

# PROJECTS, ENERGY & INFRASTRUCTURE

## MONTHLY NEWSLETTER

### SEPTEMBER 2022



# LEGAL & POLICY UPDATES



## In this Section

Draft Karnataka Electricity Regulatory Commission (Terms and Conditions for Green Energy Open Access) Regulations, 2022

Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Third Amendment) Regulations, 2022

## Draft Karnataka Electricity Regulatory Commission (Terms and Conditions for Green Energy Open Access) Regulations, 2022

### ■ Introduction

- The Karnataka Electricity Regulatory Commission (**KERC**) on August 11, 2022 notified the Draft Karnataka Electricity Regulatory Commission (Terms and Conditions for Green Energy Open access) regulations 2022 (**OA Regulations**).
- The OA Regulations shall be applicable for allowing Open Access to electricity generated from Renewable Energy (**RE**) sources for usage of Intra-State Transmission System(s) (**InSTS**) and/or distribution system/s of licensee(s) in the state, including such InSTS and/or distribution system(s) which are incidental to Inter-State transmission of electricity.
- Consumers except captive consumers will be eligible for green energy open access if they have a contracted demand or sanctioned load of 100 kW or more.

### ■ Eligibility

- As per the draft OA Regulations, the consumers will be eligible for Open Access (**OA**) through the InSTS of the State Transmission Utility (**STU**) of the state or distribution system of the distribution licensees of the state.
- The consumers having the Captive Power Projects (**CPP**) will have the right to OA under the draft OA Regulations. Apart from the captive consumers, those consumers who have a sanctioned load of 100 kW and above will have the right to OA under the draft OA Regulations.

### ■ Nodal Agency

- Karnataka State Load Despatch Centre (**SLDC**) shall operate as the state Nodal Agency (**SNA**) for grant of long term, medium-term and short-term green energy open access. All the applications relating to green energy OA shall be submitted on the portal set up by the SNA. The applications shall be routed to the SNA by the Central Nodal Agency (**CNA**)
- All the relevant information regarding green OA shall be uploaded on the portal of CNA.

### ■ Allotment Priority

- Green Energy Open Access consumers (**GEOA**) will have a preference over the normal OA consumers. Among the GEOA, the Long-term OA consumers (**LTOA**) will have a preference over the Medium-term OA consumers (**MTOA**) and Short-term OA consumers (**STOA**).

- **Procedure for grant of GEOA**

- KERC proposed that SNC must ensure that the applicant must pay a non-refundable fee of INR 5000 for LTOA/MTOA and INR 1000 for STOA.
- The application for LTOA, MTOA and STOA must be accompanied by a non-refundable Bank Guarantee (**BG**) of INR 10000. The BG should be kept valid till until the Wheeling Agreement is signed.
- If there is a modification in the quantum of power to be interchanged using the ISTS or the distribution system, then a fresh application would be made for the entire capacity along with the relevant documents and application fees.
- The applicant would be entitled for payment at the Average Pooled Power Purchase Cost (**APPC**) or 75% of the generic tariff determined by the KERC for the energy injected into the licensee's network from the date of grant of OA until the date of submission of the Wheeling Agreement.

- **Non-utilization of OA services by consumers**

- In the event of inability of STOA, to utilize more than 4 hours of the total or substantial part of the energy allocated to them, then they will be required to intimate the SLDC of their inability to utilize the capacity and surrender the allocated capacity.
- An LTOA, MTOA should not relinquish his right specified in OA agreement without the prior approval of the Nodal Agency. The SLDC will reduce the capacity allotted to STOA consumers if the consumer underutilizes the allocated capacity more than twice a month with the duration underutilizing exceeding 2 hours each time.

- **OA Charges**

- KERC will determine the Transmission charges, CSS, Wheeling charges, Additional Surcharge, Banking charges, Standby charges considering the methodology specified for GEOA. Till the methodology is determined, the charges will be determined by KERC from time to time.

- **Banking**

- Banking shall be permitted on payment of the charges as determined by KERC. The banked energy will not be permitted to be carry-forwarded to the subsequent months. The credit for the energy banked will be adjusted during the same month.
- The payment for the unutilized banked energy will be as per the actual banked energy limited to 30% consumption during the month from the license. The electricity supply companies will pay 75% of the generic tariff for the RE sources for the relevant period.

- **Curtailment priority**

- The KERC proposed that STOA consumers will be curtailed first followed by Short Term GEOA, After that MTOA consumers followed by Medium-term GEOA. Lastly, LTOA consumers will be curtailed followed by Long term GEOA.

- **Meters**

- The GEOA would have to install tri-vector meter with time of day (**TOD**) facility. The meters should be capable of time differentiated measurements (15 minutes) of necessary parameters and communicate their reading to SLDC in real time.
- The SLDC must post all the information on separate web page titled Green Energy Open Access Information and issue monthly and annual report containing such information.

## **Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Third Amendment) Regulations, 2022**

- CERC in its Explanatory Memorandum titled 'Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Third Amendment) Regulations, 2022' elaborated upon two Amendments, namely, Amendment to Clause (4) under Appendix-II 'Procedure for Calculation of Transmission System Availability Factor for a Month' of the Principal Regulations; and Amendment to Clause (5) under Appendix-II 'Procedure for Calculation of Transmission System Availability Factor for a Month' of the Principal Regulations.
- Under the Amendment to Clause (4) under Appendix-II 'Procedure for Calculation of Transmission System Availability Factor for a Month' of the Principal Regulations, several elaborations were made:
  - Ministry of Power vide letter dated August 31, 2021 and letters dated June 16, 2022 & August 03, 2022 respectively has requested CERC to suitably modify/make necessary amendments in the CERC (Terms and Conditions of Tariff) Regulations, 2019 in order to enable issue of deemed availability certificate by Member Secretary, RPC for shifting of ISTS Transmission Lines for all nationally important infrastructure projects of NHAI, Railways & BRO, provided that transmission customers are not affected by the shutdown of the line.

- The Ministry of Power (MoP) vide its letter dated August 31, 2021, conveyed to the CERC that Secretary, Ministry of Road Transport (MoRTH) in his DO letter dated August 02, 2021 raised the issue of shutdown charges among others for shifting of transmission lines for NHAI projects. The Secretary, MoRTH, mentioned in the letter that shutdown charges are levied on MoRTH agencies for shifting of transmission lines. Till last year, the charges were about @ 2% of estimated costs, and now it has increased to about INR 5 crore to 7 crore in some estimates. Hence, MoRTH requested MoP to give deemed availability certificate for waiving of these charges.
- The MoP further mentioned vide its letter dated August 31, 2021 that Present CERC (Terms and Conditions of Tariff) Regulations 2019 provides that shut down availed for maintenance of another transmission scheme or construction of new element or renovation /upgradation /additional capitalization in existing system approved by the Commission are covered under deemed availability of transmission lines to be provided by Member Secretary, Regional Power Committees (RPCs). Accordingly, RPCs do not provide deemed availability in cases of outages of transmission lines for construction of projects of NHAI/ Railways etc..
- A meeting was also held under the Chairmanship of Secretary (Power) with representatives of CEA, PGCIL, CTUIL, NHAI, POSOCO and private transmission licensees on August 11, 2021 to discuss these issues. In this meeting it was noted that generally customers of transmission lines are not affected by shutdown of a particular transmission line, because of redundancy in the power system and NHAI projects are of national importance. Therefore, it was agreed that in case of NHAI projects, RPC Secretariat would provide deemed availability certificate for the shutdown period availed by transmission licensees for shifting of their transmission lines, provided that transmission customers are not affected by the shutdown of the line. Shutdown charges would be computed by CEA as per practice and would be included in the cost estimates to be provided to NHAI for shifting of lines. CEA was also requested to standardize the shutdown period, so that deemed availability period is not utilized for other than intended purposes.
- Hence, the MoP vide its letter dated August 31, 2021, requested that CERC (Terms and Conditions of Tariff) Regulations, 2019 may be modified suitably, so that RPC Secretariat can issue deemed availability certificate for the shutdown period availed by transmission licensees for shifting of their transmission lines in NHAI projects, provided that transmission customers are not affected by the shutdown of the line.
- Afterwards, the MoP vide its letter dated August 03, 2022 conveyed that the matter had been noted by the Ministry and the following had been decided:
  - RPC Secretariat shall provide deemed availability certificate for the shutdown period availed by transmission licensees (both RTM and TBCB) for shifting of their Inter State Transmission System (ISTS) lines for all national importance infrastructure projects of NHAI, Railways, BRO etc., provided that transmission customers are not affected by the shutdown of the line.
  - All such applications for deemed availability shall be considered irrespective of date of application. However, deemed availability for past shifting of lines, where the diversion work has already been completed, shall not be considered.
  - A consolidated Standard Operating Procedure for shifting of Transmission line by transmission licensees for other infrastructure projects shall be prepared by CEA and submitted to the Ministry. The same will be put up for approval of the Competent Authority in the Ministry.
  - The CERC shall make necessary changes quickly in the CERC (Terms and Conditions of Tariff) Regulations to enable declaration of deemed availability certificate by Regional Power Committees for shifting of transmission lines for other infrastructure projects, provided that transmission customers are not affected by the shutdown of the line.
  - In view of the above, a new sub-Clause (iii) is proposed to be inserted after sub-Clause (ii) of Clause (4) under Appendix II of the Principal Regulations to declare deemed availability for the shutdown availed for shifting of Transmission Line for Projects of NHAI, Railways and Border Road Organisations.
  - The Clause (5) under Appendix-II of the Principal Regulation provides for dual effect on transmission charges with respect to the outage period of transmission elements by providing no benefit and further making the beneficiaries liable under shutdown. Such outage period is proposed to be decided at RPC for outage beyond one month and upto three months beyond which for such exclusion, consultation with the beneficiaries is necessary for which the transmission licensee is obliged to take approval from commission.
- In furtherance, the following amendments are proposed:
  - Provisos to sub clause (ii) are proposed to be deleted
  - Addition of sub-Clause (iii) with respect to exclusion of outage period for the prior sub-Clauses

- CERC gave out a public notice on September 6, 2022 wherein the commission has notified a draft CERC (terms and conditions of tariff) (Third Amendment) Regulation, 2022 along with Explanatory memorandum. Through the notice CERC has invited comments/suggestions/objections from the stakeholders and interested persons on the Draft Regulations.
- The Draft Notification dated September 6, 2022 notified by CERC, includes 3 clauses. The first one being the short title and commencement; the second clause provides for amendment to Clause (4) under Appendix-II; and third clause is newly added to provide for shutdown availed for shifting of Transmission Line and restriction on the deemed availability period which may only be considered for the period for which DICs are not affected by the shutdown of the such transmission Line. The 3rd clause provides for amendment to Clause (5) wherein sub-Clause (iii) was proposed to be added to provide for exclusion of outage period to be declared by respective authorities with respect to the period.

# RECENT JUDGMENTS



## In this Section

Parampujya Solar Energy Pvt Ltd & Anr v. Central Electricity Regulatory Commission & Ors

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

Uttar Haryana Bijli Vitran Nigam Ltd & Anr v. Adani Power (Mundra) Ltd & Anr

Power Grid Corporation of India Ltd (PGCIL) v. Madhya Pradesh Power Management Company Ltd (MPPMCL) & Ors

Avaada Energy Pvt Ltd & Anr v. Central Transmission Utility of India Ltd (CTUIL) & Anr

## Parampujya Solar Energy Pvt Ltd & Anr v. Central Electricity Regulatory Commission & Ors

APTEL | Order dated September 15, 2022 in Appeal No. 256 of 2019

### Background facts

- These batch of appeals were filed by solar power project developers (**SPPDs**) who were aggrieved by the orders passed by the Central Electricity Regulatory Commission (**CERC**) mainly because the orders denied the relief of 'Carrying Cost' after approving Change in Law (**CIL**) events. A cross appeal was also filed by the distribution licensees of State of Chhattisgarh raising the issue of jurisdiction exercised by CERC.
- The SPPDs in the appeals claimed compensation for CIL with reference to GST regime introduced in July 2017.
- In the present case, NTPC had issued two Request for Selection (**Rfs**) for setting up Grid Connected SPPs in the State of Telangana and Karnataka. Further, even Solar Energy Corporation of India Limited (**SECI**) had invited bids for setting up of solar projects in the State of Karnataka and State of Maharashtra, respectively.
- Subsequent to the aforementioned bidding process, the Central Government in July, 2017 introduced GST Law in India. Owing to additional cost incurred by the developers after introductions of GST laws, the developers approached CERC seeking declaration to consider said event as Change in Law and consequently claiming compensation and Carrying Cost.
- The said petitions were disposed of by CERC vide Order dated April 11, 2019, wherein, CERC acknowledged that the introduction of GST laws is a Change in Law event and hold that the respective solar power developers are entitled to be compensated due to escalation in the cost of construction on account of levy of GST.
- However, CERC while passing the aforesaid order declined the relief sought by the developers owing to Carrying Cost and O&M expenses. Further, the relief towards Change in Law was allowed only where the invoices were raised before the COD of the project, and CERC declined any relief towards Change in Law where invoices raised by the contractors were post COD of the project. Aggrieved by such decision, the solar power developers filed present Appeal before Appellate Tribunal for Electricity (**APTEL**).

### Issues at hand

- Whether the provision of Change in Law in the RE-PPAs includes within its scope, the mechanism to provide all relief in case of a Change in Law event including Carrying Cost?
- Whether the restitutionary principle of Change in Law, as recognized by APTEL and the Supreme Court of India, can be denied to the Solar Power Developers after Change in Law events stand approved?

## Decision of the Tribunal

### ■ Issue of jurisdiction:

- APTEL while referring to the provisions of the PPAs noted that there is no mandate under the PPAs that there must necessarily be sale of 10% of installed capacity of the power to State other than the State where 90% is being sold. As per Clause 1.6 of MNRE Guidelines 2015, SECI has been entitled to divert power beyond the state when there is excess generation over the quantum of power specified in the PSA read with PPAs.
- Accordingly, APTEL held that when the MNRE Guidelines issued by the Central Government under Section 63 of the Electricity Act 2003 envisages the sale of electricity under a 'composite scheme' in more than one State, the arrangement falls within the scope of Section 79(1)(b) of the Electricity Act 2003 and, the jurisdiction lies with CERC.
- Further, APTEL also relied on the Change in Law provision of the PPA that expressly conferred the jurisdiction on the Central Commission and observed that the PPAs and PSAs in the present matter are under back-to-back arrangement and forms part of a single transaction. Accordingly, the jurisdiction to adjudicate the present dispute lies with the CERC and not the State Commissions as argued by DISCOMs.

### ■ Claim of Carrying Cost:

- APTEL interpreted the word 'provide relief'. APTEL held that the purpose of the change in law clause in the PPAs is to relieve the developer of the additional burden. Since the impact of the new tax (i.e., GST) would come from the date of enforcement of the new laws, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy.
- The APTEL held that the expression 'provide relief' is of widest amplitude and cannot be read to limit its scope the way the contesting Respondents seek to propagate or the way the CERC has determined. Accordingly, APTEL held that the developers are entitled to claim Carrying Cost over and above the principle claim raised by the developers in the respective petitions before CERC.

### ■ Claim of compensation against invoices raised post-COD:

- To this extent the APTEL held that change in law clauses in the PPAs assure relief to be provided in relation to 'any additional recurring/non-recurring expenditure' arising from a change in law event. As there is no restriction in the contracts which provided that only those claims as change in law could be permitted which occurred prior to COD, therefore, the blanket denial of additional expenditure incurred post COD, due to change in law events already acknowledged, is wrong. Accordingly, the APTEL through the present Order set-aside the such findings passed by CERC.
- APTEL, while referring to its earlier orders in Coastal Gujarat Power Limited v. CERC & Ors<sup>1</sup> and Azure Solar Private Limited v. CERC & Ors<sup>2</sup>, disapproved the decision taken by CERC and held that the solar power developers are entitled to compensation for additional expenditure (recurring /non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced.



#### HSA Viewpoint

The present judgment is a precedent setting decision, which recognizes the principal w.r.t time value of money and allows the developers to claim Carrying Cost even in cases where the change in law provisions do not specifically provide that 'the developer on the occurrence of change in law event shall be restituted to same economic position as if the change in law event had not occurred'. Further, the present Judgment clarifies the issue of jurisdiction and allows developers to claim compensation on account of GST even post COD of the project.

## Avaada Sunce Energy Pvt Ltd v. Maharashtra State Electricity Distribution Company Ltd

Maharashtra Electricity Regulatory Commission (MERC) Order | Order dated August 24, 2022

### Background facts

- Avaada Sunce Energy Private Ltd. (**ASEPL**) filed the present Petition seeking extension/ deferment of the Scheduled Commissioning Date for commissioning of 150 MW capacity out of 350 MW contracted capacity on account of certain Force Majeure events including Covid-19 and disruption in import of modules from China impacting the progress of its Project.

<sup>1</sup> 2021 SCC Online APTEL 10

<sup>2</sup> 2022 SCC OnLine APTEL 24

- ASEPL is a Special Purpose Vehicle (**SPV**) promoted and incorporated by Avaada Energy Private Limited (**AEPL**) for the purpose of developing a 350 MW solar photovoltaic power project located at Village Noorsar, Taluka Bikaner, District Bikaner, State Rajasthan.
- According to the PPA signed between the parties, the project was supposed to be commissioned by June 26, 2022. But, on account of disruptions in supply chain due to the spread of COVID-19, MSEDCL has granted an extension twice thereby making February 8, 2022 as the final COD.
- Despite the extension being granted to ASEPL, it was able to part commission the 100 MW on November 3, 2021. Capacities of 50 MW each were commissioned on January 7, 2021, and the other 150 MW was completed in three stages on February 8, 2022 respectively. ASEPL's request for further grant in SCOD was not granted by Maharashtra State Electricity Distribution Co Ltd (**MSEDCL**).
- MSEDCL while rejecting the request stated that ASEPL has not placed any material on record to substantiate their claim.

### Issues at hand

- Whether supply chain disruptions in China qualify as a Force Majeure event (**FM**) under PPA?
- Whether ASEPL is affected on account of FM event?

### Decision of the Commission

- Issue I:** MERC noted that ASEPL has narrated the difficulties faced by its procurement of Solar PV modules. MERC further took note of the fact that ASEPL informed MSEDCL that no supply was expected from China till February 2022 and also the vendors were committing to new shipment timelines starting from March-April 2022. So, MERC held that the disruption in China qualifies as FM event under PPA.
- Issue II:** MERC stated that once an event is declared as a FM event, then the relief available under PPA is that the effected party is exempted from its obligations for that period without any compensation in tariff. MERC stated that according to the terms of PPA, ASEPL is eligible for extension in time for meeting its obligations by 84 days. In light of the fact that ASEPL is affected by FM event so, the MERC noted that as the actual delay in commissioning is 59 days, so the SCOD will be extended from February 8, 2022, till the actual date of commissioning which is April 8, 2022 without any penalty.



#### HSA Viewpoint

The Supreme Court's decision will provide a much-needed relief to the generators as they suffered financially on account of Change of Law events. This order of the Apex court will pave the way for Generators to recover their dues along with interest compounded annually on the occasion of wilful default of the Discom(s).

## Uttar Haryana Bijli Vitran Nigam Ltd & Anr v. Adani Power (Mundra) Ltd & Anr

Supreme Court of India | Judgement dated August 24, 2022 in Civil Appeal No. 7129 of 2021.

### Background facts

- The present appeal has been filed by Uttar Haryana Bijli Vitran Nigam Ltd (**UHBVNL**) against the order dated August 12, 2021 passed by APTEL. The scope of the present appeal is restricted to the decision of the APTEL of granting Carrying Cost interest on compounding basis in favour of the Respondent No. 1 i.e. Adani Power (Mundra) limited (**APML**) from the date on which the Change in Law event took place i.e. January 29, 2014, till the date of actual payment of the amount determined by the Central Electricity regulatory Commission (**CERC**).
- The grievance of UHBVNL is that APTEL has not just permitted Carrying Cost on simple interest basis but has imposed interest on Carrying Cost.
- APML is a power generating company that has set up a 4620 MW (comprising of four units of 330 MW and five units of 660 MW), coal fired power plant in Mundra, Gujarat. UHBVNL entered into a PPA with APML dated August 7, 2008 procurement of contracted capacity of 1424 MW from the generating units 7, 8 and 9 established at Mundra, Gujarat. In the year 2010, on account of Environment Clearance dated May 20, 2010, given by the Ministry of Environment and Forest (**MoEF**), a CIL event took place as APML had to incur additional costs on installing Flue Gas Desulfurization unit (**FGD**). APML filed a petition on July 17, 2014, for adjudication of compensation on account of COL events including installation of FGD.
- CERC vide order dated February 6, 2017 allowed compensation for CIL events but disallowed claim for Carrying Cost raised by APML. Aggrieved by the order of CERC APML filed an appeal before

APTEL challenging the CERC order July 17, 2014. The limited grievance raised therein was w.r.t the issue pertaining to the claim of APML in respect of levy of customs duty on electricity removed from Special Economic Zone (SEZ) to Domestic Tariff Area (DTA). Notably, on March 28, 2018, CERC passed an order on the separate petition preferred by APML allowing compensation on account of the Change in Law event pertaining to installation of the FGD and at the same time, disallowing its claim for Carrying Cost.

- By the impugned judgment dated August 12, 2021, APTEL has not only held that APML is entitled for Carrying Cost in respect of compensation for CIL events towards FGD installation, but it has also held that APML would be entitled for interest on Carrying Cost.

### Issue at hand

- Whether the Appellants are liable to pay simple interest or compound interest on the Carrying Cost?

### Decision of the Court

- The Supreme Court upheld the decision of APTEL and observed that the restitutionary principles encapsulated in the PPA would take effect for computing the impact of CIL.
- The Court further stated that once Carrying Cost has been granted in favour of APML, it cannot be urged by the UHBVNL that interest on Carrying Cost should be calculated on simple interest basis instead of compound interest basis. The idea behind granting interest on Carrying Cost is aimed at restituting a party that is adversely affected by a Change in Law event and restore it to its original economic position as if such a COL event had not taken place.
- The Court took note of the fact that APML had to incur expenses to purchase the FGD and install it in view of the terms and conditions of the environment clearance given by the MoEF in the year 2010. For this, it had to arrange finances by borrowing from banks. The interest rate framework followed by Scheduled Commercial banks and regulated by the Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests.
- Supreme Court held that interest on Carrying Cost is nothing but time value for money. Further it was observed that CERC was not justified to have excluded the period between 2014 and 2018 and grant relief from the date of the passing of the order i.e., from March 28, 2018 to 2021.
- The Court further held that the principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on Carrying Cost on account of a CIL events.



#### HSA Viewpoint

The Supreme Court's decision will provide a much-needed relief to the generators as they suffered financially on account of Change of Law events. This order of the Apex court will pave the way for Generators to recover their dues along with interest compounded annually on the occasion of wilful default of the Discom(s).

## Power Grid Corporation of India Ltd (PGCIL) v. Madhya Pradesh Power Management Company Ltd (MPPMCL) & Ors

CERC | Order dated September 02, 2022 in Petition No. 261/TT/2015

### Background facts

- The present petition was filed by PGCIL for determination of transmission tariff from the date of commercial operation (COD) to March 31, 2019 under the CERC (Terms and Conditions of Tariff) Regulations, 2014 (Tariff Regulations, 2014) in respect of the certain assets under 'Line Bays and Reactor Provisions at Powergrid Sub-station associated with Common System Strengthening for Western Region and Northern Region' (Transmission System) in Western Region.
- The associated bays and line reactors at Bina-Jabalpur 765 kV S/C (Circuit-3) line i.e., Asset-1 and Asset-2 under the scope of PGCIL were put into commercial operation on October 5, 2014 and November 13, 2014 respectively. Taking into consideration the mismatch between the bays and reactors of PGCIL and the transmission line of Jabalpur Transmission Company Limited (JTCL), CERC vide order dated May 27, 2016 had held that transmission charges of Asset-1 and Asset-2 shall be borne by Long Term Transmission Customers (LTTCS) of the Transmission Service Agreement (TSA) executed by JTCL under Tariff Based Competitive Bidding (TBCB) line, till the execution of the transmission line of JTCL.
- Aggrieved with CERC's Order dated May 27, 2016, MB Power (Madhya Pradesh) Limited (MBPMPL) filed Review Petition No. 35/RP/2018. MBPMPL also preferred Petition No. 232/MP/2018 under Section 79 of the Electricity Act, 2003 with prayers to quash the bills raised

by PGCIL on the basis of CERC's order dated May 27, 2016 and for adjudication of the dispute arising out the said bills. The prayers being inter-linked in Petition No. 35/RP/2018 and Petition No. 232/MP/2015, CERC vide common order dated January 28, 2020 in the said petitions decided to hear afresh the issue of payment of transmission charges for the period of mismatch in the execution of transmission assets of PGCIL and Associated Transmission Line (ATL) of JTCL.

- MBPMPL submitted that no liability can be placed on it i.e., the Generator, whose obligations to bear transmission charges only commences once the system is put in use for regular service and its LTA is operationalised. The liability to pay transmission charges will fall on the entity on whose account the transmission system could not be put to use, i.e., the defaulting entity principle. MBPMPL further submitted that for the mis-match period, the transmission charges payable are in the nature of damages and cannot be qualified as sharing of transmission charges under the Sharing/PoC Regulations.

### Issue at hand

- Who will bear the transmission charges, in instances when PGCIL's transmission system has been delayed on account of delay in commissioning of ATS of JTCL?

### Decision of the Commission

- CERC relied on its Order dated April 26, 2022 in Petition No. 60/TT/2017 wherein it was observed that, even if under Force majeure, delay is condoned or SCOD is extended, the liability of upstream/downstream system remains on such delayed transmission licensee.
- CERC also relied on the decision rendered by the APTEL in the NRSS Judgment to arrive at the finding that only relief(s) available to JTCL on account of Force Majeure would be in terms of the TSA viz. extension of SCOD. However, such relief(s) would not absolve JTCL from payment of IDC/IEDC of the transmission assets of PGCIL which could not be put to use on account of JTCL's ATS being delayed. Ultimately, CERC placed the liability of payment of transmission charges for the period of mismatch on JTCL.



#### HSA Viewpoint

CERC's decision sets a precedent in the sector where the question of liability for payment of transmission charges on account of mismatch of commissioning of assets has been omnipresent. CERC by its Order has distinguished the relief(s) available to a transmission licensee under a TSA, and when such relief(s) cannot be sought by the licensee. HSA successfully represented MBPMPL in the present matter and convinced CERC that no liability can be placed upon it since the said liability to bear transmission charges only commences once the system is put in use for regular service and its LTA is operationalized.

## Avaada Energy Pvt Ltd & Anr v. Central Transmission Utility of India Ltd (CTUIL) & Anr

CERC | Order dated September 09, 2022 in Petition No. 86/MP/2022

### Background facts

- Avaada, was declared as a successful bidder in a tender floated by Haryana Power Purchase Centre (HPPC) to sell 240 MW solar power from its proposed solar power project. In pursuance of the same, it entered into a Power Purchase Agreement with HPPC.
- Avaada applied for Stage -I and Stage-II connectivity, which was granted by CTUIL. Further, based on application for enhancement dated October 13, 2020, Stage-II connectivity for 240 MW w.e.f December 31, 2021 was granted to Avaada.
- For evacuation of the power from the above project, CTUIL granted Avaada Long-Term Access (LTA) for 240 MW, w.e.f. January 5, 2022. However, CTUIL intimated that there would be delay in operationalization of the LTA and same is likely to be operationalized only on September 25, 2022. Avaada, in the meantime, applied for Medium term open access (MTOA) for evacuation of power, which was granted by CTUIL for the period from January 1, 2022 to November 30, 2026.
- Since the Petitioners were able to achieve the commercial operation of only 125.75 MW by the end of January 2022, the Petitioner No.1 vide its letter dated January 10, 2022 had requested CTUIL for extension of time for the part operationalisation of MTOA for the balance 114.25 MW upto May 23, 2022. on the following grounds:
  - Dual Control System of Total Energy Consumption and Energy Intensity" policy introduced by the Chinese Government
  - Issues in sourcing modules from domestic suppliers
  - High prices of PV modules

- For such balance of 114.23 MW, billing was raised by CTUIL on Haryana (beneficiary).
- On the above basis, Avaada filed the present petition seeking:
  - Extension in start date of MTOA for balance 114.25 MW
  - Restraining CTUIL from levying penalty for non-operationalization of the balance on February 1, 2022

### Issues at hand

- Whether extension in start date of MTOA for balance 114.25 MW can be allowed on grounds of Force Majeure in accordance with the MTOA Agreement dated October 29, 2021?
- Whether transmission charges and losses are payable by Avaada due to part non operationalization on start date according to the CERC Sharing Regulations 2020?

### Decision of the Commission

- The provision for deferment of start date of MTOA is neither provided in the MTOA Agreement nor the 2009 Connectivity regulations.
  - Commercial implications have to be kept in mind by an applicant seeking LTA/MTOA. Section 37 of the Indian Contract clearly states that the parties to a contract have to perform their obligations unless such performance is dispensed with or excused by operation of any law.
  - Issuance of Notice to the other party is a sine qua non for invoking Force Majeure which was not fulfilled by Avaada.
- Avaada has failed to prove any cause of action because Avaada has failed to disclose any provision that supports its contention.
- Waiver of transmission charges is for generation of electricity which is after commercial operation date of the generating station. This relief is not applicable due to delay of the generation project.
- Avaada had specifically agreed to pay the transmission charges from the date of commencement of MTOA in accordance with the sharing mechanism specified by the Commission which was decided as February 01, 2022.
- The bills raised on Haryana for balance 114.25 MW is contrary Regulation 13(2) of the Sharing Regulations, 2020 because the transmission charges towards MTOA would be billed to buyer only after COD of the generating station or unit thereof.
- In view of the above, CERC concluded that:
  - The petition is not maintainable as per the Regulations and the MTOA Agreement entered into between the parties.
  - CTUIL shall raise the bills upon Avaada for the period between operationalization of MTOA and commissioning of the project.
  - CTUIL shall revise the bills raised on Haryana for the balance and raise bills upon Avaada in accordance with Regulation 13(2).



#### HSA Viewpoint

The CERC has observed that irrespective of the date of commissioning, the transmission charges have to be paid from the date of operationalization. It has emphasized that parties have to perform their obligations as stipulated in the Agreement. For invoking Force Majeure, issuance of notice is a mandate. Further, the CERC has also stated that in the absence of provisions in either the Agreement or the Sharing Regulations, 2020, deferment in extension date cannot be granted and the buyer will have to pay the charges.

# RECENT DEVELOPMENTS

A decorative image in the top right corner of the page. It shows a portion of a calendar with dates from 13 to 31. Below the calendar, there are four colorful sticky notes (pink, yellow, magenta, and teal) arranged diagonally.

## In this Section

Amendments to the Guidelines for Tariff Based Competitive Bidding Process for procurement of Round the Clock Power from Grid Connected Renewable Energy Power Projects complemented with power from any other source or storage

## Amendments to the Guidelines for Tariff Based Competitive Bidding Process for procurement of Round the Clock Power from Grid Connected Renewable Energy Power Projects complemented with power from any other source or storage

### ■ Introduction

- The Ministry of Power, Government of India (**MOP**) on August 26, 2022, has passed a Resolution on the Amendments to the Guidelines for Tariff Based Competitive Bidding Process for procurement of Round the Clock (RTC) Power from Grid Connected Renewable Energy Power projects complemented with power from any other source or storage (**Amendment Resolution**).
- The amendments are made to the MOP guidelines dated July 22, 2020, which was amended on three occasions i.e. November 3, 2020, February 5, 2021 and February 3, 2022.

### ■ Generator's obligation to supply dispatchable Renewable Energy Power (RE Power)

- Amendment has been made to Para 4.1. of the principal guidelines. Now it states that the Generator shall supply dispatchable RE Power complemented with power from any other source, in Round-The-Clock manner, keeping at least 90% availability annually, along with maintaining at least 90% availability monthly for at least eleven months in a year and at least 90% availability during the peak hours. MOP has decided the peak hours to be 4 hours out of the 24 hours as declared by Regional Load Despatch Centre (**RLDC**) according to Central Electricity Regulatory Commission (**CERC**) guidelines. Penalty for not meeting the stipulated availability shall be equal to the fixed tariff for the number of units not supplied.
- Clause 4.3 of the guidelines have been amended. It states that the Generator can combine storage for ensuring that it achieves the required minimum annual availability of 90% along with maintaining at least 90% availability monthly for at least eleven months in a year. MOP has lucidly stated that 51% of the energy shall come from RE sources which will include offer from storage systems provided that RE sources were used to store energy in the storage system.

### ■ Computation of Weighted Average Levelized Tariff

- Clause 6.4 now states that the Weighted Average Levelized Tariff will be considered as the Bidding Parameter according to per unit RTC Power. The weighted average levelized tariff shall be computed in INR/kWh. The fixed tariff will comprise of 4 parts which is- Fixed component [RE power (fixed), non-RE power (fixed)] and Variable component [Non -RE power (escalable for fuel), and non-RE power (escalable for transportation)].

- The Fixed component of tariff of the RE power and Non RE power shall be quoted for each year of the term of PPA. The variable component of the Non RE power shall be quoted as on scheduled date of commissioning. The levelized tariff shall be arrived at using the CERC escalation indices for the type of fuel quoted by the bidder and the discount factor to be specified in the bidding document.
- The bidder shall be selected on the basis of least quoted weighted average levelized Tariff. Subsequent to the e-reverse auction, the bidder (called the L1 bidder) quoting the least weighted average levelized Tariff (called the L1 tariff) shall be allocated the quantum of power offered by him. If the allocated quantum of power is less than the total quantum of power to be contracted, the capacity allocation shall be on the basis of —Bucket filling|| i.e. capacity quoted by L1 bidder at L1 rates shall be allocated first, then the capacity quoted by the next lowest bidder (called the L2 bidder) at the rates quoted by him (called the L2 rates) may be allocated and so on. However, the allocation will only be made to the bidders whose bid falls within a pre-defined range from the L1 tariff, as stipulated in the RfS.
- PPA period has been amended and now it shall be 25 years from the Scheduled Commissioning Date (**SCOD**).
- **Peak Hours**
  - It has been stated in para 7.2 (a) that the Generator has to ensure at least 90% availability annually along with maintaining at least 90% availability on a monthly basis for at least eleven months in a year and also during the peak hours. Peak hours will be 4 hours out of 24 hours as declared by RLDCs as per the relevant CERC regulation
- **Penalty**
  - The para mentioned in Clause 7.2 (d) states that in case if the project availability is less than 90% on annual basis then the Generator will pay penalty to the procurer for penalty for shortfall in availability. Penalty for not meeting the stipulated availability shall be equal to the fixed tariff for the number of units not supplied
  - The para mentioned in Clause 7.2 (f) states that in case of multiple payment criteria mentioned in tender, then the penalty will be calculated separately for shortfall in achieving the individual criteria.
  - The para mentioned in Clause 7.3.2.2 talks about the Payment Security by End procurer to Intermediary procurer through Revolving Letter of Credit (**LoC**) and State Government Guarantee.
  - The provision for Change in Law (**COL**) shall be in accordance with the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (**LPSC Rules**).
- **Early Commissioning**
  - In the scenario of Early Commissioning of single component outside PPA, the Generator will be allowed for commissioning of such component which is ready outside the ambit of PPA, with first right of refusal for such power being vested with the End Procurer. Subsequent to refusal of such power by the End Procurer, the right of refusal shall vest with the Intermediary Procurer. In case Procurer/Intermediary Procurer decides to buy such discrete component(s) power outside the PPA, such power shall be purchased at 50% of the PPA Tariff/weighted average levelized tariff for the applicable Contract Year. Specific provisions regarding the same will be uploaded in the tender documents.

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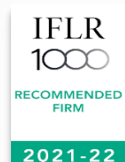


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