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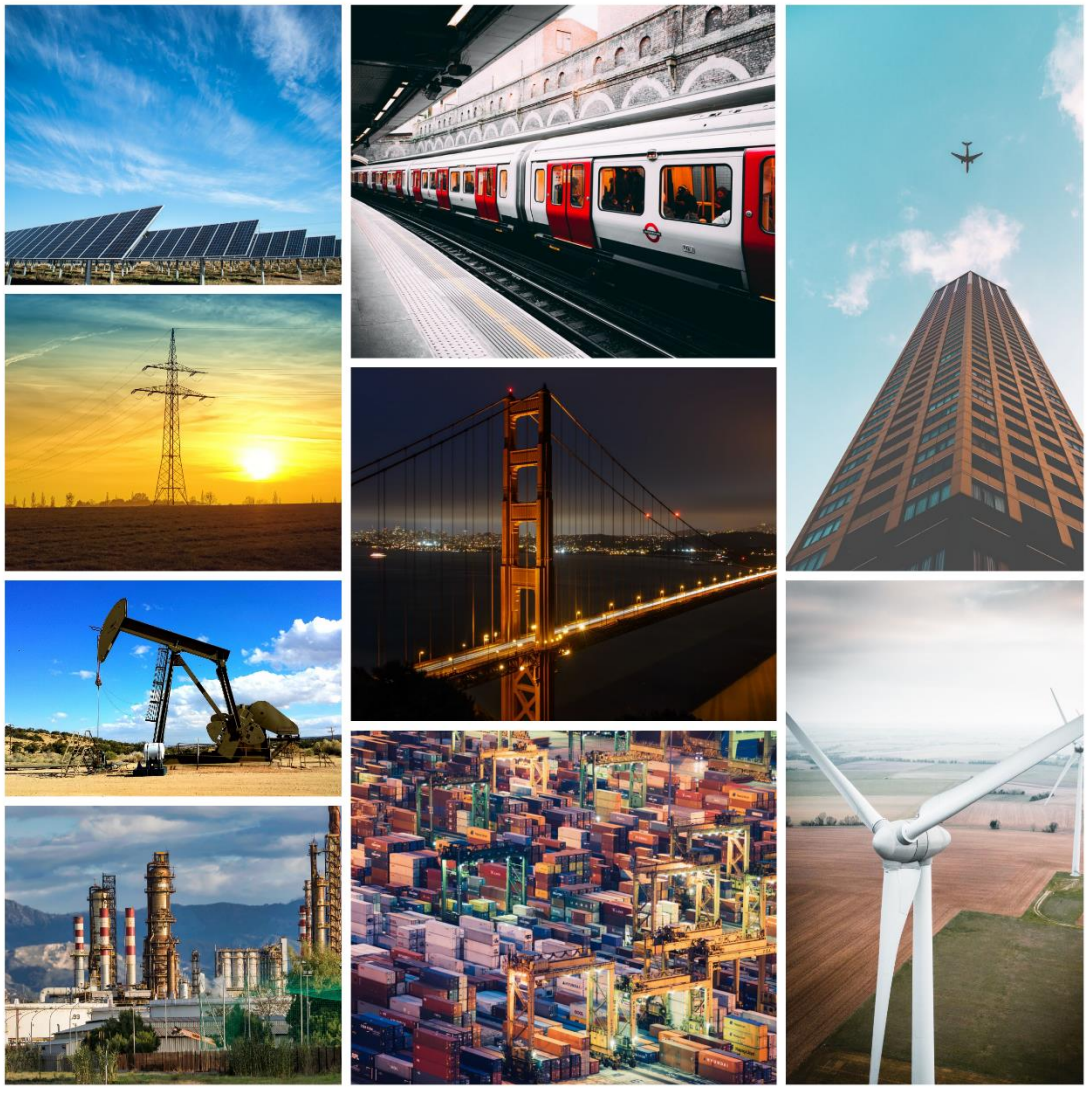
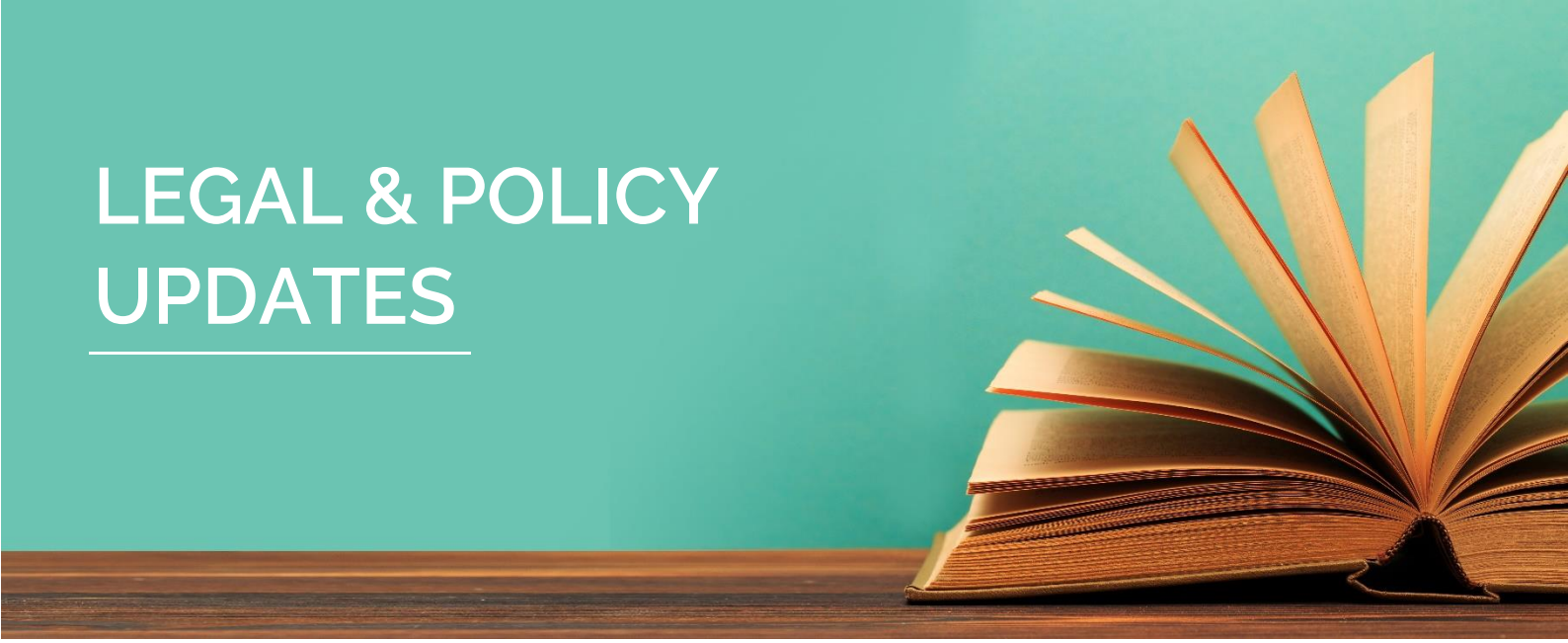
PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER

JANUARY 2023



LEGAL & POLICY UPDATES



In this Section

Energy Conservation (Amendment) Act, 2022

The Ministry of Law and Justice (**Ministry**) on December 20, 2022 issued the Energy Conservation (Amendment) Act, 2022 (**Amendment Act**). By way of the said amendments the Ministry has amended the Energy Conservation Act, 2001 (**Principal Act**).

Key aspects

- The Amendment Act has substituted the definition of 'energy conservation building codes' with 'energy conservation and sustainable building code' under Clause (p) of Section 14 and by the State Government under Clause (a) of Section 15 of the Amendment Act.
- The definition of Building under the Amendment Act includes any structure or erection, or part of a structure or erection constructed after the rules relating to energy conservation, which has a minimum connected load of 100 Kilowatt (kW**)** or contract demand of 120 Kilovolt Ampere (**kVA**).
- The Energy Conservation and Building Code now applies to buildings used or intended to be used as an office building or for residential purpose.
- Section 14 includes 'vehicles' (as defined under Section 2 (28) of the Motor Vehicles Act, 1988) and vessels (includes ships and boats).
- The Amendment Act enhances the penalty under Section 26 and provides that if any person fails to comply with the energy consumption standards specified by the Central Government, he shall be liable to a penalty of INR 10 lakh. He shall be liable to an additional penalty which may extend to INR 10,000 for every day during which such failures continue.
- In the event of non-compliance related to any vessel, the person in addition to paying a penalty of up to INR 10 lakh shall be liable to pay an additional penalty of up to twice the price of every metric ton of oil equivalent consumed in excess of the prescribed norms.
- In event of non-compliance of fuel consumption norms, in addition to the penalty of INR 10 lakh, the violator will be liable to pay a penalty of INR 25,000 per vehicle for non-compliance of norms up to 0.2 litres per 100 kms and fifty thousand rupees per vehicle for non-compliance of norms above 0.2 litres per 100 kms.
- Similarly, a penalty up to INR 10 lakh and additional penalty of up to twice the price of every metric ton of oil equivalent in excess to the prescribed norms has been introduced for failure to comply with directions issued for minimum share of consumption of non-fossil sources by designated consumers.
- The Amended Act prohibits the use of deceptive names that resemble the name of the Bureau, used to deceive or likely to deceive the public, and makes it punishable with penalty of up to INR 50,000 for first non-compliance, and for every subsequent non-compliance with an additional penalty of up to INR 10,000 per day of such noncompliance.

- Failure to provide information to the Bureau, as required, has been made punishable with a penalty of up to INR 50,000 for first such failure and for every subsequent failure with an additional penalty of up to INR 10,000 per day of such failure.
- The Adjudicating Authority while deciding the quantum of punishment under Section 26 has to give due regard to the loss caused to a consumer in addition to the two factors under the Act i.e. (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default and (b) the repetitive nature of the default.

Notification of the amendment in Charging Infrastructure for Electric Vehicles - the revised consolidated Guidelines & Standards issued by Ministry of Power on January 14, 2022

- The Ministry of Power, Government of India (**MOP**) on November 07, 2022 notified the Amendment in charging Infrastructure for Electric Vehicles (EV**)** – the revised consolidated Guidelines & Standards issued by Ministry of Power on January 14, 2022. (**Amendment**).
- MOP as made additions in paragraphs 3 and 8 of the revised consolidated Guidelines & Standards dated January 14, 2022 (**Revised Guidelines**).
- The amendment has added sub paragraph (xi) to paragraph 3.1 of the revised guidelines.
  - As per the amendment the public charging stations shall have the feature of prepaid collection of service charges with the time of the day rates and discount for solar hours.
  - Prior to the amendment, the revised guidelines were silent on the collection of the service charges.
- With regard to Service charges at PCS, the amendment provides for a committee under the Central Electricity Authority (**CEA**) which will periodically recommend the State Government on the ceiling limit of the service charges to be levied.
  - This committee will also recommend 'time of the day rate' for service charges as well as the discount to be given for charging solar hours.
  - Prior to the amendment, only state governments had the sole discretion to fix the ceiling of the Service Charges to be charged by the PCS/FCS

Central Electricity Regulatory Commission (Terms and Conditions for Dealing in Energy Savings Certificates) (First Amendment) Regulations, 2022

- The Central Electricity Regulatory Commission (**CERC**) has notified the CERC (Terms and Conditions for Dealing in Energy Savings Certificates) (First Amendment) Regulations, 2022 dated December 7, 2022 (**First Amendment**), and has amended the CERC (Terms and Conditions for Dealing in Energy Savings Certificates) Regulations, 2016 (**Principal Regulations**) with the objective of developing a market in energy for exchange of transferable and saleable Energy Savings Certificates. This amendment has been made in furtherance of the Energy Conservation (Amendment) Act, 2022.
- The Regulations have been amended to include a floor price which shall be the minimum price at which the Energy Savings Certificate shall be traded on the power exchanges. Further, such floor shall be fixed at ten percent of the price of one metric tonne of oil equivalent of energy

Notice regarding competitive bidding mechanism for procurement of power from wind power projects

- Bids for a cumulative capacity of about 08 GW will be issued each year from January 01, 2023 onwards up to 2030.
- The power generated from capacity established in each of the state sub-bids will be pooled and offered at pooled tariff to all procurers. The pooling of tariff will be as per the notified Electricity (Amendment) Rules, 2022. Each bid will be a composite bid-comprising of state specific sub- bids for each of India's 8 windy states.
- The bids will be on a single stage two envelope closed bid basis, with one containing the technical bid, and the other containing the financial bid. The envelope containing the technical bid will be opened first; financial bid of only those bidders who qualify in the technical bid will be opened.
- The bids will specify the capacity to be installed, specific to one state. SECI may determine the minimum and maximum bid size based on Wind RPO targets of states. However, the maximum capacity to be established in one year in one State shall not be more than 2 GW.
- SECI will issue bids of cumulative capacity of about 8 GW in calendar year 2023 up to 2030. A detailed breakup of this capacity shall be issued by SECI.

Notification of Electricity (Amendment) Rules, 2022

The MOP on December29, 2022 notified the Electricity (Amendment) Rules, 2022 (**Amendment Rules**). The Amendment Rules has amended the provisions of the Electricity Rules, 2005 (**Original Rules**).

Key aspects

- The Amendment Rules have introduced the concept of a 'Central Pool' of renewable energy sources from which an intermediary company will procure power as per Section 63 of the Electricity Act, 2003 (**Act**) and as per the provisions of the bidding guidelines issued by the Central Government to be supplied to the end procurers of more than one state at a uniform tariff i.e. tariff computed by Implementing Agency separately on a monthly basis for each category of central pool like that Solar Power Central Pool, Wind Power Central Pool, at which the intermediary procurer shall sell power from renewable energy from that central pool to all the end procurers.
- The term 'End Procurer' means person(s) who have license to undertake distribution and retail supply of electricity or is designated by the State Government to procure power on behalf of the licensees undertaking distribution and retail supply of electricity or open access consumer.
- Appropriate Commission under sub-Section (1) of Sections 79 (f) and Clause (f) of sub-Section (1) of Section 86 of the Act is empowered with adjudication of disputes. As per rule 13 of the Amended Rules any surcharge determined by the State Commission shall not exceed twenty percent of the average cost of supply.
- For timely recovery of power purchase costs by distribution licensee, the appropriate commission shall within 90 days of publication of these rules, specify a price adjustment formula for recovery of costs, arising on account of the variation in the price of fuel, or power purchase costs. In absence of the said adjustment formula for recovery of cost, the methodology and formula specified in Schedule-II of the Amended Rules will be applicable. The impact in the cost due to such variation shall be automatically passed through in the consumer tariff, on a monthly basis, using this formula. Such monthly automatic adjustment shall be trued up on an annual basis by the appropriate commission. In case the distribution licensee fails to compute and charge fuel and power purchase adjustment surcharge within the time line, specified by the Appropriate Commission, except in case of any force majeure condition, its right for recovery of costs on account of fuel and power purchase adjustment surcharge will be forfeited and in such cases, the right to recovery the fuel and power purchase adjustment surcharge determined during true-up shall also be forfeited and the true up of fuel and power purchase adjustment surcharge by the Appropriate Commission, for any financial Year, shall be completed by 30th June of the next financial year.
- Accounting of the due subsidy shall be done by the DISCOM in accordance with the Standard Operating Procedure (**SoP**) issued by the central government.
- Energy Storage System will come within the ambit of Section 2 (50) of the Act. The Energy Storage System will be accorded the status based on its application area. The Energy Storage System can be developed, owned, leased and/ or operated by a generator company or a transmission licensee or a DISCOM or a system operator or a standalone Energy Storage System provider. When an Energy Storage System is owned and operated by and co-located with a generating station or a transmission licensee or a distribution licensee, it shall have the same legal status as that of the owner. The developer of the ESS shall have an option to sell or lease or rent out the storage space in whole or in part to any utility engaged in generation or transmission or distribution, or to a Load Despatch Centre. The independent energy storage system will be a delicensed activity at par with a generating company in accordance with the provisions of Section 7 of the Act.
- Uniform tariffs will be computed on a monthly basis by an implementing agency for each category in the central pool (for instance, solar power central pool, wind power central pool, etc.). The intermediary procurer will sell power from renewable energy sources to all end procurers at pre-decided tariffs. The implementing agency will be a central agency, notified by the centre, from time to time for implementation of 'uniform renewable energy tariff for central pool' under the said rules.

Notification to power plants to ensure maximum utilization of ash

- The Ministry of Power (**MOP**) issued a notification to all the coal/lignite based Thermal Power Producers (**TPPs**) to keep the implementation of MOP's Advisory dated February 22, 2022 in abeyance as per the Order dated August 25, 2022 passed by the NGT in ***Amaravati Fly Ash Bricks Manufactures Association v. Union of India & Ors***[1].

[1] OA No.327 of 2022

RECENT JUDGMENTS

In this Section

Southern Power Distribution Company of Andhra Pradesh Ltd v. Andhra Pradesh Electricity Regulatory Commission & Ors

And

JS Power Trading Company Ltd v. Andhra Pradesh Electricity Regulatory Commission & Ors

Appellate Tribunal for Electricity (APTEL) | Judgement dated November 14, 2022 in Appeal No. 397 of 2022 and Appeal No. 147 of 2021

Background facts

- JSW Power Trading Company Ltd (**JSWPTC**) is a trading licensee under the Electricity Act having been awarded contract for supply of power sourced from JSW Energy Ltd (**JSWE**) located in Karnataka. JSWPTC also has a Power Purchase Agreement (**PPA**) with Southern Power Distribution Company of AP Ltd (**Procurer**) dated September 29, 2014 (**JSW PPA**).
- Pertinently, JSW PPA provides that disputes related to tariff shall be adjudicated by the State Commission i.e., the Andhra Pradesh Electricity Regulatory Commission (**APERC**) while 'other disputes' shall be resolved through arbitration under the Arbitration and Conciliation Act, 1996 (**A&C Act**).
- Because of delayed payments made by the Procurer, JSWPTC claimed payment of surcharge for late payment and interest. As such payments were not forthcoming from the Procurer(s), thus, JSWPTC approached APERC by way of Original Petition No. 34 of 2019.
- APERC by way of its decision dated March 06, 2022 in OP No. 34 of 2019 (**Impugned Order**) upheld the claim of JSWPTC and rejected the objections of waiver, acquiescence, and estoppel as also the plea that surcharge was not leviable against claim of reimbursement of open access charges.
- However, APERC found in favor of the Procurer regarding the computation of claim presented by JSWPTC being party restricted due to the law of limitation stating that the claim submitted by JSPTC was for surcharge computed for period even prior to three years preceding the filing of the petition. Further, APERC reduced the liability of the Procurers by 50% for 'justice, equity and good conscience' since the Procurers had pleaded its inability to make payments.
- The Procurers challenged the Impugned Order vide Appeal No. 397 of 2022 on the ground that it did not have the requisite jurisdiction since the transaction covered by the PPA involved inter-State sale of electricity, the generating unit being located in the State of Karnataka and the beneficiary being in the State of Andhra Pradesh, and also because the contract binding the parties contains an arbitration clause which could not be overlooked.
- Per contra, JSWPTC have challenged the Impugned Order (vide Appeal No. 147 of 2021) the ground that principles of equity and good conscience could not have been invoked in a money claim of such nature as at hand particularly since it was founded on express provision of the JSW PPA binding the parties.

Issue at hand

- Whether APERC could proceeds with adjudicating the matter when the parties had agreed to an arbitration clause?

Decision of the Tribunal

- Upon considering the submissions of the parties, APTEL held as under:
  - On issue of jurisdiction, APTEL observed that JSW PPA states the delivery point agreed by parties is the Southern Regional Periphery and held that the same cannot be described as inter-state sale to divest the jurisdiction of APERC.
  - JSW PPA clearly stipulates that the parties had mutually agreed that their endeavor would be to resolve the disputes or differences initially by mutual consultation and if that were not to succeed through arbitration under the provisions of the Act and the provisions of A&C Act. Therefore, there had been improper exercise of adjudicatory function by APERC.
  - Regarding the same, and after detailed discussion of inappropriate handling of adjudicatory functions in several instances by State Commissions, APTEL stated that such functions have to be carried out in accordance with Section 158 of the Act which provides for resolution of disputes by arbitration.
  - Further, APTEL has categorically observed that in instances which require resolution of dispute that may not involve exercise of any regulatory power – illustratively, by availing power to relax or power to remove difficulties or power to amend (regulatory framework), it might be advisable that the State Commissions choose the course of making reference to arbitration which is permitted by S. 79, S 86 and S. 158 of the Act.
  - Considering the aforesaid discussion, APTEL held that he possibility of reference to arbitration of a dispute by Regulatory Commissions under the Electricity Act is not contingent upon existence of a prior arbitration agreement or consent being given by the disputants before the Commission for such reference to be made since S. 79(1)(f) or S. 86(1(f) do not require the existence of such a clause.
  - Further, APTEL stated that the special legislation (the Electricity Act) vests the prerogative of reference to arbitration in the regulatory authority and not conditional upon the discretion or choice of the parties.
  - APTEL also opined that the jurisdiction of Electricity Regulatory Commissions over tariff related disputes and mandatory referral of non-tariff related disputes for arbitration, if properly exercised, would give harmonious meaning to the dispute resolution sub-clauses in the PPAs so as to avoid making the arbitration clause redundant in case the Regulatory Commissions prefer to adjudicate all disputes.
  - It also stated that State Commissions ought to proceed with adjudication by itself only if it decides, by a reasoned order, that the dispute is of such nature as ought not be referred for arbitration which can be judged on the principles enunciated in ***Afcons Infrastructure Ltd & Anr v. Cherian Varkey Construction Co (P) Ltd & Ors***[2].
  - On the present matter, APTEL set aside the Impugned Order on the ground that JSWPTC's claims had not been effectively adjudicated upon and opined that the dispute is fit to for reference to arbitration being a money claim. In light of the same, APTEL decided to refer the matter for arbitration instead of remitting the matter to APERC.
- Further, in view of the discussion thereof, APTEL issued guidelines for Regulatory Commissions under the Act for the exercise of jurisdiction in the context of provision for reference of disputes to arbitration stating that Regulatory Commissions must decide whether a dispute is suitable for arbitration based on whether it is a nontariff dispute, one involving money claim or dispute arising out of contract or between supplier and procurer or one requiring exercise of regulatory power, etc.

HSA
Viewpoint

APTEL has recommended that CERC and SERC exercise the power to refer matters to arbitration in disputes that do not require the technical expertise of the regulatory commissions in order to allow CERC and SERC to give more time to disputes that require the exercise of regulatory powers. In light of the same, APTEL has stated the statutory framework of the Act does not require any agreement between parties to choose to resolve dispute via arbitration and that CERC and SERCs can refer such matters even in the absence of the same. While APTEL has directed non-tariff matters to be appropriate for adjudication, it is yet to be seen how CERC and SERC comply with the guidelines and indeed classify matters to be referred to arbitration.

[2] (2010) 8 SCC 24

Amplus Green Power Pvt Ltd v. Director (Commercial), Uttar Pradesh Power Corporation Ltd & Ors

Uttar Pradesh Electricity Regulatory Commission (UPERC) | Order dated December 13, 2022 in Petition No. 1832 of 2022

Background facts

- The present Petition was filed by Amplus Green Power Pvt Ltd (**Amplus**), seeking issuance of directions to the Respondent, Uttar Pradesh Power Corporation Ltd (**UPPCL**), that Amplus be allowed to utilize the banking facility for 100% of the power generated from its 50 MW round mounted Captive Solar Power Project in Mirzapur, Uttar Pradesh (**Project**), in accordance with the UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2019 (**CRE Regulations**).
- Further, directions were sought by Amplus to offset its auxiliary power consumption from its banked energy.
- Any excess energy generated by the Project is banked with UPPCL and is withdrawn by Amplus upon payment of banking charges as per the provisions of CRE Regulations for its own use and/or supplied to its Captive users upon payment of open access charges.

Issues at hand

- Whether the Petitioner can be allowed to utilize banking facility for 100% of the power generated?
- Entitlement of the Petitioner to offset the auxiliary consumption from its banked energy.

Decision of the Commission

- UPERC has observed that besides the mandatory nature of promoting renewable energy through Renewable Purchase Obligation and Must Run status, Regulation 31 (a)(ii) and 31 (b)(ii) of CRE Regulations also lay down the provisions of banking for RE Captive and Non-RE Captive.
- Regulation 31 (a) (ii) of the CRE Regulations allows banking of energy up to 100% as agreed between RE Captive power project developers and distribution licensees/procurers, subject to technical feasibility. Further, Regulations 31 (b) (ii) allows up to 100% banking of energy for Non-RE Captive projects, subject to technical feasibility.
- It has been observed that although for Non-RE Captive, SLDC/distribution licensees never objected to 100% banking, they have raised objections towards similar treatment for RE Captive projects. The CRE Regulations allow 100% banking of energy, as long as there are no technical constraints with regard to banking.
- It has been clarified that there is no distinction between RE and Non-RE Captive Generating Plant based on the source of generation. The only difference in terms of the CRE Regulations is that the banking charges on solar-based Captive Generating Plant is 6% whereas for Non-RE Captive plant, it is 12%.
- All other provisions including those in the Electricity Rules, 2005 are equally applicable on both RE and Non-RE Captive arrangements.
- In terms of the above observation, UPERC has allowed the facility of banking up to 100% in accordance with CRE Regulations.
- UPERC has observed that in so far as transmission constraints are concerned, it is the responsibility of the State Transmission Utility (**STU**) to appropriately plan for upcoming renewable capacity, and the State Load Despatch Centre (**SLDC**) is to manage adherence of generation schedule for ensuring grid stability.
- However, UPERC has held that it would be gross misrepresentation if auxiliary consumption is included in the term 'Own Use'. The definition given in Section 9(2) of the Electricity Act, 2003 (**Electricity Act**), clearly indicates that energy, post auxiliary consumption is being carried to the captive consumer (destination) for his own use, thus, auxiliary consumption and 'own use' are happening at two separate and distinct points and are not malleable with each other.

HSA
Viewpoint

UPERC's findings set an important precedent for RE Captive power projects. The findings are in line with the settled position of law that both RE and Non-RE captive power projects are to be in compliance with the specific mandate under the Electricity Rules, 2005. Further, there cannot be any differential treatment given to RE and Non-RE Captive projects.

The TATA Power Company Ltd Transmission v. Maharashtra Electricity Regulatory Commission & Ors

Supreme Court of India | Appeal No.73 of 2018 and Appeal No. 196 of 2019

Background facts

- The Civil Appeal (**CA**) wad filed by The TATA Power Company Ltd Transmission (**TATA Power**) challenging the order dated February 18, 2022 (**APTEL Order**) passed by APTEL.
- On March 21, 2021, Maharashtra Electricity Regulatory Commission (**MERC**) granted a transmission license to Adani Electricity Mumbai Infra Ltd (**Adani Infra**) under Sections 14 and 15 of the Electricity Act, for setting up of a 1000 MW High Voltage Direct Current (**HVDC**) (Voltage Source Converter or **VSC based**) link between 400 kV MSETCL Kudus and 220 kV AEML Aarey EHV Station.
- TATA Power challenged MERC's Order before APTEL inter alia on the ground that the grant of the license was not preceded by a Tariff Based Competitive Bidding (**TBCB**) process. TATA Power contended that the failure to adhere to a TBCB process pursuant to Section 63 of Electricity Act was contrary to public interest and statutory mandate. APTEL dismissed the appeal. Subsequently, TATA Power filed its appeal under Section 125 of the Electricity Act and approached the Supreme Court of India.

Issues at hand

- **Primary issue framed by the Supreme Court of India:**
  - Whether the decision of MERC to allow the joint license petition submitted by Adani Infra and Adani Electricity Mumbai Ltd-Transmission (AEML-T) granting a transmission license for the 1000 MW Aarey-Kudus HVDC project is vitiated by the failure to follow the TBCB route (the Section 63 route)?
- **Secondary issues framed by the Supreme Court of India to answer the primary issue:**
  - Whether the Electricity Act envisages the TBCB route under Section 63 as the dominant method to determine tariff?
  - Whether the National Tariff Policy (NTP) framed under Section 3 of the Electricity Act is binding on the Electricity Regulatory Commissions (ERCs), particularly in view of the observations made by the Supreme Court of India in the Energy Watchdog case?
  - Whether the ERCs have the power to prescribe the modalities to determine the tariff under the provisions of the Electricity Act (and the regulations framed thereunder)?
  - Whether MERC was bound to decide the tariff for the HVDC Project through TBCB under Section 63 in view of the Government of Maharashtra's resolution dated January 4, 2019 notifying the decision to allocate new inter-State transmission projects through TBCB route and setting up an Empowered Committee?
  - Is MSETCL's decision to not refer the HVDC Project to the Empowered Committee for holding bidding under the TBCB route in breach of the Government Resolution?

Decision of the Court

- The TBCB route is not the dominant route of tariff determination. The reference in Section 63 to the Guidelines framed by the Central Government is made to the limited extent of determining whether the procedure of bidding was in accordance with the Guidelines framed thereunder, which is the TBCB Guidelines.
- The TBCB Guidelines issued by the Central Government under Section 63 of the Electricity Act prescribe the mechanism of the bidding process and do not lay down the criteria or guidelines for choosing between the alternative routes under Section 62 and 63 of the Electricity Act. MERC had neither notified any Regulations under Section 181, nor has it notified the terms and conditions under Section 61 of the Electricity Act. That being the case, MERC could choose the modality of tariff determination by taking recourse to the general regulatory power under Section 86 of Electricity Act.
- Merely because the threshold limit is not notified, it would not mean that MERC only had to determine tariff through the Regulated Tariff Mechanism (**RTM**) route. It is open to MERC to determine the tariff through either Section 63 of the Section 62 route. When MERC is exercising its general regulatory power under Section 86 to determine tariff, the NTP is a material consideration. Thus, the absence of a threshold limit would not affect the power that MERC holds to determine tariff (and its modalities).
- Section 100 of the Code of Civil Procedure 1908 (**CPC**) stipulates that a second appeal shall lie only if the court is satisfied that the case involves a substantial question of law.
- It is a settled law that concurrent findings of fact recorded by the for a below (MERC and APTEL) cannot be interfered with by the Supreme Court of India. Since both APTEL and MERC have recorded concurrent findings that the HVDC Aarey-Kudus project is an existing project, it would

not be open to the Supreme Court of India in an appeal under Section 125 of the Electricity Act to reopen the findings. Even otherwise, in view of the facts enumerated in the appeal, the Supreme Court of India took the view that the said Project is an existing project.

- Section 108 delas with 'directions in matters of policy involving public interest as the State Government may give to in in writing.' In the provision, the term 'it' refers to the State Commission. The Government Resolution does not mention the State Commission and has not been issued as a direction to the MERC as envisaged in Section 108. Therefore, the HVDC Project, is *firstly*, an existing project in terms of the Government Resolution, and *secondly*, the Government Resolution has not been issued in terms of Section 108 as a direction to the State Commission. MERC's decision cannot be challenged for failing to comply with the same as MERC is an independent body with statutory powers to determine and regulate tariff.
- MSETCL has acted in terms of the Government Resolution as it has referred the HVDC Project to the Empowered Committee and the decision to not refer the HVDC Project under the TBCB route was in line with the Empowered Committee's directions. The Empowered Committee has the power to select projects to be taken up under the TBCB route under the Government Resolution.
- The Supreme Court of India directed all the State Regulatory Commissions to frame regulations under Section 181 of the Electricity Act on the terms and conditions for determination of tariff within three months from the date of the judgment. Where the State Commissions has already framed regulations, they shall be amended to include provisions on the criteria for choosing the modalities to determine the tariff, in case they have not already been included.

HSA
Viewpoint

The Supreme Court has laid to rest the question on the primacy of Section 63 over Section 62 and held that the TBCB route under Section 63 does not have primacy over Section 62. The Court has further reiterated the independent and wide powers of the State Commissions to regulate and determine tariff. In a positive step to put an end to uncertainties regarding determination of tariff, the Court has given directions to the appropriate Commissions to frame the relevant tariff regulations in a time bound manner.

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

Uttar Pradesh Electricity Regulatory Commission (UPERC) | Order dated December 14, 2022 in Petition No. 1771 of 2021

Background facts

- Renew Solar Power Pvt Ltd (**ReNew**) through its Special Purpose Vehicles (**SPV**) was to setup a 150 MW capacity solar power project in Rihand Dam, Sonbhadra District, Uttar Pradesh (**Project**). To this effect, a Power Sale Agreement (**PSA**) was executed between Solar Energy Corporation of India Ltd (**SECI**) and UPPCL which PPA dated December 20, 2019 was executed between the SPVs and SECI having Effective Date as December 4, 2019. As per Article 3.3 of the PPA, Renew submitted a Performance Bank Guarantee (**PBG**) having initial validity from date of submission until 30 months from December 4, 2019.
- On February 19, 2022, the Department of Expenditure, MoF vide its OM declared Covid-19 outbreak as a natural calamity, permitting invocation of Force Majeure clause wherever appropriate. The same was recognized by MNRE by way of its OM dated March 20, 2020 allowing invocation of Force Majeure due to the delays caused on account of disruption of global supply chains due to Covid-19. A blanket extension of five months from March 25, 2020 to August 24, 2020 was granted by MNRE on account of the above vide subsequent OMs dated April 17, 2020, June 30, 2020 and August 13, 2020.
- Renew through numerous communications issued Force Majeure Notices to SECI requesting extension of Financial Closure and the Scheduled Commercial Operation Date (**SCOD**).
- Meanwhile, on October 08, 2020 SECI and UPPCL approached UPERC for approval of procurement of power under PSA without any prayer for adoption of tariff. It was only on January 30, 2021 that SECI approached CERC for approval of tariff. Pertinently, CERC in the said petition disposed the matter on the ground that UPERC would be the appropriate commission for approval of tariff.
- On July 30, 2021, UPERC adopted the tariff and granted approval to the PSA.
- Considering inter alia the delayed approval and adoption ReNew sought an extension of at least 12 months and 21 months to the date of Financial Closure and SCOD to April 30, 2023 and commensurate extension of expiry of PPA. Such a request was rejected by SECI and further vide its letter dated September 6, 2021, SECI stated that Conditions Subsequent/Financial Closure had not been achieved on account of which PBG may be encashed.

- Accordingly, ReNew approached UPERC seeking directions to SECI for grant of extension of Project timelines as well as for non-encashment of PBGs.
- In response, SECI submitted that ReNew has failed to give undertaking as per MNRE OM dated May 12, 2021 and June 29, 2021 for a further extension of SCOD by 2.5 months. Further, the PPA does not provide Condition Precedent of adoption of tariff or approval of PSA and that the responsibility to obtain approvals, permits and clearances required for setting up the project as also the connectivity of the project. ReNew on the other hand has submitted that SECI/UPPCL is trying to force ReNew to submit an Undertaking foregoing certain rights under the PPA.
- However, due to alleged impediments and hurdles imposed by SECI/UPPCL seeking to force conditions on ReNew de hors the contract caused ReNew immense loss in monetary terms and in loss of opportunity to develop the Project. Thus, ReNew sought to be released from their obligations under the PPAs without any further liability. In response, SECI has submitted that failure to comply with conditions subsequent by ReNew means that the PPA stood automatically terminated on September 15, 2021 itself.

Issues at hand

- Whether the Project Developer can seek for release from PPA/PSA on account of severe delay in adoption of tariff and approval of PSA making relief of extension of timeline infructuous?
- Whether SECI can encash PBGs for delay in achieving PPA obligations when such delay is not on account of the Project Developer?

Decision of the Commission

- Upon considering the submissions of both parties, UPERC held that:
  - Force Majeure due to Covid-19 as per MNRE OMs and its effects have existed for more than three months to fulfil the condition under PPA to allow for extension of time for obligations under PPA inter alia Financial Closure and SCOD.
  - The conditions sought to be imposed by SECI and UPPCL amount to novation of contract between parties and rights of the parties thereunder without seeking any regulatory approval. While ReNew has repeatedly requested SECI and UPPCL to allow for extension of timelines under PPA on account of Force Majeure.
  - Clearly, due to such long delas, the nature of the present matter was altered due the actions of SECI and UPPCL leading ReNew to approach UPERC with a request to amend the original petition and seek relief for release from PPA since mere extension of timelines were no longer viable relief.
  - Since, the implementation of the Project has suffered at the hands of uncontrollable events being Covid-19 and its effects and delay in adoption of tariff and approval of power procurement process, for no fault of ReNew. Thus, there has been no occasion to invoke encashment of PBGs since there was no default on account of ReNew.
  - In light of the above, UPERC granted relief to ReNew allowing for release from obligations under the PPA and PSA and directed that PBGs by ReNew shall be released.
- UPERC further observed that tariff for bid-out projects, once adopted, cannot be revised by the parties without regulatory approval and that the right to invoke PBG must be caveated by the default of the other party not having been caused on account of delay by the invoking party or Force Majeure events.

HSA
Viewpoint

UPERC has considered the factual circumstances surrounding the practical implementation of a Project to allow the Project developer to exit a PPA/PSA due severe delay on account of the intermediary and final beneficiary, SECI and UPPCL herein. Categorically, UPERC has held that in situations wherein the relief of extended timelines would not serve as an adequate relief for a party, release from the PPA/PSA may be a viable alternative.

Keshavlal Fulabhai Vyas v. Deputy Engineer (O&M)

High Court of Gujarat | R/Special Civil Application No. 20295 of 2021

Background facts

- Keshavlal Fulabhai Vyas (**Petitioner**) had filed the captioned petition under Article 226 of the Constitution of India challenging the communication dated September 27, 2021, by which, APTEL refused to entertain an appeal filed by the Petitioner under Section 127 of the Electricity Act, 2003.

- APTEL opined that there is no provision to condone the delay in a appeal filed under Section 127 of the Electricity Act, 2003, and therefore, the appeal filed beyond the period of 30 days cannot be entertained.

Issue at hand

- Whether APTEL can condone delay beyond the period of 30 days in an appeal filed under Section 127 of Electricity Act, 2003?

Decision of the Court

- The High Court of Gujarat dismissed the petition basis the decision of the High Court of Calcutta in the case of ***Sudipta Koley v. Smt. M Bhowmick & Anr***[3] wherein the issue of condonation of delay beyond 30 days under Section 127 of the Electricity Act, 2003 was considered. The High Court of Calcutta had taken the view that an appeal filed under Section 127 of the Electricity Act, 2003 beyond 30 days cannot be condoned.
- In the said case the High Court of Calcutta held that the language of the particular Section has to be seen in juxtaposition to the language in which the other Sections are couched. The language of Section 125 permits condonation of delay beyond 60 days but limited to 120 days' delay, whereas Section 127 does not permit condonation of delay at all. The proviso to Section 125 cannot be read in a manner so as to clothe an Appellate Authority under Section 127 to condone the delay. Resultantly, delay in an appeal under Section 125 beyond 120 days and under Section 127 beyond 30 days cannot be condoned.
- The High Court of Calcutta also dealt with the observations in other cases that a writ court should not by invoking jurisdiction under Article 226 of the Constitution of India revive a barred remedy, is the settled law. As per the High Court of Calcutta such an approach narrows down the amplitude of Article 226 of the Constitution of India.
- The High Court of Calcutta also stated that it is conscious that the delay in preferring an appeal under Section 127 within 30 days could result in the person, against whom an adverse order under Section 126 has been passed, being left without the statutory appellate remedy; however, such a person would not find himself totally without any remedy. The High Court of Calcutta stated that a final order of assessment under Section 126 could be a subject of judicial review, if any of the conditions for entertainment of a writ petition (existence of an efficacious alternative remedy notwithstanding) is satisfied. If indeed the writ Petitioner satisfies the writ court that for genuine reasons, he could not avail the remedy of an appeal and seeks a writ of certiorari to have the impugned order quashed, the writ court may in its discretion entertain the writ petition and judicially review the decision-making process. However, if the writ court is approached long after the final order of assessment under Section 126 is made and proper explanation for the belated approach is either not shown or the court is not satisfied that the Petitioner disabled himself to pursue the appellate remedy for his own fault, the court may not entertain the writ petition at all.

HSA
Viewpoint

The High Court has correctly given its affirmation to the interpretation given by the High Court of Calcutta that a delay beyond 30 days cannot be condoned by APTEL in an appeal filed under Section 127 of the Electricity Act, 2003. The High Courts have further taken the correct approach in stating that such a person shall not be left remedy less and shall have the recourse to a writ of certiorari in appropriate cases.

Ultratech Cement Ltd & Ors v. Madhya Pradesh Electricity Regulatory Commission (MPERC) & Ors

Appellate Tribunal for Electricity (APTEL) | Judgment dated November 29, 2022 in Appeal No. 198 of 2021; Appeal No. 202 of 2021; Appeal No. 204 of 2021; Appeal No. 337 of 2021 and Appeal No. 295 of 2021

Background facts

- The present appeals raise a common question of law as to the applicability of 'additional surcharge' on the charges of wheeling by a DISCOM on a captive user receiving supply of electricity from its own 'Captive Generation Plant' (**CGP**) in terms of Section 42(4) of the
- Electricity Act, 2003. While Appeal No. 198 of 2021, Appeal No. 202 of 2021, Appeal No. 204 of 2021 and Appeal No. 337 of 2021 were preferred by Ultratech Cement Ltd, the fifth appeal being Appeal No. 295 of 2021 was preferred by Prism Johnson Ltd against the Impugned Order(s) dated May 14, 2021, November 2, 2021 and September 16, 2021 passed by MPERC qua the afore-stated common question of law.

[3] WP No. 84 of 2019

- While, Ultratech Cement Ltd was availing supply of electricity from its CGP to its manufacturing unit through a dedicated line without obtaining open access from MPERC, the Appellant Prism Johnson Ltd was procuring more than 51% of the power generated from Unit-1 of its generating station set-up by an entity named BLA Power. Notably, the Prism Johnson Ltd had acquired stake in the said entity to the extent of 30.46%.
- In the Impugned Order(s), more pertinently in context to Appeal Nos. 337 of 2021 and 295 of 2021, MPERC had passed identical conclusions holding the Appellant(s) liable for payment of additional surcharge on the charges of wheeling, as specified by MPERC, to meet the fixed cost obligation of the DISCOM.
- Aggrieved by the Impugned Order(s) passed by MPERC, the Appellant(s) approached APTEL for deciding the common question of law challenging the legality, validity and propriety of the Impugned Order(s).

Issue at hand

- After considering the submissions made by the parties, APTEL framed a common question of law qua applicability of 'additional surcharge' on the charges of wheeling by a DISCOM on a captive user receiving supply of electricity from its own CGP in terms of Section 42(4) of the Electricity Act, 2003.

Decision of the Tribunal

- APTEL while passing a common judgment for the Batch Appeal, has placed reliance on Section 9 read with the fourth proviso to Section 42(2) of the Electricity Act and has categorically observed that while the 'Cross Subsidy Surcharge' (**CSS**) can be levied on the charges of wheeling in context of open access, the fourth provision to Section 42(2) exempts captive user(s) from the payment of the CSS in the event such captive user(s) avail open access for carrying electricity from its own captive generating unit(s) to the destination of its own use.
- In the common judgment, APTEL has applied the mischief rule and has further concluded that a 'captive user' cannot be classified within the contours of 'class of consumers' as contemplated under Section 42(4) of the Electricity Act. On the contrary, a 'captive user' as defined under Rule 3 of the Electricity Rules, 2005 simply refers to 'end user of electricity generated in a captive generating plant'.
- However, as regards the Appeal Nos. 337 of 2021 and 295 of 2021, APTEL remanded the matter back to MPERC for a fresh consideration of the factual issue qua transmission of power through the transmission lines/system of the DISCOM. Pertinently, APTEL was pleased to distinguish the Batch Appeals on the factual matrix presented before it. While the Appeal Nos. 198/2021, 202/2021 and 204/2021 pertained to transmission of power through a dedicated transmission network, the last two appeals being Appeal Nos. 337/2021 and 295/2021 posed a different factual scenario wherein the Appellants were allegedly using the transmission lines/ system of the DISCOM. As such, APTEL remanded the last two appeals to MPERC qua the issue of total exemption from the levy of additional surcharge under Section 42(4) of the Electricity Act.
- In light of the aforementioned observation, the APTEL set aside the orders passed by MERC in Appeal Nos. 198/2021; 202/2021 and 204/2021 while the last two appeals being 337/2021 and 295/2021 were remanded to MERC for undertaking a fact-finding enquiry and dispose of the issues in the light of the observations made the APTEL.

HSA
Viewpoint

APTEL's decision has impacted various stake holders in large to the extent that MPERC has imposed additional surcharge on captive user(s) availing supply of electricity from their own CGP(s) to their 'destination of use'. The challenge to the levy of additional surcharge is an interesting issue, and will have a sector wide impact, once settled.

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AT A GLANCE

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