribunal for Electricity in **Uttar Haryana Bijli Vitran Nigam Ltd & Anr v. Adani Power (Mundra) Ltd & Anr¹ (Adani Judgment)** does not dilute the requirement of notice stipulated under contractual provisions of power purchase agreement for claiming Change in Law, but rather relaxed such requirement in the event of a continuous cause of action to the extent of issuing a fresh notice. Since the same was in the context of Change in Law claim under NCDP Scheme continuing under the SHAKTI Scheme (both being related to coal supply) while in the present case, the events being claimed as Change in Law are not continuous or is there any prior notice to supplement the case of ASEPL, the reliance on said Judgment is misplaced.
 - The ground of constructive notice is not available to ASEPL since they have served notice on MSEDCL albeit with substantial delay. The mandatory condition of issuing notice within 7 days cannot be ignored, which ASEPL has failed to comply with. Thus, it is not eligible to claim Change in Law compensation.
 - Despite the fact that MSEDCL could have been aware of such event of increase in Safeguard Duty and GST being claimed as Change in Law events, but the concerned PPA clearly stipulates that 'If the seller is affected by Change in Law and wishes to claim' then it shall issue notice for within 7 days. Thus, the Change in Law provision kicks in only if the seller wishes to claim such compensation and if so has to give notice within 7 days.
 - The word 'shall' used in Clause 9.3.1 cannot be interpreted as 'may' as it would vitiate the purpose of this Clause i.e., compulsory intimation of the possibility of increase in cost to the procurer due to Change in Law events.



HSA Viewpoint

In view of the above analysis, MERC's findings set an important precedent for the issuance of notice in the light of the mandatory condition mentioned in the PPA for claiming compensation under the Change Law. Further, MERC has distinguished the findings in the Adani Judgment and delivered its finding based on a narrow interpretation of the findings of APTEL which were based on the notion that substantial rights of parties cannot be thwarted on grounds of procedural technicalities.

¹ Appeal No. 358 of 2019

Dollar Industries Ltd v. Tamil Nadu Generation and Distribution Corporation Ltd

Tamil Nadu Electricity Regulatory Commission (TNERC) | Order dated April 25, 2023 | Miscellaneous Petition No. 8 of 2023

Background facts

- Dollar Industries Ltd (DIL) is involved in the industry of manufacture of textile processing with High Tension Supply and had set up a solar plant of 1 MW each in two phases totalling 2 MW for captive use.
- In addition to the above, DIL with a view to establish solar power plant with battery storage system of combined capacity of 4 MW using the Tamil Nadu Generation and Distribution Corporation Ltd (TANGEDCO) grid by paying open access and other connected charges (which would be the first in the state of Tamil Nadu) applied to TANGEDCO vide letter dated May 19, 2022 requesting for approval to establish 4 MWhr Battery Energy Storage System (BESS) for charging the battery from the electricity generated from the 2 MW Solar plant and using the stored power for their own captive adjustment during peak hours and night hours.
- By way of its letter dated November 2, 2022 TANGEDCO directed DIL to commission and synchronise its 2 MW solar plant and 4 MWhr BESS with the grid within 12 months i.e., November 2, 2023 and any failure on account of the same would result in forfeiture of security deposit. TANGEDCO also directed DIL to obtain prior permission from the Tamil Nadu Electricity Regulatory Commission for such adjustment of power.
- Pursuant to the same, DIL has completed the erection work for the 2 MW solar plant and the 4 MWhr BESS, applied to the Chief Electrical Inspector of the Government (CEIG) for issuance of safety certificate and filed the Petition (MP 8 of 2023) seeking approval for establishing its 2 MW solar plant and 4 MWhr BESS.

Issue at hand

- Whether to grant the license for the establishment of the 2MW Solar Power Plant with 4MWhr BESS for captive adjustment during day-time and also during peak hour/night hour consumption from the 4MWhr Battery Energy Storage System.

Decision of the Commission

- Based on the submissions made by DIL and TANGEDCO, TNERC held as under:
 - As per Section 2(30) and Section 2(50) of the Electricity Act, 2003, the definition of ‘Power System’ is comprehensive and wide enough to cover Energy Storage Systems (ESS) and that ESS acts like a ‘Generating Station’. Accordingly, insofar as the activity of charging is concerned, it is to be treated as an input to the activity of generating electricity. Further, the definition of ‘generating station’ prescribes the process of producing electricity and it does not put any restrictions on the form of energy it was in earlier or on duration for which it was in that form. Hence, for generating electricity, the input could be any source in the form of fuel or the electricity itself.
 - DIL is benefitted by using stored power during the peak and night hours for their captive use, while TANGEDCO is equally benefitted by being relieved of their obligation to buy costly power from the power exchange/market during peak hours and supplying the same to DIL thereby creating a win-win situation for both.
 - DIL permitted to adjust the stored energy exported to the grid in the respective slots/blocks including peak hour slot. All applicable charges and other related terms and conditions shall be as per the regulations and orders of TNERC in force from time to time.
 - By way of a bilateral agreement, DIL and TANGEDCO shall agree on the technical, commercial, operation and maintenance conditions, metering, protection and billing mechanism, other related matters etc.
- In view of the above, TNERC granted permission to the Petitioner to set up a 4 MWhr Battery Energy Storage System powered by their allied 2 MW Solar Power Plant in the same site.



HSA Viewpoint

TNERC has lauded such an initiative to set up BESS as a first of its kind project in the State of Tamil Nadu. It has harmoniously read the provisions of the Electricity Act, 2003 to recognize ESS as part of the power system falling within the ambit of Section 2(50). This has not only widened the scope of the Electricity Act, 2003 and definition of ‘power system’ but also promotes establishment of other such projects by categorically observing that they provide a win-win situation for generators and Discoms.

Ayana Renewable Power One Pvt Ltd v. Solar Energy Corporation of India Ltd & Anr

Central Electricity Regulatory Commission (CERC) | Order dated April 21, 2023 | Petition No. 219/MP/2022

Background facts

- The Petitioner, Ayana Renewable Power One Pvt Ltd, vide the instant Petition has sought relief on account of Change in Law events, viz., the imposition of Safeguard Duty as well as increase in the Integrated Goods and Services Tax, and grant of consequential reliefs therefore.
- The Petitioner had claimed relief on account of the introduction of Safeguard Duty vide 2020 SGD Notification dated July 29, 2020 and increase in GST rate vide 2021 IGST Notification dated September 30, 2021 as Change in Law events under Article 12 of the PPA.
- The Petitioner has submitted that the 2020 SGD Notification was issued after the sunset clause of the 2018 SGD Notification and resulted in introduction of Safeguard Duty beyond July 30, 2020, which had a direct impact on the project's expenditure. Further, vide 2021 IGST Notification the GST rates were increased from 5% to 12%. As such both notifications qualify as Change in law under Article 12 of the PPA and the Petitioner should be compensated accordingly.
- Per contra, SECI has submitted that the onus is on the Petitioner to demonstrate that the notifications resulted in incurring additional expenditure against the anticipated expenditure on the Bid Submission Date.

Issues at hand

- Whether the introduction of Notification No.02/2020- Custom (SG)dated July 29, 2020 and the introduction of Notification No. 8/2021 - Central Tax (Rate), Notification No. 8/2021 - Integrated Tax (Rate) dated September 30, 2021 amount to Change in Law events under Article 12 of the Power Purchase Agreement dated October 17, 2019?
- Whether the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA? And Whether the Petitioner is entitled to Carrying Cost towards compensation for Change in Law?
- Whether discount rate @ 10.40% decided by this Commission vide order dated August 20, 2021 in Petition No.536/MP/2020 be considered in calculation of annuity methodology for payment of compensation (if any) on account of Change in Law?

Decision of the Commission

- CERC observed that Article 12 of the PPA specifically provides that any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of solar power project and supply of power from the project which have a direct effect on the project, qualifies as Change in Law event. CERC further observed that 2021 IGST Notification dated September 30, 2021 and 2020 SGD Notification dated July 29, 2020 have been issued by the Ministry of Finance, Government of India and the same qualifies as 'Law' as defined under the PPA. Thus, change in rate of GST from 5% to 12% w.e.f. October 01, 2021 has resulted in the change in cost of the inputs required for generation and the same qualifies as Change in Law under the PPA.
- CERC also observed that Safeguard Duty was originally imposed vide notification dated July 30, 2018 (**2018 SGD Notification**) wherein the Safeguard Duty was imposed for a period of 2 years with a sunset date till July 29, 2020. Since no Safeguard Duty was applicable beyond July 29, 2020 at the time of bid submission, therefore, the Safeguard Duty imposed vide 2020 SGD Notification qualifies as a fresh Change in Law event under the PPA.
- Regarding the methodology for payment of compensation, CERC referred to its earlier order dated January 20, 2023 in Petition Nos. 722/MP/2020 and 723/MP/2020 and held that the payments are to be made through annuity mode spread throughout the period of 15 years from COD at the interest rate of 9%, in compliance of the methodology already settled in order dated August 20, 2021 in Petition No.536/MP/2020.
- CERC allowed the Carrying Cost; however, the payment of the same is subject to the final outcome of the dispute pending before Supreme Court in **Telangana Northern Power Distribution Company Ltd & Anr v. Parampujya Solar Energy Pvt Ltd & Ors²**.



HSA Viewpoint

CERC has given a well-reasoned Order by allowing the change in rates of IGST as an event which qualifies as Change in Law. This Order will help various power generators in the sector to recover the additional expenditure incurred by them on account of change in the rates.

² Civil Appeal no. 8880/2022

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