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Legal Updates

MoP notifies the Electricity (Late Payment Surcharge) Rules, 2021

The Ministry of Power ("**MoP**"), vide its notification dated 22.02.2021, has issued the Electricity (Late Payment Surcharge) Rules, 2021 ("**LPS Rules**"). The LPS Rules shall be applicable for payments to be made in pursuance of: (i) power purchase agreements ("**PPA**"), power supply agreements ("**PSA**") and transmission service agreements ("**TSA**") in which tariff is determined under Section 62 of the Electricity Act, 2003 ("**Act**"); and (ii) PPAs, PSAs and TSAs that become effective after the LPS Rules come into force, in which tariff is determined under Section 63 of the Act. The salient features of the LPS Rules are as follows, *inter alia*:

(a) Definitions of "base rate of Late Payment Surcharge" and "due date" provided.

(b) "Late Payment Surcharge" ("**LPS**") has been defined as the charges payable by a distribution company to a generating company or electricity trader for power procured from it, or by a user of a transmission system to a transmission licensee on account of delay in payment of monthly charges beyond the due date.

(c) LPS shall be payable on the payment outstanding after the due date at the base rate of LPS applicable for the period for the first month of default, provided that the rate of LPS for the successive months of default shall increase by 0.5% for every month of delay, provided that the LPS should not be more than 3% higher than the base rate at any time. Further, the rate at which LPS is payable cannot be higher than the rate specified in the agreement for purchase or transmission of power, if any.

(d) If a distribution licensee has any payment including LPS outstanding against a bill after the expiry of 7 months from the due date of the bill, it shall be debarred from procuring power from a power exchange or grant of short-term open access till such bill is paid.

(e) All payments by a distribution licensee to a generating company or a trading licensee for power procured from it or by a user of a transmission system to a transmission licensee shall be first adjusted towards LPS and thereafter, towards monthly charges, starting from the longest overdue bill.

CERC approves Revised Procedure For "Grant of Connectivity to Projects based on Renewable Sources to Inter-State Transmission System"

The Central Electricity Regulatory Commission ("**CERC**") approved the Revised Procedure for "Grant of Connectivity to projects based on renewable energy sources to inter-State transmission system" ("**Revised Procedure**"). The Revised Procedure shall come into force, and the Detailed Procedure for "Grant of Connectivity to projects based on renewable sources to inter-State transmission system" which came into force with effect from 15.5.2018 ("**Pre-revised Procedure**") shall cease to have effect, from 20.02.2021. Some of the salient features of the Revised Procedure are as follow:

(a) Under Clause 5.1(1), for an entity which has been granted Stage-II connectivity under the Pre-revised Procedure, if action has already been initiated for revocation of Stage-II connectivity or encashment of bank guarantee prior to the issuance of the Revised Procedure, then the same shall be completed under the Pre-revised Procedure.

(b) Under Clause 5.1(2), for an entity which has been granted Stage-II connectivity under the Pre-revised Procedure, action initiated for revocation of Stage-II connectivity or encashment of bank guarantee after the issuance of the Revised Procedure, then the same shall be as per the Revised Procedure.

(c) As per Clause 5.1(3), the connectivity bank guarantee ("**Conn-BG**") to the extent of Rs. 50 lakhs submitted under Pre-revised Procedure shall be considered as Conn-BG1 and the balance amount shall be considered as Conn-BG2. In the event of encashment of Conn-BG under Clause 10.8 of the Revised Procedures, if the associated bay(s) at the inter-state transmission system ("**ISTS**") sub-station are being constructed by Stage-II grantee itself, an amount corresponding to Conn-BG1 shall be forfeited and the balance amount under Conn-BG2 shall be refunded. However, if the associated bay(s) at the ISTS sub-station are being constructed by ISTS licensee, amount corresponding to both Conn-BG1 and Conn-BG2 shall be forfeited and any excess amount submitted as Conn-BG under the Pre-revised Procedure shall be refunded.

(d) Under 1st proviso of Clause 5.3, an option has been provided to the applicants to construct the associated bay(s) at their own cost, subject to approval from CTU and agreement with the transmission licensee owning the ISTS sub-station.

(e) Under 2nd proviso of Clause 7.3, if capacity at the location where Stage-I connectivity is granted becomes unavailable at a later stage, an alternate location shall be allocated at the time of grant of Stage-II connectivity.

(f) As per Clauses 7.8 and 10.11, if the connectivity with ISTS substation remains the same, then the change in the location of generating project shall not be construed as material change in location under 1st proviso of Regulation 8(1) of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009.

(g) Under Clause 9.2.1, the entities who have entered into a power purchase agreement with a renewable energy implementing agency or a distribution licensee or an authorized agency on behalf of distribution licensee consequent to tariff based competitive bidding, are also considered to be eligible for grant of Stage-II connectivity.

(h) Under Clause 11.4, on a specific request of Stage-II connectivity grantee(s) and for the purpose of optimal utilisation of transmission infrastructure, CTU may, after consultation with the Stage-II connectivity grantee(s) concerned, carry out rearrangement or shifting of the Stage-II connectivity across different bay(s) of the same ISTS sub-station.

(i) Under Clause 13.1, Stage-II connectivity grantee has the option to apply additional quantum of Stage-II connectivity in its dedicated transmission line and associated bay as per FORMAT-RCON-E. Such Stage-II connectivity grantee shall also simultaneously apply for grant of corresponding Stage-I connectivity, as required.

The CERC, vide notification dated 19.02.2021, issued the CERC (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2021 ("**Second Amendment**"). The Second Amendment shall come into force from the date of its notification in the Official Gazette and shall be applicable for the five-year tariff period from 01.04.2019 to 31.03.2024 except amendment in Regulation 6 and Regulation 59 of the CERC (Terms and Conditions of Tariff) Regulations, 2019 ("**Principal Regulations**"), which shall be applicable from the date of notification of the Second Amendment in the Official Gazette. Some of the salient features of the Second Amendment are as below:

(a) These regulations shall apply in all cases where a generating company has the arrangement for supply of coal or lignite from the integrated mine(s) allocated to it, for one or more of its specified

CERC issues the CERC (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2021

end-use generating stations, whose tariff is required to be determined by the appropriate commission under Section 62 of the Electricity Act, 2003 ("**Electricity Act**") read with Section 79 thereof.

(b) The Second Amendment, *inter alia*, consists of new clauses containing definitions of terms, namely, 'Annual Target Quantity, 'Capital Cost', 'Date of Commercial Operation' 'Date of Commencement of Production', 'Escrow account', 'Existing Project', 'Loading Point', 'Mine Infrastructure', 'Mining Plan' or 'Mine Plan' etc.

(c) Regulation 5(3) is added to the Second Amendment defining the date of commercial operation in case of integrated mine(s), to mean the earliest of — i) the first date of the year succeeding the year in which 25% of the Peak Rated Capacity as per the Mining Plan is achieved; or ii) the first date of the year succeeding the year in which the value of production estimated in accordance with Regulation 7A of these regulations, exceeds total expenditure in that year; or iii) the date of two years from the date of commencement of production.

(d) The Second Amendment stipulates for regulations w.r.t. supply of coal or lignite prior to the date of commercial operation of integrated mine. It further prescribes the format of the petition to be filed before the commission for determination of the input price of coal or lignite from the integrated mine(s) containing.

(e) Regulation 11(2) allows the generating company undertaking any additional capitalization in integrated mine(s) on account of change in law events or force majeure conditions, to file petition for in-principle approval for incurring such expenditure, after intimating the beneficiaries, along with underlying assumptions, estimates and justification for such expenditure, if the estimated expenditure exceeds 10% of the admitted capital cost of the integrated mine(s) or Rs.100 crore, whichever is lower.

(f) Regulation 36 provides that the generating company shall, after the date of commercial operation of the integrated mine(s) till the input price of coal is determined by the commission under these regulations, adopt the notified price of Coal India Limited commensurate with the grade of the coal from the integrated mine(s) or the estimated price available in the investment approval, whichever is lower, as the input price of coal for the generating station, the difference of which shall be adjusted in accordance with Clause (4) of such regulation.

APERC proposes certain amendments to the APERC Forecasting, Scheduling and Deviation Settlement of Wind and Solar Generation Regulations, 2017

The Andhra Pradesh Electricity Regulatory Commission ("**APERC**") has, vide order dated 01.03.2021, in the matter of amendments to the APERC Forecasting, Scheduling and Deviation Settlement of Wind and Solar Generation Regulations, 2017 ("**APERC Regulations**") allowed certain amendments to the APERC Regulations which provide for levying and collection of deviation charges from the Qualified Coordinating Agencies ("**QCAs**"). Some of the key amendments allowed are as follows:

(a) With respect to the proposed amendment for levy and collection of deviation charges, the APERC observed that it had adopted a liberal tolerance band of 15% for all the generators while issuing the APERC Regulations, while also allowing virtual pooling which was being implemented since three years. In order to maintain stability of the grid and ensure proper accountability in forecasting by the variable renewable energy ("**VRE**") generators, the APERC observed that the tolerance band needs to be tightened from the present level to a reasonable extent. Accordingly, tightened the error band for deviation from 15% to 10%.

(b) With respect to the proposed amendment for deletion of the definition of the phrase "virtual pooling", the APERC observed that the VRE generators have gained experience with the weather conditions of the state and in forecasting in the state, post the enactment of the APERC Regulations. A sudden change in the deviation settlement from virtual pool concept to an individual generator stage would not be desirable. Further, the point of entry of the pooled VRE generation into the grid and possible first point in the grid that encounters the effect of deviations, is the pooling station or the substation as the case may be. Therefore, as a via media, the APERC allowed aggregation at pooling station level instead of restricting to individual level, as also being followed in all other RE rich states. Deviations of all generators connected to a pooling station / substation would this be settled accordingly. The APERC thus deleted the definition of the phrase from the APERC Regulations.

In light of the pending proceedings before Hon'ble High Court of Andhra Pradesh and the Hon'ble Supreme Court of India ("**SC**") challenging the legal and constitutional validity of the APERC Regulations and the interim order of the Hon'ble High Court to not take any coercive steps on bank

guarantees, the APERC has decided to not give effect to the proposed amendments pending further orders in such writ petition.

SC observes that a petition either under Section 7 or Section 9 of the IBC is an independent proceeding which is unaffected by winding up proceedings that may be filed qua the same company

The SC, vide its judgment dated 01.03.2021 in *A. Navinchandra Steels Pvt. Ltd. v. SREI Equipment Finance Ltd.*, observed that a petition either under Section 7 or Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") is an independent proceeding which is unaffected by winding up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding up proceeding would then take place to the National Company Law Tribunal ("**NCLT**") to be tried as a proceeding under the IBC. Every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country.

The SC rejected the appellant's contention that given Section 446 of the Companies Act, 1956/ Section 279 of the Companies Act, 2013, once a winding up petition is admitted, the winding up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. Under the Companies Act, it is only winding up that can be ordered, whereas under the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management.

Further, the SC observed that Section 7 of the IBC is an independent proceeding which has to be tried on its own merits. A discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the CA 2013 cannot prevail over the undoubted jurisdiction of the NCLT under the IBC once the parameters of Section 7 and other provisions of the IBC have been met. The SC therefore rejected the appellant's contention that SREI has suppressed the winding up proceeding in its application under Section 7 of the IBC before the NCLT and had resorted to Section 7 only as a subterfuge to avoid moving a transfer application before the Bombay High Court in the pending winding up proceeding. The SC therefore dismissed the appeal.

NCLAT holds that bank guarantees can be invoked even during moratorium period issued under Section 14 of the IBC

The National Company Law Appellate Tribunal ("**NCLAT**") has, vide order dated 26.02.2021 passed in *Bharat Aluminium Co. Ltd. v. M/s J.P. Engineers Pvt. Ltd.*, set aside the order of NCLT, Delhi and held that bank guarantees can be invoked even during moratorium period issued under Section 14 of the IBC in view of the amended provision under section 14(3)(b) of the IBC.

The corporate debtor i.e. the Respondent has issued a bank guarantee for ensuring payments to the appellant under their agreement. The Respondent defaulted in making payments and the appellant invoked the bank guarantee. The bank refused the invocation on the ground of enforcement of moratorium under Section 14(1) of the IBC against the Respondent.

The NCLAT observed that the NCLT, Delhi had relied on the judgment of NCLT Ahmadabad in the matter of *Nitin Hashkhmukh Lal Parikh (Diamond Power Transformers) Ltd. v. Madhya Gujarat Vis Company Ltd. & Ors.* wherein it was held that moratorium order passed by an NCLT applies in respect of bank guarantees other than performance bank guarantees furnished by the corporate debtor, in respect of its property since it comes within the meaning of 'security interest'. Therefore, a financial / operational creditor is not entitled to invoke bank guarantees other than that which comes within the purview of performance guarantee, during moratorium period.

The NCLAT observed that the NCLT, Ahmedabad had delivered the aforesaid order on 09.02.2018, whereas Section 14(3)(b) of the IBC – which now provides that the provisions of Section 14(1) of the IBC shall not be applicable to a surety in a contract of guarantee to a corporate debtor - had been substituted with retrospective effect from 06.06.2018. Therefore, such amended provision had not been considered by the NCLT, Delhi while passing the impugned order. The NCLAT further observed that the effect of such amendment had been considered by the SC in *SBI v. V. Ramakrishnan & Ors., (2018) 17 SCC 394* which had held that the amendment to Section 14(3)(b) of the IBC is retrospective. The SC observed that in a majority of cases, personal guarantees are given by directors who are not in management of the companies. The object of the IBC is therefore to not allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt and this is why Section 14 of the IBC is not applied to them.

MCA notifies the Companies (Specification of definitions details) Second Amendment Rules, 2021

The Ministry of Corporate Affairs ("**MCA**") has, vide notification dated 19.02.2021, notified the Companies (Specification of definitions details) Second Amendment Rules, 2021 ("**Rules**") which shall be effective from 01.04.2021. The MCA has intended to exclude certain classes of companies from the definition of 'listed company' as defined under section 2(52) of the CA 2013. Accordingly, a new rule 2A has been inserted which excludes certain classes of companies from the definition of listed companies, which are as follows:

(a) Public companies which have not listed their equity shares on a recognized stock exchange but have listed their:-
   (i) Non-convertible debt securities issued on private placement basis in terms of Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008 ("**SEBI Debt Securities Regulations**"); or
   (ii) Non-convertible redeemable preference shares issued on private placement basis in terms of Securities and Exchange Board of India (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013; or
   (iii) Both categories of (i) and (ii) above;

(b) Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI Debt Securities Regulations; and

(c) Public Companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are exclusively listed on stock exchanges in permissible foreign jurisdictions under Section 23(3) of the CA 2013.

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