

# GATI - विधि

-LAW IN ACTION



## Legal Updates

**CERC directs IEX to invite comments from stakeholders on the proposed concept of “gross bidding”**

The Central Electricity Regulatory Commission (“**CERC**”), vide order dated 06.12.2021, in Petition No. 218/MP/2021 filed by Indian Energy Exchange Ltd. (“**IEX**”), directed the IEX to give wide publicity to the proposed concept of “gross bidding” under which distribution companies (“**Discoms**”) will be able to place both buy and sell bids simultaneously in the market for a quantum of power tied under power purchase agreement (“**PPA**”) and dispatch it through the market instead of directly scheduling it in a bilateral manner. Under such arrangement, the Discom will place the sell bids at the energy charge agreed upon in the PPA and buy bids as price inelastic bids to avoid any volume risks. If the market clearing price (“**MCP**”) discovered in the market is lesser than the PPA rate, then the generator will not get to dispatch the electricity and the Discom will buy from the market thereby reducing its power procurement cost. However, when MCP will be higher than the PPA rate, the generator will get dispatched through the market and the Discom will pay the generator as per the energy rates specified in PPA for the energy dispatched without incurring any additional gain or loss in the transactions. The exchange will only settle these transactions with the Discoms in their gross bidding portfolio. IEX further contended that the concept of “gross bidding” is based on physical delivery with no offsetting involved and will provide opportunities to the Discoms to reduce their power procurement cost.

The CERC observed that the proposed “gross bidding” involves various commercial and regulatory issues requiring wider deliberations and consultations with the stakeholders. Accordingly, the CERC directed IEX to give wide publicity to the proposed “gross bidding” by uploading the same on its website and inviting comments from all stakeholders and general public on the proposed “gross bidding”. The IEX has been granted liberty to approach the CERC after receiving such comments along with views of IEX thereon.

The CERC, vide order dated 06.12.2021 in Petition No.228/MP/2021 titled as *Mahindra Renewables Pvt. Ltd. v. Solar Energy Corporation of India Limited*, has held that on occurrence of a 'change in law' event, the affected party, i.e. the Petitioner is required to settle the 'change in law' with the Respondent – Solar Energy Corporation of India Ltd. (“SECI”) and approach the appropriate commission only in terms of Rule 3(8) of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (“**Change in Law Rules**”).

The Petitioner had filed the present petition seeking declaration / approval that the imposition of safeguard duty on the import of solar cells, whether or not assembled in modules or panels, vide Notification No.2/2020-Customs (SG) dated 29.7.2020 issued by the Department of Revenue, Ministry of Finance, Government of India is an event of 'change in law' under the power purchase agreement (“PPA”) and for approval of the quantum and mechanism of compensation (along with interest) in line with the methodology provided by the CERC vide order dated 20.8.2021 in Petition No. 536/MP/2020 (“**CERC Order**”).

The CERC, while rejecting the Petitioner’s contention that the Change in Law Rules do not apply in the Petitioner’s case, observed that the definition of 'change in law' as provided in Rule 2(1)(c) of the Change in Law Rules will come into play unless otherwise defined in the agreement and cannot, in any manner, be construed to mean that the Change in Law Rules will apply only to those agreements which do not have 'change in law' provisions. The phrase “*unless otherwise defined in the agreement*” has been used in the context of the definition of 'change in law' and not in the context of applicability of the Change in Law Rules.

The CERC further observed that the Change in Law Rules have been framed to facilitate timely recovery of costs due to change in law events and provide a process and methodology to be followed. As the Petitioner, in the present case, had no objection in approaching the procurers with computations and details in terms of the Change in Law Rules to claim relief under 'change in law', the Petitioner is required to first to approach SECI / procurers in terms of the Change in Law Rules for adjustment of tariff on account of such 'change in law'.

It was further observed that compensation for change in law is to be computed in terms of Rule 3(5) of the Change in Law Rules, which provides that where the agreement lays down any formula, the same shall be in accordance with such formula; or where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to the Change in Law Rules.

The CERC noted that the Petitioner’s submissions - that it is covered by the CERC Order wherein the CERC had prescribed a mechanism of compensation for 'change in law' event of imposition of safeguard duty; and that the provisions of the Change in Law Rules cannot supersede the provisions of its PPA – were required to be raised in the appropriate forum for adjudication.

The Appellate Tribunal for Electricity (“**APTEL**”), vide order dated 26.11.2021, in *Sai Wadhwa Power Generation Ltd. versus Maharashtra Electricity Regulatory Commission and Ors.* (Appeal No. 106 of 2018 and batch), held that the judgment dated 07.06.2021 in *Tamil Nadu Power Producers Association v. Tamil Nadu Electricity Regulatory Commission and Anr.* (“**TNPPA Judgment**”) and its interpretation of Rule 3 of the Electricity Rules, 2005 (“**Electricity Rules**”) will be applied from the date of notification of the Electricity Rules i.e., from 2005.

The APTEL examined the applicability of the observations made in TNPPA Judgment w.r.t. adjudication and verification of status of certain captive generation plant (“**CGP**”) run by the Appellants. The batch appeals were filed by captive consumers, *inter alia*, challenging orders of the Maharashtra Electricity Regulatory Commission (“**MERC**”) wherein the MERC held that certain generating units of Appellants did not qualify as CGP for the years 2014-15 to 2017-18 in absence of meeting the proportionality criteria mentioned under Rule 3 of the Electricity Rules.

On the issue of prospective applicability of the TNPPA Judgment, APTEL held that for the 'Doctrine of Prospective Overruling' to be applicable, a judgment must specifically carve out that the earlier judgment is overruled, or law is overruled, and the interpretation will be applicable prospectively while being inapplicable to settled transactions. It was, however, observed that the APTEL did not apply the Doctrine of Prospective Overruling in the TNPPA Judgment since its ambit was limited to simply interpreting Rule 3 of the 2005 Rules. It was further held that when a court gives an interpretation to a particular statute or rule, that interpretation is deemed to have been applied since the beginning of that statute or rule. Accordingly, the APTEL held that the TNPPA Judgment and its interpretation of Rule 3 will be applied

**CERC observes that the compensation for 'change in law' is to be computed in terms of Rule 3(5) of the Change in Law Rules**

**APTEL holds that the TNPPA Judgment regarding status of SPVs as CGPs is a valid law and holds ground**

from the date of notification of the Electricity Rules i.e., from 2005. The APTEL clarified that Rule 3 of the 2005 Rules shall be interpreted in the following manner:

- The captive consumers should demonstrate compliance with 26% shareholding in the CGP;
- All the captive consumers, collectively, must hold 26% of shareholding and consume 51% of the power produced. The Doctrine of Proportionality will not be applicable on such generation and consumption patterns i.e., even if one consumes 90% of the requisite consumption and the rest consume 10%, it will still satisfy the requirement of consumption under Rule 3; and
- The TNPPA Judgment will be binding on all the parties including the APTEL.

The Telecom Regulatory Authority of India (“**TRAI**”), vide a letter dated 08.12.2021, has directed all the broadcasters and distributors of channels to immediately implement the provisions of the Telecommunication (Broadcasting and Cable) Services Register of Interconnection Agreements and all such other matters Regulations, 2019 (“**2019 Regulations**”), except to the extent they require registration of placement / marketing agreements. TRAI has further directed them to submit a compliance report within 15 days from the date of issuance of the said letter, failing which, action would be taken as per the provisions of the Regulations and the TRAI Act, 1997. In this regard, TRAI has also developed the Broadcasting and Communication Satellite Integrated Portal System for the purpose of filing data / details pertaining to the 2019 Regulations, which was made live on 02.01.2020.

The Regulations which had originally come into force on 02.01.2020, were challenged before the Kerala High Court in the case of WP(C) No. 428 of 2020 titled as *AIDCF & Anr. v. TRAI & Anr.* The Hon'ble High Court, vide its order dated 09.01.2020, had ordered that no coercive action was to be taken by TRAI. Vide its judgement dated 12.07.2021, the Hon'ble High Court of Kerala has disposed of the said writ petition, and has partially set aside the provisions of the Regulations to the extent they require registration of placement / marketing agreements.

The TRAI, vide communication dated 08.12.2021, has released consultation paper on “Ease of Doing Business in Telecom and Broadcasting Sector” (“**Consultation Paper**”). TRAI has *suo motu* floated the Consultation Paper to identify various concerns in existing processes in the telecom and broadcasting sectors; to suggest measures for the reforms required in the regulatory processes, policies, practices and procedures in such sectors for creating a conducive business environment in India; and to promote a single-window concept for submitting applications and getting approvals.

The key factors to be identified through the Consultation Paper are, *inter alia*:

- Simplified applications with well-defined processes wherein the format of the application while applying for a grant of any license / registration would be simple with optimum requirements of information. Further, the entire process of issuance of a license/permission should be well-defined and well-published in the policy guidelines and / or citizen charter or any manual as deemed fit and should be available on the website of the concerned ministry / department.
- Timelines for queries, approvals, and deemed approvals should be prescribed and followed in letter and spirit, and provision of deemed approval should exist wherever feasible. Timelines for raising the query and their reply should also be well defined. All queries should be raised in one go only.
- Inter-ministerial and inter-departmental movement and approval should be online and well-integrated. Opinion/approval of the other departments/ministries should be taken only where there is a requirement and should be done in a time-bound manner with the provision of deemed approval.
- Physical interface should be done away with to the extent possible, and it should only be used as a last resort where there is a specific requirement such as handing over devices to testing labs, etc.
- System should be transparent with end-to-end online tracking system so that the applicant is able to know the status of his application at all times.
- Use of technologies like DigiLocker, agreements, and contracts incorporated with digital signatures / electronic signatures, etc. to maximize the use of technology and technological instruments as far as possible.

The Consultation Paper covers the process of grant of permissions / registrations / licenses by the following ministries / departments including the Ministry of Information and Broadcasting, the Department of Telecommunications (DoT), Wireless Planning and Coordination, Network Operation Control Centre,

**TRAI directs for implementation of Telecommunication (Broadcasting and Cable) Services Register of Interconnection Agreements and all such other matters Regulations, 2019**

**TRAI releases consultation paper on “Ease of Doing Business in Telecom and Broadcasting Sector”**

Telecommunication Engineering Centre, Department of Space (DOS), Ministry of Electronics and Information Technology (MeitY), Ministry of Power (MoP) and TRAI.

Written comments on the Consultation Paper are invited from the stakeholders by 05.01.2022, and counter comments, if any, may be submitted by 19.01.2022, preferably in electronic form on the email: [dyadvbcs-1@traigov.in](mailto:dyadvbcs-1@traigov.in).

The Insolvency and Bankruptcy Board of India (“**IBBI**”), on 01.12.2021 issued ‘the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2021’ (“**2021 Guidelines**”). The 2021 Guidelines shall be effective from 01.01.2022 and shall supersede the earlier guidelines i.e., ‘the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustee (Recommendation) Guidelines, 2021’ issued on 01.06.2021.

The principal features of the 2021 Guidelines are as follows:

- IBBI shall appoint a common Panel of Insolvency Professionals (“**IPs**”) for appointment as Interim Resolution Professional (“**IRP**”), Resolution Professional (“**RP**”), or as Liquidator for corporate debtors under the corporate insolvency resolution process (“**CIRP**”), and to act as the RP or Bankruptcy Trustee (“**BT**”) for individuals under individual insolvency resolution process.
- The Panel will be valid for a period of six months. The National Company Law Tribunal (“**NCLT**”) and Debt Recovery Tribunal (“**DRT**”) may pick the IPs from such Panel.
- The 2021 Guidelines stipulates for the eligibility criteria for an IP to be part of the Panel.
- An IP will be included in the Panel against the Zone where his registered office is located.
- Appointment to the panel of IPs will be based on expression of interest from the IPs. The eligible IPs will be included in the Panel in the order of the volume of ongoing processes they have in hand.
- The IPs in the Panel shall be barred from withdrawing his interest or declining to act as IRP, Liquidator, RP or BT, as the case may be.
- NCLT / DRT may require IBBI to recommend an IP from or outside the Panel and in such cases, the Board shall accordingly recommend an IP.

The Ministry of Corporate Affairs (“**MCA**”), vide General Circular No. 19/2021 dated 08.12.2021, has allowed the companies whose Annual General Meetings (“**AGMs**”) are due in the year 2021, to conduct their AGMs on or before 30.06.2022 in accordance with the requirements laid down in Para 3 and Para 4 of the General Circular No. 20/2020 dated 05.05.2020.

It was also clarified that this shall not be construed as conferring any extension of time for companies to hold AGMs under the Companies Act, 2013 (“**2013 Act**”). The MCA further explained that that companies that have not adhered to the relevant timelines will face legal action under the relevant provisions of the 2013 Act.

The MCA has further permitted the companies to conduct their Extraordinary General Meetings through video conference or other audio-visual means or transact items through postal ballot up to 30.06.2022 in terms of General Circular No. 20/2021 dated 08.12.2021.

**Insolvency and Bankruptcy Board of India issues guidelines for Insolvency Professional to act as Interim Resolution Professional, Liquidator, Resolution Professional and Bankruptcy Trustees**

**Ministry of Corporate Affairs issues clarification on holding of AGM and EGM through video conferencing or other audio-visual means**

A-142, Neeti Bagh  
New Delhi – 110 049, India  
T: +91 11 4659 4466 F: +91 11 4359 4466  
E: [mail@neetiniyaman.co](mailto:mail@neetiniyaman.co)  
W: [www.neetiniyaman.co](http://www.neetiniyaman.co)

Office No. 501, 5th Floor,  
Rehman House Premises CHS,  
Nadirsha Sukhia Street, Fort,  
Mumbai-400001, India  
T: +91 22 4973 9114

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