November 12, 2021

Legal Updates

Ministry of Power issued letter regarding "Automatic pass through of the fuel and power procurement cost in tariff for ensuring the viability of the power sector"

The Ministry of Power ("**MoP**"), vide its letter dated 09.11.2021, issued clarification regarding automatic pass through of the fuel and power procurement cost in tariff for ensuring the viability of the power sector. MoP had earlier notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 ("**Electricity Rules**") on 22.10.2021 providing for an automatic pass through of impact in cost due to change in law. MoP has clarified that though some States already have a formula for fuel surcharge adjustment, it cannot be treated as an automatic pass through of fuel and power procurement cost in tariff and the same needs approval of State Electricity Regulatory Commissions ("**SERCs**").

Till such time that SERCs prescribe a suitable formula for pass through of fuel and power procurement cost in tariff against change in law / power purchase costs, MoP has directed that the formula provided under the Electricity Rules may be adopted. Distribution companies shall send relevant papers / calculation sheets to SERCs which shall verify and confirm the pass through within 60 days.

Ministry of New and Renewable Energy issues clarification regarding "Time Extension in Scheduled Commissioning Date of Renewable Energy Projects due to second surge of COVID-19"

The Ministry of New and Renewable Energy ("**MNRE**"), in its O.M dated 03.11.2021, has issued clarification regarding "Time Extension in Scheduled Commissioning Date of Renewable Energy ("**RE**") Projects considering disruption due to second surge of COVID-19." MNRE, in its earlier O.M dated 12.05.2021, 29.06.2021, and a clarification dated 15.09.2021 had granted a time-extension of 2.5 months (corresponding to the period from 1st April 2021 to 15th June 2021) to RE projects on account of 2nd wave of COVID-19. Representations have been received by MNRE for further clarification on the issue of change-in-law in the context of the above OMs. MNRE clarified that the change-in-law shall continue to be governed by the provisions of power purchase agreement ("**PPA**") and is to be decided by the Appropriate Commission.

Ministry of New and Renewable Energy issues Order regarding "Temporary disruptions in supply of imported solar PV modules - Special Dispensation under Dispute Resolution Mechanism"

The MNRE, vide its order dated 03.11.2021, has addressed the issue of temporary disruptions in supply of imported solar PV modules on account of various factors. Owing to the same, MNRE received requests for extension in project commissioning timelines and postponement of scheduled date of imposition of Basic Customs Duty ("**BCD**") on import of solar cells and modules. In order to address the same, after considering all time extensions including the extensions given on account of COVID-19, and considering the scheduled date of imposition of BCD on import of solar cells and modules as 01.04.2022, it has been decided that Dispute Resolution Committee ("**DRC**") shall be empowered to look into any additional time extension requirement for projects under implementation through MNRE's Renewable Energy Implementing Agencies ("**REIAs**") and having Scheduled Commissioning Date ("**SCD**") before 01.04.2022.

As per the present provisions of dispute resolution mechanism, the RE developer first approaches the concerned REIA for seeking desired relief. In case the applicant developer is not in agreement with the decision of REIA on the relief sought, the developer has the option of approaching DRC by filing an appeal within 21 days of REIA's order. A fee @1% of the impact of dispute, subject to a minimum fee of Rs. 1 lakh and maximum fee of Rs. 50 lakhs is also to be paid.

As a one-time special dispensation, the DRC has been authorised to take up the projects covered above, directly without waiting for the decision of REIA. The concerned project developer(s) may apply to DRC within one month of this order. The fee has been revised to Rs. 1 lakh only to further facilitate dispute resolution.

APTEL sets aside CERC Order dated 17.06.2020 whereby forbearance price and floor price of Renewable Energy Certificates was revised at Rs. 1000/MWh and Re. 0/MWh respectively

Appellate Tribunal for Electricity ("**APTEL**"), vide judgement dated 09.11.2021, in *Indian Wind Power Association v. Central Electricity Regulatory Commission and Ors.*, set aside the order dated 17.06.2020 passed by the Central Electricity Regulatory Commission ("**CERC**") in Suo-Moto Petition No. 05/SM/2020 ("**Impugned Order**").

By way of the Impugned Order, CERC had determined the forbearance price of the Renewable Energy Certificate(s) ("**REC**") at Rs. 1000 per MWh and floor price at Re. 0 per MWh under the Central Electricity Regulatory Commission (Terms and Condition for Recognition and Issuance of Renewable Energy Generation) Regulation 2010 ("**REC Regulations**").

APTEL, while setting aside the Impugned Order, has revived the Order(s) governing RECs immediately prior to the passing of the Impugned Order. Such Order(s) would continue to prevail to regulate the pricing and trading of the RECs so long as a fresh order is not issued, in accordance with law. APTEL also directed that the RECs which were still valid for trading at the power exchange under the REC Regulations as on the date of passing of the Impugned Order, i.e., 17.06.2020, and have remained unsold, shall continue to be valid and be good for sale or purchase for the remainder period of their validity. APTEL has passed a detailed Order observing as under:

1. There is neglect of proper punctuation in the proviso to Regulation 9(1), wherein the use of comma (,) after the words *"provided that the Commission may"* is not followed by use of another comma. Another comma should have been added after the words *"from time to time"* to make the intent clearer.
2. Determination of REC prices by way of order revising the Floor and Forbearance Prices of RECs is in effect a Tariff Order.
3. The plea of Res-judicata raised by the Respondents was rejected on the ground that the issues involved in the instant Appeals arose from a different cause of action concerning the errors stated to have been committed by CERC in its decision-making process and is not focused on the interpretation of the REC Regulations. For example, the Impugned Order was passed based on Regulation 9(1) of the REC Regulations as it stood prior to the 2013 amendment. Further, objections raised in this round were not raised or considered/ dealt with by APTEL in the previous round of Appeals.

4. Impugned Order suffers from infraction of Regulation 9(2) of REC Regulations. Cost of procurement cannot fully reflect the cost of generation, if the data gathered for the former is from a category that cannot be treated as truly representative of all RE generators.
5. Premise to go solely by competitive bid discovered tariff on the ground that CERC and some SERCs have discontinued determining generic tariff for wind and solar RE is erroneous. Final price/ tariff discovered under competitive bidding route is for specific and individual PPAs, usually for large scale projects. If the lowest bid is relied upon while determining floor and forbearance prices, the same would render small scale RE generators unviable, an anathema to public policy reflected under the Electricity Act, 2003. CERC committed a grave error by relying upon the competitive bid tariffs adopted by some Electricity Regulatory Commissions.
6. As a general rule, price of REC is to be discovered by trading in power exchange and the determination of floor and forbearance price by CERC is only by way of an exception.
7. CERC, if it decides to change the floor and forbearance price, must base its determination on market study and pick up the methodology suitable to the prevailing market conditions, bearing in mind the objectives of the law and Regulations. In the present case, review of the REC mechanism in the light of prevailing market development was not completed, before removing the floor price.
8. RECs represent the green component which cannot be recovered if they are expected to be passed on to the obligated entities at 'zero' value. The floor price is to protect the interests of RE generators, in compliance with the objectives of the law mandating promotional measures.
9. Ignoring a large number of SERCs and picking up Average Power Purchase Cost ("**APPC**") determined by just a handful of SERCs is manifestly arbitrary, contrary to and in violation of the guiding principles under the REC Regulations.
10. Revising the REC prices retrospectively is unreasonable. It affects the value of the RECs issued on or after 01.04.2017 and those issued prior to the draft order dated 31.03.2020, which is a breach of the promise held out and attracts the doctrine of promissory estoppel.
11. Regulation 9(1) not complied with as Forum of Regulators ("**FOR**"), a statutory body, was not consulted before passing of the Impugned Order. Consultation with SERCs cannot be taken as due compliance with requirement of consultation with FOR. CERC failed to abide by the statutory mandate of consultation with FOR in terms of proviso to Regulation 9(1), rendering the exercise arbitrary.

U.P. Sugar Mills Cogen Association, the Appellant in Appeal No. 123 of 2020, was represented by Neeti Niyaman before APTEL.

Penalty for illegal sand mining should include cost of restoration of environment: Supreme Court

The Supreme Court, vide judgment dated 11.11.2021, in *Bajri Lease Lol Holders Welfare Society v. The State of Rajasthan & Ors.*, observing that compensation or penalty to be paid by those indulging in illegal sand mining cannot be restricted to the value of illegally-mined minerals, held that the cost of restoration of environment as well as the cost of ecological services should also be part of the compensation.

The Supreme Court while interpreting the meaning of "Polluter Pays" principle, observed that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

Considering the report filed in December 2020 by the Central Empowered Committee ("**CEC**"), the Supreme Court directed the CEC to submit a fresh report on the problems relating to sand mining that are faced by traders, consumers, transporters, the State and other stakeholders and also on measures to stop illegal sand mining. The recommendations made by the earlier report filed by the CEC, except recommendation 'J' pertaining to exemplary penalty of Rs. 10 lakh per vehicle and Rs. 5 lakh per cubic metre of sand seized for violation of the order passed by the Supreme Court on 16.11.2017, have been approved for immediate implementation. The CEC has been directed to follow the directions given by the National Green Tribunal in respect of imposition of penalty / scale of compensation for illegal mining along with provisions of the Enforcement & Monitoring Guidelines for Sand Mining, 2020 while determining the penalty / compensation in the said report.

Supreme Court holds that a party is not barred from raising new grounds to set aside an arbitral award in appeal under Section 37 of the 1996 Act

The Supreme Court, vide judgment dated 08.11.2021 in *State of Chhattisgarh & Anr v. M/s Sal Udyog Private Limited* (Civil Appeal No. 4353 of 2010) examined the issue whether a party is allowed to raise an additional ground for setting aside of an arbitral award in arbitration appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**"), when the said ground is not raised in the petition under Section 34 of the 1996 Act to set aside the arbitral award.

The Supreme Court answered the said issue in affirmative and held that failure to raise a ground in Section 34 petition would not imply waiver of the right to raise the said ground in Section 37 petition. It was observed that it was warranted on the part of the Court in Section 37 proceedings to consider such ground as Section 34(2A) of the 1996 Act empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. It was further clarified that the principle contained in Section 34(2A) is equally applicable to proceedings under Section 34 and Section 37 and hence, the grounds available for setting aside an award ought to be invoked by the Court in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, Section 34(2A) bears the phrase "*the Court finds that*" implying that grounds may even be invoked by the Court on its own.

Unilateral appointment of arbitrator cannot be challenged under Section 34 of the 1996 Act: Delhi High Court

The Hon'ble Delhi High Court, vide judgment dated 08.11.2021 in *Kanodia Infratech Limited v. Dalmia Cement (Bharat Limited)*, observed that under the provisions of Section 34 of the 1996 Act, scope of interference in arbitral award is quite limited and can be gone into only when the arbitral tribunal has gone beyond the scope of contracts / agreements and exceeded its jurisdiction. In the instant case, the petitioner filed a challenge to the arbitral award dated 09.03.2021 under the provisions of Section 34 of the 1996 Act on the ground that the learned arbitrator lacked inherent jurisdiction to entertain and try the disputes being unilaterally appointed by the respondent which is contrary to settled law.

Petitioner's reliance on *Perkins Eastman Architects DPC & Anr. v.. HSCC (India) Ltd.*, 2019 SCC OnLine SC 1517 and *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377 was set aside by the Hon'ble Delhi High Court since in those cases, the petition was filed under the provisions of Section 11(6) of the 1996 Act, whereas in the present case, the petition was filed under Section 34 of the 1996 Act which deals with the challenge to the arbitral award and not the appointment of arbitrator.

The Hon'ble Delhi High Court further observed that the appointment of learned arbitrator by the respondent was never objected to by the petitioner, who had actively participated in the arbitration proceedings, which is evident from the fact that as many as 45 orders were passed by the learned arbitrator during pendency of the arbitral proceedings.

MCA relaxes levy of additional fees in filing of certain e-forms

The Ministry of Corporate Affairs ("**MCA**"), vide general circular no. 17/2021 dated 29.10.2021, notified relaxation on levy of additional fees up to 31.12.2021 in filing of e-forms AOC-4, AOC-4 (CFS), AOC-4, AOC-4 XBRL AOC-4 Non-XBRL and MGT-7/MGT-7A for the financial year ended on 31.03.2021 under the Companies Act, 2013.

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