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PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES

In this Section

Electricity Amendment Bill, 2022

The Ministry of Power (**MoP**), Government of India has introduced the Electricity Amendment Bill, 2022 (**Bill**) before the Lok Sabha. Among other things, the Bill proposes to lay down provisions for the following:

- Payment Security Mechanism (**PSM**), to be provided by licensee(s) and is made mandatory (No electricity shall be scheduled or dispatched by NLDC/SLDC/RLDC unless adequate security of payment has been made).
- A cross subsidy balancing fund in case of issuance of license to more than one distribution company (**DISCOM**) in an area of supply. Any surplus in the fund shall be utilized to make good deficits in cross subsidy in the same area or other area of supply.
- Amended definition of Power System under Section 2 (50), to include energy storage system as well.
- The Bill has also inter alia proposed amendments to the provisions pertaining to grant of license, functions of the National Load Despatch Centre provisions of Sections 40, 42, 61 (g), 62 (1) (d), 64.
- The Bill also introduces provisions relating to issuance of Order for interim tariff by the State Electricity Regulatory Commission.
- The provisions of penalty under Section 142 have also been amended in the Bill.

Uttar Pradesh Solar Energy Policy (Draft) 2022

- The draft of the Uttar Pradesh Solar Energy Policy (**Draft Solar Policy**) has been issued by the Government of Uttar Pradesh with an aim to achieve 16000 MW of Solar Power Project capacity by 2026-27. The same would be comprising of 10000 MW Utility/Grid Scale Solar Projects/Parks, 4000 MW Rooftop Solar projects and 2000 MW Distributed Solar Projects. The Draft Solar Policy upon being notified will be valid for a period of five years or until the Government notifies a new policy, whichever is earlier.
- The object behind the same is to ensure grid stability in a long run and round the clock power supply, the Draft Solar Policy aims to promote 'Storage Systems'. The State also aims to accelerate the deployment of Solar Power by implementing:
  - Large-scale projects
  - Small scale distributed systems
  - Establishment of ultra-mega solar parks
  - Rooftop solar PV projects

- The power generated is proposed to be purchased by Uttar Pradesh Power Corporation Ltd (**UPPCL**) through its electricity distribution companies (**DISCOMs**) to meet their Renewable Purchase Obligation (**RPO**) as determined by the Uttar Pradesh Electricity Regulatory Commission (**UPERC**). The State will make efforts to develop Solar Power Projects for captive consumption and sale of power to third parties, both inter-State and intra-State, other than UPPCL.
- The nodal agency for the implementation of this policy will be the Uttar Pradesh New and Renewable Energy Development Agency (**UPNEDA**) that will facilitate project developers and act as a single window to cater to all types of solar projects while also carrying out competitive auctions.

Letter dated August 01, 2022 issued by Ministry of Power regarding the import of coal for blending purposes

- In order to address the increasing year-on-year demand and consumption of electricity against the inadequate coal stock in the country, the MoP vide letter dated December 7, 2021, April 28, 2022 and subsequent revisions advised State Generating Companies and Independent Power Producers (**IPPS**) to import coal for blending purposes to meet requirement at 10% of the total requirement in order to ensure continuous power supply in the respective states during 2022-23.
- By way of their letter dated August 1, 2022, MoP has reviewed the stock of coal across the country and observed that coal stock position significantly varies from state to state; many states have stocks more than 50% of normative levels while others have stocks near critical levels. In view thereof, MOP has decided that States / IPPs and Ministry of Coal may decide blending percentage after assessing the availability of domestic coal supplies.
- Therefore, Generating Companies would not need to comply with the mandatory 10% blending percentage subject to the status of domestic coal availability within the concerned States.

RECENT JUDGMENTS

In this Section

NTPC Vidyut Vyapar Nigam Ltd v. Godawari Green Energy Limited & Ors & Batch

APTEL | Judgment dated July 26, 2022 in Appeal Nos. 403 of 2017, 4 of 2018, 29 of 2018, 35 of 2018 and 373 of 2018

Background facts

- The captioned batch of Appeals have been filed against Common Order dated October 11, 2017 (**Impugned Order**) passed by Central Electricity Regulatory Commission (CERC) in the abovementioned petitions.
- NTPC Vidyut Vyapar Nigam Ltd (**NVVN**), an Inter State Trading Licensee granted trading licence under Section 2 (26) read with Section 14 of the Electricity Act, 2003 (**Electricity Act**) by CERC, filed appeals seeking to challenge the Impugned Order on limited aspects concerning the adjustment of claims for shortage of energy supplied by the developer(s) and declaration of certain events such as drought as a Force Majeure event.
- Cross appeals have been filed by Godawari Green Energy Limited (**GGEL**), Rajasthan Sun Technique Pvt Ltd (**RSTPL**) and Megha Engineering & Infrastructures Limited (**MEIL**) against the Impugned Order.
- MEIL, GGEL and RSTPL are Solar Project Developers (**SPDs**) who were set up projects based on Solar Thermal Technology in pursuance of the Request for Selection dated August 18, 2010 (**RfS**) for inviting proposals for setting up grid connected Solar Thermal Projects for purchase of solar power by NVVN and further sale to various DISCOMS.
- The root cause of these litigations is non-availability of accurate Direct Normal Irradiance (**DNI**) data resulting into the disputes regarding compensation due to drastic reductions in DNI from the expected value, compensation for foreign exchange variation as a Force Majeure event, payment of Liquidated Damages (**LD**) for short-supply of committed energy due to reduction in DNI and Force Majeure claims of fire, flooding, etc.
- The grievance of the SPDs is essentially that the plants were planned, constructed and finally commissioned, on the basis of the DNI values in existence which were available and accordingly, the projects were bid. However, after commissioning the plants it was found that the actual DNI numbers were far lower than the projections resulting in reduced generation and efficiency resulting into claim for compensation for the same.
- CERC while adjudicating the petitions inter alia had held that it was the project developers' responsibility to carry out due diligence before submitting bids, in terms of the RfS. Further, CERC observed that the responsibility for variation in DNI was on the developers and not Force Majeure event. Resultantly, CERC denied the grant of compensatory tariff to the developers.
- CERC in MEIL's case, however, held that since NVVN was unable to prove 'legal injury' in the form of loss or damage on account of short supply of power to DISCOMS, therefore, no claims can be raised by NVVN or the DISCOMs unless they are able to prove that they suffered loss on account of non-compliance of RPO due to shortfall generation.

Issues at hand

- **Issue I:** Whether drop in DNI values can be considered as a Force Majeure event?
- **Issue II:** Whether the developers are entitled to seek any compensation on account of drastic reduction of DNI from expected values?
- **Issue III:** Whether NTPC can claim Liquidated Damages due to lower generation and supply?
- **Issue IV:** Whether Foreign exchange rate variation (FERV) in respect of foreign loans can be considered as a Force Majeure event?

Decision of the Tribunal

- **Issues I and II:**
  - APTEL has held that the variation in DNI values is beyond the control of the developers, and as such is a Force Majeure event. It has set aside CERC's finding that the developers ought to have utilized the technical experts in order to correctly analyse the data(s). It is APTEL's categorical finding that data available at that time of the bids was derived from the satellite analysis which was not feasible to be transformed to precise DNI value at the ground level.
  - The precise value of DNI was non-existing and any drastic change in the DNI if known earlier could have resulted into different value of the generic tariff.
  - Further, it was observed by APTEL that once reduction in DNI is recognized as an event similar to Force Majeure for the purpose of extending the SCOD, vide Notification dated May 8, 2013, issued by the MNRE, then the event of low DNI is a Force Majeure event for the purpose of revision/adjustment in tariff.
    Further, the Impugned Order does not lucidly state what due diligence was required from the developers when CERC itself determined the generic tariff based on information which was not precise and adopted the same without any due diligence which has resulted into the serious dispute.
  - APTEL held that once insufficient DNI is an event beyond the control of the developers, then it ought to be considered as Force Majeure for the purposes of claiming compensation. CERC ought to have exercise its powers under Section 79 in line with the recommendation of the Review Committee of Experts constituted by the MNRE.
  - Further, the APTEL directed CERC to formulate the mechanism for compensating the Generators against the reduction in DNI from the adopted value of DNI for determination of Generic Tariff to the actual annual values measured at project sites.
- **Issue III:**
  - APTEL took note of the Article 4.4.1 of the PPA and the observation of CERC in the Impugned Order, that no compensation can be claimed by NVVN against the event which is not attributed to the developer and is uncontrollable. DNI, is a natural phenomenon, depending on the nature and cannot be controlled by the Generators.
  - Thus, APTEL set aside the Impugned Order to the extent that LD have been levied on GGEL and upheld the decision of non-levy of LD on MEIL.
- **Issue IV:**
  - It has been held that any event, which is not under the reasonable control, directly or indirectly, of the developers and cannot be avoided even after taking reasonable care, can be considered as Force Majeure.
  - APTEL laid emphasis on the fact that it is settled law that all the provisions in the contract are to be read harmoniously and the Court or Tribunal must interpret the contract in the manner that two prudent businessmen in the ordinary course of business would have.
  - It has been held that FERV has affected the developers and is not under their control. It has been observed by APTEL that since the development of the Solar Thermal Technology and setting up of projects based on the technology are essential for the country, FERV shall be classified under Force Majeure Event. CERC has been directed to frame suitable mechanism for the purpose of appropriate compensation.

HSA
Viewpoint

The decision rendered by APTEL is well reasoned and will have a sector-wide implication on an array of legal issues which are common in the Indian regulatory space. The judgment lucidly deals with the ambit/scope of Force Majeure and Change in Law events and instances when compensation/damages may be sought. This judgment will provide much needed respite to solar thermal developers and will encourage them to set up more RE plants in future.

Dhariwal Infrastructure Ltd v. Power Grid Corporation of India Ltd & Ors

CERC | Order dated August 1, 2022 in Petition No. 630/MP/2020

Background facts

- The Petition has been filed by Dhariwal Infrastructure Ltd (**DIL**), which has set up a 2 X 300 MW coal-fired thermal generating station located at Chandrapur in the State of Maharashtra (**Project**). Unit 1 of the Project achieved COD on February 11, 2014 and Unit 2 of the Project achieved COD on August 2, 2014. DIL sought appropriate guidance from the CERC with reference to the implementation of closed bus operation of Unit 1 (connected to STU) and Unit 2 (connected to ISTS) at DIL's 2 X 300 MW coal-based thermal generating station.
- DIL's case is that Unit 1 of the Project is connected to the State Transmission Utility's System (**STU System**) at 400 kV Chandrapur II Substation of Maharashtra State Electricity Transmission Company Limited (**MSETCL**) through 8 km long dedicated 400 kV D/C Line. On the other hand, Unit 2 is connected through above mentioned dedicated line to the Inter State Transmission System of the Central Transmission Utility (**CTU/ISTS**) network. Both the units are operated under disconnected bus mode and the power from these units is evacuated independently through the State and Central transmission systems respectively. MSEDCL schedules energy from the Unit 1 and the energy from Unit 2 is scheduled by WRLDC i.e. the regional entity.
- DIL has sought approval for a closed bus operation of Unit 1 and 2. The issues relating to connectivity, commercial arrangements, scheduling and control area, applicable transmission charges and losses needed to be addressed prior to establishment of this interconnection.

Issues at hand

- **Issue I:** Whether inter-connection of 400 kV buses of STU connected Unit 1 and CTU-connected Unit 2 of the DIL's generating station can be allowed?
- **Issue II:** What will be the status of connectivity granted to both the units of the DIL i.e. Unit 1 by STU and Unit 2 by CTU post interconnection of the buses?
- **Issue III:** What will be the control area jurisdiction for scheduling and accounting post interconnection of the buses?
- **Issue IV:** What should be treatment of transmission charges and losses post interconnection of the buses?

Decision of the Commission

- **Issue I:**
  - CERC observed that in the Minutes of Meeting (**MoM**) held by CEA on January 10, 2020 for examining DIL's proposal to allow closed bus operation of Unit 1 and Unit 2 at its 2X300 MW TPP, there are no technical issues/constraints in closing the circuit breaker between Unit 1 bus and Unit 2 bus of the DIL's generating station. The interconnection of 400 kV buses of STU connected Unit 1 and CTU connected Unit 2 shall be allowed keeping 400 KV DIL-Chandrapur D/C line connected to STU under operation. CERC further directed that the interface metering arrangement should be as per the CEA (Installation & Operation of meters) Regulations and the Regulation 6.4.21 of the CERC Indian Electricity Grid Code Regulations 2010 (IEGC).
- **Issue II:**
  - CERC observed that Clause 1.4 of the Detailed Procedure prohibits an entity which is already connected to regional/state grid from seeking further connectivity from ISTS for the same capacity. Post inter-connection of 400 kV buses of STU connected Unit 1 and CTU connected Unit 2, the generating station will have connectivity with STU system for 300 MW of Unit 1 and with CTU system for 300 MW of Unit 2.
  - It was further observed that once the bus coupler is closed, the power may flow either through STU system or ISTS or both STU system and ISTS depending on load generation balance. Before any such inter-connection, it must be ensured by CTU that interconnected system is adequate as per load flow studies so that grid security is not affected. Technical experts such as CTU, CEA, RLDC and MSETCL have already concluded that there are no technical constraints and the issue to be decided was of commercial nature.
- **Issue III:**
  - CERC observed that according to Regulation 6.4.2 (c) of the IEGC, if a generating station is connected to ISTS as well as the STU network, and the State has more than 50% share of power, then in that scenario such generating station shall be under the jurisdiction of SLDC. In the present instance, post interconnection of 400 kV buses of STU connected Unit 1 and CTU connected Unit 2, the generating station gets connected to both ISTS and the

STU network. Unit 1 which is connected to STU network has no long term or medium-term power purchase agreement (**PPA**) with Maharashtra. Thus, the state has less than 50% share in the power station. CERC observed that post-interconnection, the scheduling of the DIL's generating stations shall be under WRLDC. CERC directed that the energy accounting shall be done as per extant regulations depending upon the control jurisdiction of WRLDC.

- **Issue IV:**
  - CERC pointed that DIL's generating station is connected to both ISTS and STU network, where 300 MW connectivity is with STU and 300 MW is with the ISTS. The scheduling of the said generating station shall be under the purview of WRLDC.
  - For the sake of convenience, CERC has considered four scenarios for the treatment of transmission charges:
    - **Case-I: If the generating station gets total schedule of 600 MW, out of which 300 MW is within the State (sale of power to Maharashtra) through Bilateral transaction and 300 MW through Collective STOA transaction through Power exchange:** CERC assumed that 300 MW power has wheeled through ISTS network and remaining 300 MW power has wheeled through STU network as per network topology built for the instant generating station.
    - **Case-II: If the generating station gets total schedule of say 400 MW all through Collective STOA transaction through Power exchange:** CERC held that the generating station shall bear ISTS transmission charges and losses corresponding to 400 MW. Additionally, it shall bear the STU transmission charges and losses corresponding to 100 MW, as applicable assuming that 300 MW (upto connectivity quantum to ISTS network) has been transmitted directly through ISTS, while 100 MW power wheeled to ISTS network through STU network.
    - **Case-III: If the generating station gets total schedule of say 400 MW all through Bilateral STOA transaction for sale to Maharashtra state:** CERC held that the generating station shall bear ISTS transmission charges and losses corresponding to 100 MW and STU transmission charges and losses corresponding to 400 MW, as applicable (as per state regulations or agreements), assuming that the 100 MW power has been wheeled through ISTS network.
    - **Case-IV: If the generating station gets total schedule of say 600 MW out of which 400 MW is for within the State (sale of power to Maharashtra) through bilateral transaction and 200 MW is through Collective STOA transaction through Power exchange:** CERC held that the generating station shall bear ISTS transmission charges and losses corresponding to 300 MW and STU transmission charges and losses corresponding to 400 MW, as applicable (as per state regulations or agreements). It is assumed that out of 400 MW scheduled to state, 300 MW power (up to the connectivity quantum to STU network) has been wheeled through STU network directly and balance 100 MW wheeled to STU network through ISTS network as per network topology built for the instant generating station. CERC further observed that if DIL chooses to take additional connectivity's with ISTS, he needs to surrender Connectivity of equivalent quantity in State system after payment of necessary charges of State.

HSA
Viewpoint

CERC has dealt with the issue of responsibility of the entities to bear the transmission charges in a scenario where a generating station is connected to the STU as well as the ISTS network. This order will help DIL to explore opportunities for sale of its un-tied capacity from Unit 1 within and outside the State of Maharashtra.

Lakadia Vadodara Transmission Project Ltd (LVTPL) v Adani Green Energy MP Ltd & Ors

CERC | Order dated August 1, 2022 in Petition No. 158/MP/2021

Background facts

- LVTPL, a transmission licensee owned by Sterlite, by way of this Petition had sought compensation due to various Force Majeure and Change in Law events during the implementation of its transmission project and due to delay on account of such Force Majeure events sought an extension of Scheduled Commercial Operation Date (**SCOD**).
- One of the major issues involved in the matter was the scope of work under the Request for Proposal (**RFP**) and Transmission Service Agreement (**TSA**) and consequential Change in Law, if any.

- It was LVTPL's case that neither the RFP nor the TSA provided for the requirement to implement additional 2 nos. of 765 kV bays each at the Lakadia S/s and Vadodara S/s for the LV Line, as part of the Project being constructed by LVTPL. Rather it was Power Grid Corporation of India Limited (**PGCIL**) was required to provide space for the same.
- LVTPL sought that if at all the additional bays are implemented by it, then the expenditure incurred on account of the same should be allowed to be recovered by way of compensation on account of Change in Law, since such requirement was not stipulated in the bid documents.
- Per Contra, PGCIL has insisted that as per the annexure to clarification on RFP and TSA dated May 30, 2019, LVTPL is required to provide three bays in each diameter of the transmission line. Central Electricity Authority (**CEA**) has concurred with this assertion that implementation of extra bays is required as per minutes of meeting held on March 16, 2021 between PGCIL, Central Transmission Utility of India Limited (**CTU**) and LVPTL.

Issue at hand

- Whether subsequent documents can unilaterally change the scope of work of a developer provided under bid and pre-bid documents?

Decision of the Commission

- Upon consideration of the submissions of both parties, CERC observed that:
  - An examination of the scope of work detailed under Article 1.2 of RFP and Schedule 2 of the TSA and the transmission license granted vide Order dated March 4, 2022, it is evident that only 2 nos. of 765kV bays at Vadodara S/s for Lakadia – Vadodara 765kV D/c line has been provided for, which is to be built by LVTPL.
  - BPC has not clarified whether the scope of work has changed subsequently nor expressly addressed such change by way of an amendment which has been done in case of other RFPs submitted by LVTPL.
  - RFP does not mandate the scheme of 'one and half breaker' scheme but merely suggests it. A mandate must be clearly provided for in a document and cannot be presented as a mere option.
- In view thereof, CERC has held that 765 kV GIS bays for Lakadia-Vadodra line at Vadodra being implemented by LVTPL are in accordance with RFP and it is not required to implement the third breaker for each diameter as per the RFP.

HSA
Viewpoint

CERC has prioritized the terms and provisions of bid documents and pre-bid documents over the opinion of BPC, CEA and CTU and upheld the interpretation of the same by the developers. Such an approach signifies the importance of having technical precision and transparency in the bidding documents and during pre-bid process for such bid out projects. This decision could prove beneficial to developers as a safeguard against additional liabilities that were not envisaged at the same of bidding and at the same time incentivize unambiguous, transparent and fair actions on part of planning authorities and bid-process coordinators.

Sunfree Paschim Renewable Energy Pvt Ltd & Anr v. Maharashtra State Electricity Distribution Co Ltd

MERC | Order dated August 04, 2022 in Case No. 39 of 2022 and Case No. 41 of 2022

Background facts

- Sunfree Paschim Renewable Energy Pvt Ltd (**SPREPL**) and Nature International Pvt Ltd (**NIPL**) filed the present case against Maharashtra State Electricity Distribution Co Ltd (**MSEDCL**) seeking extension of SCOD and appropriate relief on account of Change in Law under their respective Power Purchase Agreement (**PPA**) due to the increase in Goods and Service Tax (**GST**) rates on solar panels/modules and increase in Custom Duty on solar inverters.
- MSEDCL on December 31, 2019 floated a tender to procure 50 MW (AC) from projects through competitive bidding process. Thereafter, MERC vide its Order dated May 16, 2020 adopted the tariff discovered during bidding process.
- SPREPL and NIPL pursuant to becoming successful bidder vide letter of Award (**LOA**) dated June 12, 2020 executed PPA with MSEDCL on September 30, 2020.
- **Issue of extension of SCOD**
  - In the meanwhile, due to outbreak of COVID-19 the Government of India in March 2020 declared nationwide lockdown. Considering Covid-19 as pandemic and lockdown imposed by the government as Force Majeure event, the MNRE through its various notifications

had extended the SCOD and date of Financial Closure of various RE based power projects in India which were still under construction at the time of imposition of lockdown.
  - Considering original SCOD under the PPA as **June 11, 2021**, MSEDCL while considering extensions granted by MNRE extended the SCOD under the PPA first till **August 23, 2021** (*first extension*), and subsequently till **November 07, 2021** (*second extension*).
  - Further, owing to the difficulty faced by the developers due to COVID-19, the MSEDCL also extended the date of Financial Closure till **August 23, 2021** (*first extension*), thereafter till **May 23, 2021** (*second extension*) and finally till **August 07, 2021** (*third extension*).
  - SPREPL and NIPL case before MERC through present Petition is that even though MSEDCL through its letter dated April 15, 2021 has drafted second extension for achieving Financial Closure till August 23, 2021, but no such extension at that time was granted for achieving SCOD. As bid document provides 6 months' period between financial closure and SCOD, therefore, while extending date for achieving Financial Closure vide letter dated April 15, 2021, MSEDCL ought to have extend SCOD by 3 months.
  - Further, SPREPL and NIPL had contended that MSEDCL has delayed approval for Change in location of project which delayed the project by 2 months. As without approval of location, project activities could not be proceeded with, therefore, if such period of delay in approving the change of location is considered, then there is no delay in commissioning.
  - Accordingly, SPREPL and NIPL through present Petition have sought extension of SCOD till the date of actual commissioning i.e. December 30, 2021, without levy of any penalty.
- **Issue of change in Basic Custom Duty as Change in Law event**
  - Additionally, SPREPL and NIPL claimed Change in Law compensation on account of change in Basic Custom Duty on solar inverters.
  - The Government of India vide notification dated February 01, 2021 had imposed/increased Basic Custom Duty on solar inverters from 5% to 20%. As the said notification issued by the government of India is post the bid submission date or the date when PPA was executed, the SPREPL and NIPL has claimed increase in rate of Basic Custom Duty as a Change in Law event
- **Issue of increase in GST rate as Change in Law event**
  - Moreover, the Ministry of Finance, vide Notification dated September 30, 2021 had increased GST on the solar power devises from 5% to 12%.
  - Considering increase in GST rates, SPREPL and NIPL vide letter dated October 07, 2021 informed MSEDCL that increase in the GST rates on solar modules and other solar operated devices from 5% to 12% will directly affect the cost of Project and the same amounts to Change in Law as per provisions of PPA.
  - Due to failing to recognize increase in GST rate as change in law event, the SPREPL and NIPL through present Petition had approached the MERC for seeking declaration that the increase in GST Rate qualifies as Change in Law event under the PPA.

Issue at hand

- Whether the Petitioners are eligible for extension of SCOD up to actual date of commissioning?
- Whether Notification dated February 01, 2021 resulting in change in Basic Custom Duty from 5% to 20% qualifies as Change in Law event?
- Whether Notification dated September 30, 2021 resulting in Change in GST rate qualifies as Change in Law event?
- What should be the methodology and the frequency of payment of compensation amount?

Decision of the Commission

- **Issue of extension of SCOD**
  - To the extent the issue to extension of SCOD till COD of the Project is concerned, the MERC noted that the bid document enabled the developer (i.e., SPREPL and NIPL) to make such request twice i.e. once before signing of PPA and once before financial closure.
  - SPREPL and NIPL have availed such option on January 19, 2021 after signing of PPA but before the financial closure. Hence, SPREPL and NIPL cannot be faulted with for not availing such option earlier as same is permissible as per bid document.
  - As such change in location is permissible under the bid document and accordingly MSEDCL approved it on April 15, 2021, the time taken by MSEDCL of 87 days for granting such permission is to be considered as Project activities cannot be proceeded without approval for change in location.
  - As delay in project execution led to levy of penalty on the SPREPL and NIPL, the MERC opined that such delay on behalf of MSEDCL needs to be factored in while computing delay in project execution. Thus, actual delay commissioning of project being 54 days from final extended SCOD, such delay of 54 days being lower than MSEDCL's delay of 87 days in approving change in project location. Therefore, such delay needs to be condoned and accordingly, the MERC allowed extension of SCOD to the actual date of commissioning.

- **Issue of change in Basic Custom Duty as Change in Law event**
  - To the extent issue of change of Basic Custom Duty is concerned, the MERC noted that PPA provisions mandate that if developer wishes to claim Change in Law under the PPA, it shall give notice to MSEDCL within 7 days after becoming aware of the same or should reasonably have known of the Change in Law.
  - As change in Basic Custom Duty on inverters was introduced on February 01, 2021, and no Notice for Change in Law was issued by SPREPL and NIPL, the MERC rejected the Change in Law claim for Basic Custom Duty without entering into merits of the case.
- **Issue of increase in GST rate as Change in Law event**
  - To the extent increase in GST Rates in concerned, the MERC noted that notification dated September 30, 2021 is subsequent to the last date of bid submission.
  - Under the provisions of PPAs, an event arising from the actions of an authority covered within the definition of 'Indian Governmental Instrumentality' would satisfy the requirement of 'Change in Law'. Further, as required under the PPA, SPREPL and NIPL have issued Change in Law notice within 7 days of said notification. Hence, condition of giving notice for claiming Change in Law impact was complied.
  - As Ministry of Finance being Ministry under the Government of India is satisfying the requirement of 'an Indian Government Instrumentality' under the PPAs, and further, as per the PPA, notification of new law or amendment of existing law or introduction / change in tax, duty or cess subsequent to Bid Submission date qualifying as Change in Law, therefore, notification dated September 30, 2021 which has led to change in the rate of GST from 5% to 12% on solar modules and inverters was declared to qualify as change in law event under the PPA by MERC.
  - In light of the above, the MERC directed MSEDCL with a liberty to decide whether it intends to opt for payment of the compensation on lumpsum basis or per unit basis over the PPA tenure. Accordingly, MERC directed MSEDCL to communicate its option of paying Change in Law compensation to SPREPL and NIPL within two weeks from the date of the present Order.

HSA
Viewpoint

Present judgment passed by MERC is a landmark judgment to the extent it allows any change/increase/modification to the existing law as change in law event, even including the change in rate of GST as a Change in Law event.

Blending of imported coal with domestic coal to mitigate the domestic coal shortage

CERC | Order dated July 26, 2022 titled 10/SM/2022

Background facts

- The MoP, vide letter/advisory dated April 24, 2022 had directed the concerned State Generating Companies / Independent Power Procurers to import at least 10% of their requirement of coal for blending and if required, higher percentage of blending in future.
- In order to allow such higher percentage of blending, MoP by way of their letter dated April 18, 2022 directed CERC under Section 107 of the Act to allow higher amount of blending of up to 30% blending using imported coal till March 31, 2023, subject to technical feasibility and after due consultation with the beneficiaries.
- In this regard, Regulation 43 (3) of the CERC (Terms and Conditions of Tariff) Regulations, 2019 (**2019 Tariff Regulations**) permit generating stations to use alternative fuel sources (i.e. sources other than that agreed in concerned PPAs) for blending subject to the condition that the weighted average price of alternative source of fuel should not exceed 30% of base price of fuel as computed under the terms of 2019 Tariff Regulations.
- In pursuance of MoP directions, CERC had published the Staff Paper on 'Blending of imported coal with domestic coal to mitigate the domestic coal shortage' and sought comments from the relevant stakeholders vide notice dated June 2, 2022. The generating companies had submitted as under:
  - Prior consent for import of coal from beneficiaries would be difficult and impractical to address the prevalent situation.
  - Until coal shortage is normalised, restriction on % of blending requires to be removed.
  - Cost of coal must be allowed to be recovered in full as a pass through.
  - Ceiling in Energy Charge Rate (**ECR**) may be kept in abeyance till March 31, 2024 as the upfront determination of blending percentage and increase in ECR would be difficult since the same depends on domestic coal availability, energy required technical feasibility.

- The DISCOMs raised concern of exorbitant increase in ECR which would lead to high cost of power for the end user, therefore, a cap maybe prescribed for blending percentage of 10% and ECR increase up to 30%.
  - It was also submitted that the coal shortage situation may improve in coming months as:
  - Increased demand due to monsoon season would subside.
  - Other sources of generation (wind /hydro) would be available to meet demand of power.
  - Higher production by Coal India Ltd and operationalization of new mines has increased coal availability.
  - Increasing ECR due to import of coal would decrease the demand from consumers.

Issue at hand

- Relaxation of CERC Regulations to allow for implementation of MoP advisory on import of coal for blending purposes.

Decision of the Commission

- Upon considering the comments from stakeholders, CERC observed that:
  - As per the Central Electricity Authority monthly coal report, coal stock as on May 31, 2022 (23.68 MT) stood lesser than the stock in the previous year (32.63 MT), while the year-on-year demand had increased (187 MW in 2021 to 207 MW in 2022). Further the onset of south-west monsoon could further aggravate the coal availability. Therefore, coal from alternative sources is required to mitigate any power crises in future.
  - In acknowledgement of the prevailing situation, MoP has issued directions under Section 11 to imported coal based generating stations and directed all domestic coal based generators to import at least 10% of their requirement for blending.
  - To effectively implement these directions, MoP has also directed CERC under Section 107 of the Act to allow higher blending percentage to maintain coal stock position.
- CERC is empowered to exercise its power to relax under Section 76 of the 2019 Tariff Regulations
- In the light of the analysis of the power demand-supply and coal stock position and in exercise of its power to relax any provision of the 2019 Tariff Regulations, CERC has relaxed the provisions of Regulation 43 (3) of the 2019 Tariff Regulations in order to implement objectives of the directions of MoP viz., availability of adequate quantum of coal to ensure uninterrupted generation of power and allow distribution companies to meet the demand of consumers.

HSA
Viewpoint

CERC has acknowledged the adverse situation with regard to shortage of coal and resultant energy crisis currently being faced in the country which has been addressed by way of MoP actions outlined in their Order. In light of recent developments, such relaxation of regulations would be welcomed by State Gencos/IPPs in States with coal position at critical levels without adversely effecting generators in States with adequate coal reserves.

Maharashtra State Power Generation Co Ltd v. Maharashtra State Electricity Distribution Company Ltd

Impleaded Respondent - Dhariwal Infrastructure Ltd

MERC | Order dated July 21, 2022 in Case No. 127 of 2022

Background facts

- The present Petition had been filed by Maharashtra State Power Generation Company Limited (**MSPGCL**) seeking approval for Change in Law claims related to coal tolling arrangement carried out under Case- IV Phase- I and seeking permission to recover the amount of change in law under coal tolling arrangement from MSEDCL through FAC mechanism related to the contract of Dhariwal Infrastructure Ltd (**DIL**).
- As per the terms of the Detailed Procedure Agreement (**DPA**) for coal tolling arrangement, all of the existing coal price, taxes and duties prevailing at the time of submission of the bid were to be paid by MSPGCL and any increase in price of coal, duties and taxes during the contract period were required to be borne by MSPGCL and to be passed on to Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) for recovery under FAC mechanism or as additional claim in truing up process.
- It was MSPGCL's case that after the bid submission date, i.e., September 8, 2017, following changes in relation to price of coal had occurred:
  - Surface Transportation Charges

- Evacuation Facility Charges
- Change in basic price of coal
- Change in Surface Transportation Charges

- MSPGCL submitted that the impact of change in price of coal was INR 149.79/MT amounting to INR 8.47 crore for the coal supplied to DIL and the price impact calculated was against the coal quantity billed to DIL during the contract period. In addition, there was also net impact of Debit/ Credit notes of INR 72 lakh.
- MSEDCL contended that MSPGCL was supposed to file its Petition before the MERC with its claim for Change in Law within a period of one month from the date of first occurrence of such event, which was not done by MSPGCL. Further, it was stated that the intent of coal tolling arrangement under Case IV bidding was to optimize utilization of coal and thus, it was necessary for MSPGCL to substantiate the operational efficiency of the power station selected under Case IV bidding as compared to its existing power stations which were replaced and to demonstrate the savings in cost of generation.
- MSEDCL further contended that MSPGCL had conducted the final reconciliation of coal quality and quantity after significant delay and had not strictly followed the guidelines specified by MoP for coal tolling arrangement and as such, the captioned Petition may not be allowed.

Issues at hand

- Whether claim made by MSPGCL qualified for Change in Law and whether relief could be granted in the present Petition?
- If the claim made by MSPGCL qualified for Change in Law then what should be the amount of claim to be allowed?
- What would be the recovery mechanism for the amount allowed as a pass through?

Decision of the Commission

- MERC observed that MSEDCL had in principle, not objected to the claim of Change in Law of MSPGCL on account of the revisions in the charges by Coal India Ltd on account of the four factors as mentioned above. Further, all the notifications were notified after the bid submission date (being September 8, 2017). Therefore, MERC observed that it was inclined to accept the submission of MSPGCL that the change in basic price of coal cost, evacuation facility charges and the surface transportation charges were after the submission of the bids by the bidders. Therefore, MERC allowed the Change in Law claim of MSPGCL.
- MSEDCL was of the view that the objective of the coal tolling arrangement was to optimize the cost of generation and therefore before passing on the Change in Law adjustments for tolling arrangement, it needs to be ensured that the overall costs of power supplied under tolling arrangement is lower than the cost of generation approved by MERC for MSPGCL stations considered for tolling. Thus, it would be appropriate to allow MSPGCL to raise the supplementary bills for CIL only after the prudence check. Accordingly, MERC analyzed the details of the operational parameters provided by MSPGCL and also analyzed the impact of tariff for power supplied under coal tolling arrangement.
- As regards the amount of claim to be allowed to MSPGCL, MERC noted that the actual impact of change in price of coal was INR 8.45 crore based on the coal quantity dispatch to DIL under Case IV Phase I. Further, MERC observed that the impact of Debit notes/Credit notes received from Coal India Ltd was shared between MSPGCL and DIL and on the bases of such sharing, the net impact of Debit/Credit note on MSPGCL was INR (-) 62.7 lakh and not INR 72 lakh as earlier submitted in the Petition. Accordingly, the MERC allowed MSPGCL's claim of INR 7.821 crore as Change in Law as per sub-Clause 'e' of Change in Law definition under MYT Regulations, 2019.
- Regarding the recovery mechanism for abovementioned amount, MERC observed that the amount of INR 7.821 crore was for the period of FY 2018-19. Allowing recovery of such expenses immediately could cause adverse impact on end consumers and thus to avoid such burden, MERC deemed it fit to allow this amount as Change in Law and directed that the recovery of such expense to be included in its Annual Revenue Requirement during the upcoming Mid Term Review (**MTR**) Petition. Accordingly, MSPGCL was directed to claim the amount of INR 7.821 crore in its MTR Petition.

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The MERC has applied the well settled principles of law as regards the Change in Law compensation and restitution. Further, the impact on consumers for allowing such amounts for Change in Law have also been taken into consideration while evolving a methodology for recovery of the Change in Law claims.

CONTRIBUTIONS BY

Shreshth Sharma | Partner
Nishant Talwar | Senior Associate
Surbhi Pandey | Senior Associate
Aditya Jain | Associate
Molshree Bhatnagar | Partner
Nehul Sharma | Senior Associate
Utkarsh Singh | Associate
Ankit Kumar | Associate
Parichita chowdhury | Senior Associate
Nipun Sharma | Senior Associate
Neel Rahate | Associate

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AT A GLANCE

FULL-SERVICE CAPABILITIES

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GLOBAL RECOGNITION

The Legal 500 Asia Pacific Leading Firm 2022
asialaw Awards 2021
India Business Law Journal Award Winning Law Firm 2021
The A List India Business Law Journal
IFLR 1000 Recommended Firm 2021-22
Recognised in WWL
Ranked in Chambers Global 2022
Ranked in Chambers Asia-Pacific 2022

CONTACT US

www.hsalegal.com
mail@hsalegal.com
HSA Advocates

PAN INDIA PRESENCE

New Delhi
Email: newdelhi@hsalegal.com

Mumbai
Email: mumbai@hsalegal.com

Bengaluru
Email: bengaluru@hsalegal.com

Kolkata
Email: kolkata@hsalegal.com