June 11, 2021

Legal Updates

Ministry of Coal seeks comments on decision to repeal CMCD Act, 1974 and CMCD Rules, 1975 read with CMCD (Amendment) Rules, 2011

The Ministry of Coal ("**MoC**"), vide letter dated 08.06.2021, has sought comments from stakeholders on the decision to repeal the Coal Mines (Conservation and Development) Act, 1974 ("**CMCD Act, 1974**") and Coal Mines (Conservation and Development) Rules, 1975 ("**CMCD Rules, 1975**") read with the Coal Mines (Conservation and Development) Amendment Rules, 2011 ("**CMCD (Amendment) Rules, 2011**") and to incorporate relevant provisions of CMCD Rules, 1975 read with CMCD (Amendment) Rules in the CENVAT Credit Rules, 2004 ("**CCR, 2004**"), within 30 days from date of the letter i.e., by 08.07.2021.

The provisions of the CMCD Rules, 1975 read with CMCD (Amendment) Rules, 2011 that are proposed to be incorporated in CCR, 2004 are:

(a) Rule 4 which provides that any order issued under Section 18 of the Mines and Minerals (Development and Regulation) Act, 1957 ("**MMDR Act**"), with respect to conservation of coal and development of coal mines and power of inspectors, should be complied with by the owner, agent or manager of the coal mine and failure to do so shall be deemed to be in contravention of CMCD Rules, 1975;

(b) Rule 6 which provides for power of the Central Government to recover cost of measures or operations undertaken by it under Section 18 of MMDR Act, in respect of conservation of coal and development of coal mines;

(c) Rule 7which provides for supply of information by every owner, agent or manager to the Coal Controller;

(d) Rule 10 which provides for composition and functions of the Coal Conservation and Development Advisory Committee;

(e) Rule 12, 13, 14, 15, 17 and 18K which deal with Grant of assistance.

Ministry of Coal issues "Policy for Handling & Disposal of Washery Rejects"

The MoC, vide its letter dated 27.05.2021, has framed and issued "Policy for Handling & Disposal of Washery Rejects" for regulation of handling and disposal of washery rejects in a uniform manner and which shall be applicable on all coal washeries. The salient features of the policy are as follows, *inter alia*:

(a) Definition of coal washery rejects ("**CWR**"): CWR has been defined as by-product of coal washeries with gross calorific value less than 220 kcal/kg. Owner of CWR defined as the party which owns the raw coal supplied to the washery. Any rejects generated due to washing that cannot be utilised by the owner may be sold to washery operator who will be the deemed owner of the CWR.

(b) Stacking of CWR: Owner/deemed owner shall ensure that low calorific value ("**LCV**") and high calorific value ("**HCV**") rejects are stacked separately at appropriate sites as per environmental guidelines. Stacking sites shall be properly levelled, surveyed and grid plan shall be prepared showing reduced levels at 15m interval. Monthly records shall be maintained in respect of each stock of CWR. Rejects shall be disposed as per conditions in environmental clearance.

(c) Disposal of CWR: Owners/deemed owners shall carry out disposal of CWR by: (i) prioritizing conservation – extraction of energy from the HCV rejects as a first priority; (ii) exploring alternate use of washery rejects as a second priority; and (iii) dumping of washery rejects in mine voids / low lying areas in environment friendly manner.

(d) All coal mining companies should identify and make a list of abandoned mine voids / running mines suitable for dumping of rejects and submit the same to Coal Controller's Organisation ("**CCO**"). The list of such mines shall be updated annually by the coal companies.

(e) The linkage holders drawing coal under the long-term linkage as per National Coal Distribution Policy ("**NCDP**") / Fuel Supply Agreements ("**FSA**") and the coal block owners (allotment route) will be solely responsible for efficient use of coal for the specified purpose as per the FSA / allotment order. If coal is washed in a third party washery, such linkage holders/block owners and in case any agreement is signed with washery operator as mentioned above, the said washery operator (deemed owner) will be responsible for handling and disposal of rejects.

(f) Monitoring and control: Subsequent to grant of permission for disposal of reject under any of the three routes, CCO may carry out inspection of concerned washery. CCO shall carry out regular/surprise inspections of washeries and sites of reject handling to check efficacy of handling and disposal of rejects. Cost of all sampling and testing out carried out by CCO shall be borne by the owner/deemed owner.

It has also been clarified that the contents of the present policy shall not: (i) absolve the owners / deemed owners from fulfilling the various statutory requirements under other applicable statutes and obligations under various agreements executed with the MoC / coal companies; or (ii) place any restrictions on various statutory bodies / state authorities / coal companies in discharging their duties with regard to coal washeries under respective statutes / agreements.

The Ministry of Power ("**MoP**") has, vide its letter dated 04.06.2021, sought comments from certain key stakeholders on the Discussion Paper on 'Re-designing the Renewable Energy Certificate ('REC') Mechanism ("**REC Discussion Paper**") by 25.06.2021. The REC Discussion Paper proposes the following aspects for redesign of REC mechanism for consideration, *inter alia*:

(a) Validity period of RECs: Floor and forbearance price**:** The REC validity period may be removed. Validity of REC would be perpetual, i.e. till it is sold. Consequently, the floor and forbearance prices would not be required to be specified as REC holders would have complete freedom to decide the timing to sell.

(b) Period for which the RECs are to be issued to renewable energy ("**RE**") generators: The RE generators who are eligible for RECs will be eligible for issuance of RECs for 15 years from the

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date of commissioning of the projects. The existing RE projects that are eligible for RECs would continue to get RECs for 25 years.

(c) Promotion of new and high-cost technologies in RE and the provision of multiplier for issuance of RECs: The concept of technology multiplier can be introduced for promotion of new and high-priced RE technologies, which can be allocated in various baskets specific to technologies depending on maturity. The concept of negative list and sunset clause may also be considered for various technologies depending upon their maturity level. Any RE technologies which need to be promoted may be identified say 2 years in advance. For such RE projects, at least 15 years' policy visibility would be provided to attract investments and promotion of such technologies in RE sector. However, these conditions would be applicable only to new RE projects, and not RE projects which have already been commissioned.

(d) Incentivising obligated entities for procurement of RE power beyond renewable purchase obligation ("**RPO**"): Following opinions are under consideration: (i) Only distribution companies ("**DISCOMs**") to be issued RECs for quantum beyond RPO compliance, as per the prevalent practice; or (ii) RECs can be issued to the obligated entities which purchase RE power beyond their RPO compliance, similar to the provisions for the existing DISCOMs. This will incentivise the obligated entities to not only achieve RPO but also go beyond the RPO level. This would facilitate and promote REC market as well.

(e) No REC to be issued to the beneficiary of the concessional charges or waiver of any other charges: Anyone that gets any concession, i.e. waiver of transmission charges or preferential banking charges, etc. should not be given the REC. The Forum of Regulators may define concessional charges for denying the RECs. The small buyers can bank on the traders for buying RECs as an ease of purchase. This will ensure that even small buyers, who find it difficult to trade in REC market, will be able to fulfil their RPO. Trade in REC will be in addition to trade in power exchange.

Ministry of Power seeks comments from key stakeholders on Discussion Paper on 'Market Based Economic Dispatch (MBED)'

The MoP has, vide letter dated 01.06.2021, sought comments from certain key stakeholders on the Discussion Paper on 'Market Based Economic Dispatch (MBED)' by 30.06.2021. The proposed market-based economic dispatch ("**MBED**") mechanism would be a key step in enabling uniform clearing price for procurement of electricity and transitioning towards a "One Nation, One Grid, One Price" phenomenon. The MBED framework was proposed in this backdrop in a discussion paper released by the Central Electricity Regulatory Commission ("**CERC**") in December 2018, with substantial system cost savings, which would benefit end consumers. It would also pave the way for wider market reforms like introduction of co-optimization of ancillary services with energy, capacity market and increased renewable energy integration.

The paper, based on inputs from key stakeholders on the subject, outlines a phased introduction of MBED with Phase 1 involving only the thermal fleet of NTPC to test the efficacy of the MBED mechanism, identifying deficiencies or potential issues that need to be addressed prior to a nation-wide rollout, familiarizing all key stakeholders with the framework and allowing for necessary infrastructure and systems to be built out and tested before scale up. The MoP intends to hold wider consultations with all States to arrive at a consensual way forward on implementing Phase 1 of MBED from 01.04.2022. The proposed MBED framework is expected to function on a day-ahead time horizon and enable scheduling and dispatch of all generation on economic principles, subject to plant and network constraints. The salient features of the MBED mechanism in day-ahead horizon are as follows:

(a) Pooling of buy / sell bids: Sellers and buyers submit their offers and bids on a day ahead basis. Offers and bids (quantum and price) are pooled.

(b) Price discovery, scheduling and dispatch: National merit order stack is prepared. Market clearing price ("**MCP**") is discovered as per common merit order for each scheduling and time block of upcoming day.

(c) Payments and settlement: Cleared buyers would pay MCP to the power exchange which will in turn pay the MCP to the cleared sellers. Final settlement would be as per contract for the portion of demand cleared in relation to contracted MW. Gains realized due to URS sale will be shared with beneficiaries as stipulated by the CERC. The buyers would still continue to pay the fixed costs outside the market.

CERC invites comments from stakeholders on the Draft CERC (Ancillary Services) Regulations, 2021

The Central Electricity Regulatory Commission ("**CERC**") has, vide public notice dated 29.05.2021, invited comments from stakeholders on the Draft CERC (Ancillary Services) Regulations, 2021 ("**Draft Regulations**") by 30.06.2021. The Draft Regulations would be applicable to regional entities, including entities having energy storage resources and demand side resources qualified to provide Ancillary Services ("**AS**") and other entities as provided. The salient features of the Draft Regulations are as follows, *inter alia*:

(a) The Draft Regulations aim to provide mechanisms for procurement, through administered as well as market-based mechanisms, deployment and payment of AS for maintaining the grid frequency close to 50 Hz and restoring the grid frequency within the allowable band as specified in the CERC (Indian Electricity Grid Code) Regulations, 2010 ("**Grid Code**") and for relieving congestion in the transmission network, to ensure smooth operation of the power system, and safety and security of the grid.

(b) The Draft Regulations define 'Ancillary Service' in relation to power system operation, as the service necessary to support the grid operation in maintaining power quality, reliability and security of the grid and includes primary reserve AS, secondary reserve AS, tertiary reserve AS, active power support for load following, reactive power support, black start and such other services as defined in the Grid Code.

(c) 'Primary Reserve Ancillary Service' has been defined as the AS which immediately comes into service through governor action of the generator or through any other resource in the event of sudden change in frequency. 'Secondary Reserve Ancillary Service' ("**SRAS**") has been defined as the AS comprising SRAS-Up and SRAS-Down, which is activated and deployed through secondary control signals. 'Tertiary Reserve Ancillary Service' ("**TRAS**") has been defined as the AS comprising TRAS-Up and TRAS-Down and consists of spinning reserve or non-spinning reserve, which responds to despatch instructions from the nodal agency, i.e. National Load Despatch Centre ("**NLDC**").

(d) NLDC will be obligated to estimate the quantum of requirement of SRAS and TRAS, in coordination with regional load despatch centres and state load despatch centres, for such period and based on such methodology as specified in the Grid Code. NLDC will be required to re-assess the quantum of requirement of SRAS and TRAS on day-ahead basis and incremental requirement, if any, on real time basis. The requirement of SRAS is to be estimated on regional basis.

(e) Accounting of SRAS and TRAS will be done by the Regional Power Committee on a weekly basis, based on SCADA data and on interface meter data and schedules, respectively. Deviation of AS provider in every 15 minutes time block shall be calculated as per prescribed formula and settled as per the procedure of CERC (Deviation Settlement Mechanism and related matters) Regulations, 2014. Deviation from schedule by the AS provider shall be settled first against the AS schedule. No transmission charges or transmission losses or transmission deviation charges shall be payable for SRAS and TRAS.

(f) NLDC will be required to issue the Detailed Procedure on the operational aspects of SRAS and TRAS, after stakeholders' consultation within a period of 3 months of notification of the regulations and submit the same for information to the CERC.

(g) The Deviation and Ancillary Service Pool Account will be charged for: (i) the full cost of despatched SRAS-Up including the variable charge / energy charge / compensation charge for every time-block on a regional basis as well as the incentive for SRAS, payable to the concerned SRAS Provider; and (ii) the full cost towards TRAS-Up including the charges for the quantum cleared and despatched and the commitment charge for the quantum cleared but not despatched.

(h) The account will receive credits for: (i) payments made by SRAS Provider for the SRAS-Down despatched; and (ii) payments made by TRAS Provider for the TRAS-Down despatched.

(i) Settlement of payment liabilities in respect of the AS providers will be done directly by NLDC on a weekly basis based on the accounts prepared by the Regional Power Committee. No retrospective settlement of variable charge or compensation charge will be undertaken.

MERC holds that consumer of an individual captive plant would not be entitled to pay additional surcharge to MSEDCL

The Maharashtra Electricity Regulatory Commission ("**MERC**"), vide order dated 03.06.2021 in *Exide Industries Limited* v. *Maharashtra State Electricity Distribution Co. Ltd* (Case No. 10 of 2021), held that since the petitioner was a consumer of an individual captive plant, it would not be entitled to pay additional surcharge ("**ASC**") to Maharashtra State Electricity Distribution Co. Ltd ("**MSEDCL**") as per the principles laid down by MERC in order dated 12.09.2018 in Case No. 195 of 2017 ("**MERC Order**"). The petitioner had claimed that it is a sole captive user of the power plant - holding 27.19% equity shareholding - and therefore it is a consumer of a non-group captive power plant as per provisions of the Electricity Rules, 2005 ("**2005 Rules**"). Such levy and recovery of ASC was illegal in terms of the ruling of MERC in Case No. 195 of 2017 which provided that ASC is leviable only on the consumers of group captive power plants and not on the individual or non-group captive power plant.

As per MSEDCL, there is no concept of 'sale and purchase' of power in captive transaction which is meant for self-use only. Since there is 'sale and purchase' of power happening between the petitioner and generator under the camouflage of "group captive / captive generation", the MERC should hold and declare that the commercial arrangement of the petitioner does not fall under the purview of Section 9 of the 2003 Act (i.e., captive arrangement), and that it should instead be treated under Section 10 (i.e. supply by independent power producer, a non-captive generating plant, to open access consumer). The MERC did not go into the merits of such issue raised and the petition was decided dehors the adjudication of such issue. The MERC however gave MSEDCL liberty to file a separate petition (making the captive consumers, the respondents to the petition) where the issue raised by it could be adjudicated in a holistic manner vis-à-vis the relevant provisions of the 2003 Act, 2005 Rules and the open access regulations notified by the MERC.

On a perusal of the 2005 Rules and the judgment of the Appellate Tribunal for Electricity in its judgment dated 17.05.2019 in Appeal No. 02 of 2018 and Appeal No. 179 of 2018 (*M/s Prism & M/s BLA Power v. MPERC*), the MERC held that group captive arrangement would be the arrangement wherein there are multiple users of the given captive power plant such as association of persons, registered co-operative society or special purpose vehicle. Therefore, MERC rejected MSEDCL's contention that if there are two different entities - one generator and one captive user - such arrangement has to be treated as group captive arrangement. MERC agreed that the 2005 Rules themselves presuppose two separate legal entities - one entity which has issued the shares and owns the generating station, and the other entity which is an equity shareholder / captive user. MERC noted that the petitioner is a sole consumer or captive user of the power plant of the generator and owning not less than 26% equity in the power plant established by the generator. Entire 100% electricity generated in the power plant was getting consumed by the petitioner and it was complying with the minimum 51% consumption criteria. Hence, MERC found that twin-conditions of Rule 3 are complied with by the generator with petitioner as the captive user. MERC also noted that the petitioner (which is a single legal entity) is the sole beneficiary of the power plant and thus in spite of existence of three different consumers at three different locations, the power plant needs to be treated as the single user captive power plant and not a multi-user captive power plant with co-operative society or association of persons.

The MERC held that the petitioner is a consumer of an individual captive power plant and hence it would not be entitled to pay ASC as per the principles laid down in the MERC Order. MSEDCL was directed to not levy any ASC on the petitioner in the future and also directed to refund the ASC paid by the petitioner in the past. However, no interest would be payable to the petitioner on such refund.

APERC notifies APERC (Licensees' Standards of Performance) Third Amendment Regulations, 2021

The Andhra Pradesh Electricity Regulatory Commission ("**APERC**"), vide notification dated 04.06.2021, has notified the APERC (Licensees' Standards of Performance) Third Amendment Regulations, 2021 ("**Third Amendment**"). The Third Amendment pertains to the manner of payment compensation amount under Schedule II of APERC (Licensees' Standards of Performance) Regulations, 2004. The salient features of the Third Amendment are as follows:

(a) For failure to meet the standards of performance in respect of service areas in respect of: (i) normal fuse-off calls; (ii) processing of application and intimation of relevant charges payable for new connection / sanction of additional load / demand; (iii) release of new connection / additional load upon payment of all charges; (iv) wrongful disconnection of service connection / levy of reconnection charges without disconnection, the DISCOMs shall pay the compensation amount to the complaining consumers automatically.

(b) DISCOMs are required to submit reports to the APERC on quarterly basis indicating the cases in which payment of compensation was paid and the cases in which compensation was denied clearly mentioning the reasons for failure to meet the guaranteed standards of performance for scrutiny of the APERC. On such scrutiny, APERC will decide whether denial is proper or not. In the latter event, APERC may direct the licensee to pay compensation.

(c) During force majeure events, the DISCOMs are required to issue public notices, clearly specifying the intended date within which the services will be restored and shall submit reports to APERC about the force majeure events within 30 days of the occurrence of such events. If services are not fully restored within the intended date mentioned by the DISCOMs, consumers shall be compensated for the same. However, the DISCOMs may be exempted from the payment of compensation if APERC is satisfied that the failure in restoring the services within the intended date is due to reasons beyond DISCOMs' control.

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