July 09, 2021

Legal Updates

Ministry of Power issues clarification on continuance or exit of Discoms from a power purchase agreement after completion of term of the agreement.

Ministry of Power ("**MoP**") issued a clarification vide its letter dated 05.07.2021 to its earlier letter dated 22.03.2021 vide which MoP had issued guidelines for enabling distribution companies ("**Discoms**") to either continue or exit from a power purchase agreement ("**PPA**") after completion of the term of the PPA and allow flexibility to the generators to sell power in any mode after State / Discom exit from PPA.

MoP has clarified that the word *'entire'* in clause 2(VIII) of the said guidelines issued on 22.03.2021 means the entire allocated power from the project which has completed 25 years from the date of commissioning of the project. Clause 2(VIII) reads as follows:

"In case of Bulk Power Supply Agreement (BPSA) also, the State/Discoms may relinquish entire allocated power from such projects which have completed 25 years since commissioning of the project. Power supply from other projects shall continue as per the terms of the PPA."

MoP further clarified that clause 2(VIII) read with clause 2(I) and 2(II) stipulates that the first right to avail power from central generating stations, even beyond the term of PPA i.e., on completion of 25 years from the date of commissioning of the plant or a period specified in the PPA will continue to be with the State / Discoms with whom the PPA was signed. Accordingly, the State may choose to continue to take power from project(s) under clause 2(VIII) even after completion of 25 years from the date of commissioning of the project or exit from a project after completion of 25 years from the date of commissioning of the project.

Ministry of Power amends Electricity (Rights of Consumers) Rules, 2020

MoP, vide notification dated 28.06.2021, issued Electricity (Rights of Consumers) Amendment Rules, 2021 ("**Amendment Rules**") that state that the arrangements for gross metering, net metering and net billing or net feed in shall be as determined by the state commissions. Notably, it also introduces net metering of rooftop solar installations for loads up to 500 kW or up to the sanctioned load, whichever is lower and time-of-day tariffs - which are important policy drivers for rooftop solar adoption.

Moreover, in case of net-metering / net-billing or net feed-in, the distribution licensee may install a solar energy meter to measure the gross solar energy generated from the grid-tied rooftop solar photovoltaic system for the purpose of RPO credit, if any. The commissions may also permit gross metering for prosumers who would like to sell all the generated solar energy to the distribution licensee, instead of availing the net metering / net-billing or net feed-in facility. The feed-in tariff for gross metering shall be decided by the commission according to tariff regulations. Click here to access more information regarding the Amendment Rules.

MNRE issues O.M. dated 29.06.2021 regarding "Time extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption die to second surge of COVID-19"

Ministry of New and Renewable Energy ("**MNRE**") vide its earlier Office Memorandum ("**O.M.**") dated 12.05.2021 had provided for a mechanism for claiming time-extension, on account of second surge of COVID-19. In light of improvement in the COVID-19 situation in the country and in order to facilitate the ease of doing business and as a measure of relief to RE projects, it has now been decided that the period of disruption shall be 01.04.2021 to 15.06.2021 (both dates inclusive) and that the same shall be allowed as time extension to RE projects, being implemented through Implementing Agencies designated by MNRE.

APTEL holds that reduction of trading margin in PPA and power supply agreement negotiated by SECI is beyond the jurisdiction of state commissions

In *Solar Energy Corporation of India* v. *Delhi Electricity Regulatory Commission* (Appeal No. 52 and 70 of 2021), Solar Energy Corporation of India ("**SECI**") had assailed orders of Delhi Electricity Regulatory Commission and Punjab State Electricity Regulatory Commission wherein the trading margin was reduced from a negotiated Rs. 0.07/kWh to Rs. 0.02/kWh.

Vide order dated 02.07.2021, the Appellate Tribunal for Electricity ("**APTEL**") set aside the de-escalation of the trading margin and held that orders disturbing the trading margin fixed by the regulatory framework put in position by the Central Electricity Regulatory Commission ("**CERC**") have been passed by the State Commissions without authority in law. Since SECI has been granted inter-state trading license by the CERC for undertaking trading in entire territory of India in terms of section 79(1)(e) read with Section 14 and Section 15 of the Electricity Act, 2003 ("**EA 2003**"), the matters of tariff will be governed by Section 79 (1) (b) of the EA 2003 as opposed to Section 86.

The orders of the state commissions are prejudicial to freedom of contract allowing the parties to mutually agree on the trading margin. APTEL relied on the finding in *Solar Energy Corporation of India Limited* v. *Ministry of New and Renewable Energy & Others* (Petition no.204/AT/2019) that CERC (Fixation of Trading Margin) Regulations, 2019 do not provide for any trading margin for long term transactions and, therefore, it is up to the contracting parties to mutually agree on trading margin.

APTEL holds that presence of Member (Legal) is mandatory for adjudication over disputes or grant of relief or issuance of

The APTEL in *Gail (India) Ltd.* v. *Petroleum and Natural Gas Regulatory Board and Ors.* (Appeal no. 152, 153, 161 and 236 of 2020 and 6 of 2021) vide order dated 07.07.2021 considered the salience of the Legal Member of Petroleum and Natural Gas Regulatory Board ("**PNGRB**") and made the following observations:

(a) The requirement of presence of, and participation by, Member (Legal) is unequivocally mandatory in the process of adjudication over disputes or grant of relief or issuance of orders permissible under Section 24 of PNGRB Act, 2006.

(b) In all matters other than those covered by preceding para, the issue may be dealt with by the PNGRB for taking such decisions or issuance of such orders as are deemed appropriate collectively in a composition that may or may not include Member (Legal) but not to exercise

orders under the PNGRB Act, 2006

jurisdiction, powers and authority mentioned in Section 24 of PNGRB Act, though adhering to the quorum specified in the Regulations.

(c) Exercise of jurisdiction, powers, and authority by the Board in absence of Member (Legal) causes prejudice to the disputant parties and, therefore, is not saved by Section 9 of the PNGRB Act.

APTEL upholds imposition of parallel operation charges by MPERC on captive generation plants

APTEL in *Hindalco Industries Ltd.* v. *MPERC and Ors.* [Appeal No. 207, 208, 219, 220, 295 of 2016 and 239 of 2017] vide order dated 02.07.2021 upheld the imposition of parallel operation charges ("**POC**") at Rs. 20/KVA per month on the installed capacity of the captive generating plants ("**CGP**") by Madhya Pradesh Electricity Regulatory Commission ("**MPERC**") in Suo Motu Petition No. 73/2012.

In terms of the said order, APTEL observed that state electricity regulatory commissions have the power, jurisdiction and authority of law to impose POC. It was clarified that the POC is meant to consequently compensate the transmission licensee. Moreover, reduced POC rate of Rs. 20/KVA per month on the installed capacity of the CGPs balances the issue of adequate compensation of state utilities as against the legislative object to promote CGPs.

APERC issues amendment to APERC (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) Regulations, 2005

Andhra Pradesh Electricity Regulatory Commission ("**APERC**") vide common order dated 30.06.2021 in O.P. No. 33 of 2020 and O.P. No. 35 of 2020 issued amendment to APERC (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) Regulations, 2005. The amendments shall come into force with effect from the quarter commencing from 01.04.2021.

The said amendment is concerning the specification of fuel & power purchase cost adjustment formula ("**FPPCA**") for pass-through of power purchase cost variation on quarterly basis instead of annually. The distribution licensee shall be entitled to recover from or refund to the consumers, as the case may be, the FPPCA as approved by the APERC from time to time.

Bombay High Court dismisses challenge to constitutional validity of Section 11 of TRAI Act as well as the Principal 2017 Regulations and the 2020 Amendments issued by TRAI

The Hon'ble High Court of Bombay has, vide judgment dated 30.06.2021 in *Film and Television Producers Guild of India Ltd. v. Union of India*, dismissed the challenge to constitutional validity of:

(a) Section 11 of the Telecom Regulatory Authority of India Act, 1997 ("**TRAI Act**") (so far as it relates to broadcasting services);

(b) Telecommunication (Broadcasting and Cable) Services Interconnections (Addressable Systems) Regulations, 2017, Telecommunication (Broadcasting and Cable) Standard of Quality of Service and Consumer Protection (Addressable Systems) Regulations 2017 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 (collectively, "**Principal 2017 Regulations**");

(c) Telecommunication (Broadcasting and Cable) Services Interconnections (Addressable Systems) (Second Amendment) Regulations, 2020, the Telecommunication (Broadcasting and Cable) Standard of Quality of Service and Consumer Protection (Addressable Systems) (Third Amendment) Regulations 2020 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 ("**Tariff Amendment Order**") (collectively, "**2020 Amendments**").

However, the Bombay High Court has held the second twin condition or 'average test' in the third proviso to Clause 3(3) of the Tariff Amendment Order - which provides that the maximum retail price ("**MRP**") per month of any a-la-carte pay channel, forming part of a bouquet, shall in no case exceed three times the average MRP per month of a pay channel of that bouquet – to be arbitrary, being contrary to the mandate of Section 11(4) of the TRAI Act of ensuring transparency and violative of the petitioner broadcasters' fundamental rights under Article 14 of the Constitution of India.

The main findings of the Bombay High Court in the aforesaid judgment are as follows:

(a) The three-judge bench decision of the Hon'ble Supreme Court in *Secy., Ministry of Information Broadcasting v. Cricket Association of Bengal*, (1995) 2 SCC 161 ("**MIB v. CAB**") has distinguished the judgments in *Sakal Case Papers*, *Bennett Coleman* and *Indian Express Newspapers* which dealt with print media, and holds that since broadcasting involves use of airwaves which is public property, public interest is an inbuilt restriction apart from the restrictions in Article 19(2) and that airwaves are required to be controlled and regulated in public interest and have to be used for the benefit of the society at large. The High Court therefore dismissed the

contention of the petitioners that broadcasting services cannot be regulated as that would infringe their right to free speech and expression under Article 19(1)(a); and that there can be no fixation of rates of broadcasting services under the Section 11(2) or Section 11(1)(b)(iv) of the TRAI Act which regulates sharing of revenue amongst service providers.

(b) Even if price fixation or reasonable stipulations as prescribed by TRAI may affect circulation to some degree, that by itself would not be an infringement of the broadcasters' rights to freedom of speech and expression and the right of the broadcasters would be required to be "balanced" with the rights the citizens to access television channels at reasonable rates.

(c) Section 11 of the TRAI Act (so far as it relates to broadcasting services) does not violate broadcasters' fundamental rights under Article 19(1)(a), 14, 19(1)(g) and 21 of the Constitution of India. Section 11 also does not suffer from the vice of excessive delegation.

(d) The TRAI Act is a beneficial piece of legislation and must be interpreted as such. The present petitions have been filed belated only in the year 2020 (so far as the challenge to Section 11 is concerned). In the event the challenge to Section 11(2) of the petitioners is upheld, every single instance of tariff fixation by the TRAI for the last 17 years will be liable to be struck down. The present petitions have been filed only after the impugned 2020 Amendments were to come into force, by incorporating a challenge also to Section 11, only as an afterthought.

(e) The Supreme Court in *Star India Pvt. Ltd. vs. DIPP*, (2019) 2 SCC 104 has already held that the Principal 2017 Regulations are *intra vires* the TRAI Act. The Principal 2017 Regulations cannot be held to be unreasonable or manifestly arbitrary or violative of broadcasters' fundamental rights under Article 14, 19(1)(a), 19(1)(g) and 21 of the Constitution. The stipulations prescribed are reasonable restrictions within the meaning of Article 19(6) of the Constitution.

(f) A tariff order, which is essentially a price-fixation and a regulatory exercise by TRAI, is not just an administrative order. A tariff order has more of a legislative character, even assuming it may partake the character of an administrative order in certain instances. The contention of the petitioners that a tariff order is not law within meaning of Article 19(2) and 19(6) of the Constitution and therefore no restrictions can be imposed by a tariff order which affect the fundamental rights of the petitioners under Article 19(1)(a) and 19(1)(g) was thus rejected.

(g) With respect to cap of Rs. 12/- on channels forming part of bouquets, the High Court found that TRAI had analyzed the data, considered the comments of the stakeholders, applied its mind and given cogent reasons. Merely because the cap had been reduced from Rs. 19/- to Rs. 12/- for a channel to form part of a bouquet would by itself not mean that the decision is unreasonable or arbitrary. The cap of Rs.12/- is in the interest of the consumers. The Madras High Court in *Star India vs. DIPP* has held that it is not for the court to examine price fixation, which finding has not been interfered by the Supreme Court.

(h) With respect to the first twin condition or 'aggregate test' which provides for cap on discount of 33.33% on the sum of à-la-carte prices of channels which can be offered on bouquets, the Bombay High Court noted that the Madras High Court had found the 15% cap to be arbitrary. In the present case, the discount was capped at 33.33%, which is less stringent. The fact that TRAI had filed its own SLP after the judgment of the Supreme Court in *Star India v. DIPP*, challenging the finding of Madras High Court that the capping of discounts of 15% is arbitrary and that the said SLP was withdrawn, cannot be a factor which can held against TRAI in the challenge to the 2020 Amendments. The withdrawal of the SLP cannot be considered as an expression on merits of the case by the Supreme Court. The manner in which bouquets are being pushed by manipulating the prices of the à-la-carte channels results in perverse pricing and deprive the subscribers of making an informed and real choice. TRAI has only stipulated the maximum discount that can be given by the broadcasters qua the sum of the a-la-carte prices of the channels in a bouquets. The 33% cap on discount of 33.33% on sum of à-la-carte prices of channels that form a bouquet cannot thus be said to be unreasonable or arbitrary.

(i) The second twin condition (average test) did not form part of the consultation paper dated 16.08.2019 issued by TRAI and thus fails the test of transparency. Such condition was held to be manifestly arbitrary and violative of the petitioners' fundamental rights under Article 14 of the Constitution.

Further, on the request of the petitioners, the Bombay High Court directed that ad-interim order dated 09.10.2020 which provided that no coercive steps or measures will be taken by TRAI for non-implementation of the 2020 Amendments was to continued for a period of 6 weeks from 30.06.2021.

MCA relaxes time for filing forms related to creation or modification of charges

In view of the continued impact of COVID-19, the Ministry of Corporate Affairs ("**MCA**") vide its circular dated 30.06.2021 has further granted relief in respect of filing of forms related to creation / modification of charges under the Companies Act, 2013 ("**CA 2013**") by extending the timelines as specified in earlier circular dated 03.05.2021. Accordingly, the figures "31.05.2021" and "01.06.2021" wherever they appear in the aforesaid previous circular has been substituted with, "31.07.2021" and "01.08.2021", respectively.

MCA relaxes levy of additional fees in filing of certain forms under the CA 2013 and LLP Act, 2008

The MCA has, vide general circular dated 30.06.2021 has decided to grant additional time up to 31.08.2021 to companies / limited liability partnerships to file forms under the CA 2013 / Limited Liability Partnership Act, 2008 ("**LLP Act, 2008**") other than the charge related forms (CHG-1 Form, CHG—4 Form, CHG-9 Form) which were due for filing during 1.04.2021 to 31.07.2021 without any additional fees, in continuation of its earlier circular dated 03.05.2021.

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