November 26, 2021

Legal Updates

Ministry of Power introduces Revised Scheme for Flexibility in Generation and Scheduling of Thermal/ Hydro Power Stations through bundling with Renewable Energy and Storage Power

The Ministry of Power ("**MoP**"), vide its letter dated 15.11.2021 has revised the 'Scheme for Flexibility in Generation and Scheduling of Thermal/ Hydro Power Stations through bundling with Renewable Energy ("**RE**") and Storage Power' ("**Scheme**"):

a) This Scheme was first introduced on 05.04.2018 with the objective to promote bundling of cheaper RE with costlier thermal power and to promote Renewable Purchase Obligations ("**RPOs**") of Distribution Licensees ("**DISCOMs**") whereas pursuant to changes in energy-mix and larger procurement trend amongst DISCOMs, changes have been sought in the said Scheme;

b) The revised Scheme comprehensively covers the replacement of hydro power with standalone RE power or RE combined with battery operated storage systems so that the DISCOMs can meet their RPOs within the existing contracted capacity without facing any additional financial burden;

c) The revised Scheme is applicable to all coal/lignite/gas based thermal generating stations or hydro power stations (collectively referred to as "**Generating Station**") and any Generating Company having such Generating Station may establish or procure RE from a RE power plant which is: (i) located within the premises or is within the vicinity of the Generating Station; (ii) located within the premises or is within the vicinity of the Generating Station but supplies RE power to procurers of another Generating Station of a different location owned by the same Generating Company;

d) Under the revised Scheme, the Tariff for the RE power plants is determined either by an appropriate Commission or via a competitive bidding process depending on whether the Generating Station has been formed under Section 62 or Section 63 of the Electricity Act, 2003 and on the location of the RE power plant;

e) No additional transmission charges would be levied when the RE power plant is: (i) located within the premises; (ii) within the vicinity of the Generating Station. Also, no transmission charges are to be levied for use of inter-state transmission system for those RE power plants that are within the vicinity of the Generating Station but supplying RE power to another Generating Station of a different location owned by the same Generating Company, provided the evacuation is through same switchyard of the thermal/hydro power plant and there is no augmentation during evacuation;

f) For thermal / hydro stations, the declared capacity shall not include the forecast from RE while the deviations shall be applicable to the sum of all the power supplied from the thermal or hydro and renewable resources. The Generating Station, upon forecast available for renewables shall supply to meet the schedule from thermal / hydro and replacement RE power. No deviation charges are attracted if it can meet its scheduled generation by supplying thermal, hydro or RE power in any ratio;

g) The RE power (with or without energy storage system) shall be supplied to the beneficiaries at a tariff which shall be less than the scheduled Energy Charge Rate ("**ECR**") of the Generating Station and would include balancing cost and tariff risk to be taken by the Generator;

h) The declared capacity of the thermal / hydro Generating Station shall be with respect to terms of the Power Purchase Agreement ("**PPA**") and the availability of primary fuel only and the net savings realized from supply of RE power in place of thermal / hydro power of any of the Generating Station shall be passed to the beneficiary by the Generating Company on monthly basis;

i) DISCOMs can procure the RE power under the existing PPAs by annexing standard terms and conditions for the same and no additional agreement is required in cases where landed tariff of RE power is less than the ECR of the Generating Station;

j) To avoid stranding of RE power, Generating Stations would be allowed to sell RE power to third parties/ power exchanges when it is not feasible to replace the thermal / hydro power. However, the right to schedule power from the Generating Stations shall first rest with the PPA holders.

Ministry of Power mandates all thermal power plants to provide fly ash to the end users for all new commitments

The MoP, vide Circular dated 8.11.2021, has clarified that it is mandatory for all the thermal power plants to provide fly ash to the end users for all new commitments as per the guidelines mandated in its letter dated 22.09.2021 without fail and the same shall be applied prospectively.

The MoP has further clarified that the thermal power plants may continue to provide fly ash (including pond ash) for national asset creation projects under their existing commitments based on transportation rates arrived at on the basis of transparent competitive bidding / State Schedule of Rates or whichever is lower as per the Central Electricity Regulatory Commission norms.

Supreme Court holds that contractual clauses having extension procedure and provision for liquidated damages indicate that 'time was not the essence of the contract'

The Supreme Court, vide judgment dated 13.11.2021 in *Welspun Specialty Solutions Limited v. Oil and Natural Gas Corporation Ltd.*, held that the question 'whether time is of the essence in a contract', has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract. The fact that extensions were granted indicates effort of the parties to uphold the integrity of the contract instead of repudiating the same. The Court held that contract containing provision for extension of time or payment of penalty on default would dilute the obligation of timely performance and render the clauses imbuing time as essence of the contract ineffective.

The Court upheld the Arbitral Tribunal's decision that liquidated damages, which are pre-estimated damages, cannot be granted as there was no breach of contract due to the fact that time was not the essence. The Court observed that since liquidated damages were waived twice before giving extension with pre-estimated damages, subsequent extension could not be coupled with liquidated damages unless a clear intention flowed from the contract. The Supreme Court observed that while the autonomy of the party to engage in contractual obligation is recognised, such obligation must be contracted in clear terms.

CERC issues clarification on validity of RECs in light of APTEL's order regarding REC framework

Central Electricity Regulatory Commission ("**CERC**"), vide order dated 18.11.2021 in Petition No. 05/SM/2020 , in pursuance of the directions issued by Appellate Tribunal for Electricity ("**APTEL**") vide judgment dated 09.11.2021 in *Indian Wind Power Association v. Central Electricity Regulatory Commission and Ors.*, has clarified that the Renewable Energy Certificates ("**RECs**") which were still valid for trading at the power exchange under CERC (Terms and Condition for Recognition and Issuance of Renewable Energy Generation) Regulations, 2010 as on 17.06.2020, and have remained unsold till date, shall continue to be valid and be good for sale or purchase for the then remainder period of their validity, computed with reference to 17.06.2020. It was also clarified that purchase of such RECs during the period of such extended validity, by the Obligated Entities shall be treated as good compliance with RPO targets.

KERC invites comments from stakeholders on Draft KERC Electricity Consumers' Rights, Duty to Supply Electricity by the Licensee, Consumers' Complaint Handling Procedure and the Licensees' Standards of Performance) Regulations, 2021

The Karnataka Electricity Regulatory Commission ("**KERC**"), vide notification dated 10.11.2021, has invited comments from stakeholders, the general public and interested persons on the Draft KERC (Electricity Consumers' Rights, Duty to Supply Electricity by the Licensee, Consumers' Complaint Handling Procedure and the Licensees' Standards of Performance) Regulations, 2021 ("**Draft KERC Regulations**") within 30 days from the date of their publication in the State Gazette, i.e. by 10.12.2021.

The Draft KERC Regulations seek to duly incorporate the provisions of the Electricity (Rights of Consumers) Rules, 2020 ("**Electricity Rules**") issued by the Ministry of Power, wherever necessary; and repeal the following regulations: (i) KERC (Duty of the Licensee to Supply Electricity on Request) Regulations, 2004; (ii) KERC (Licensees' Standards of Performance) Regulations, 2004 with amendments; and (iii) KERC (Consumer Complaints Handling Procedure) Regulations, 2004. They will be applicable to all the distribution licensees and the consumers in the State of Karnataka.

The salient features of the Draft KERC Regulations are as follows, *inter alia*:

a) An application for supply of electricity is required to be filed with the distribution licensee by the owner or occupier of the premises. The distribution licensees are required to arrange supply of electricity on request as per the prevailing conditions specified in Clause 4.00 to 12.00 of the Conditions of Supply of Electricity of Distribution Licensees in the State of Karnataka, as amended from time to time. The Draft KERC Regulations further provide for the time frame where supply of electricity requires / does not require any extension of distribution mains or commissioning of new substations;

b) It shall be the responsibility of the distribution licensee to have necessary commercial arrangements with the respective transmission licensee(s) to ensure that the required supply at Extra High Tension (EHT), i.e. above 33,000 volts, is made available within the time frame specified under the Draft KERC Regulations;

c) If a distribution licensee fails to supply electricity within the specified period, it will be liable to pay a penalty as determined under Schedule-I to the Draft KERC Regulations, which shall not exceed Rs. 1,000 for each day of default;

d) The distribution licensee will be required to supply 24x7 power to all the consumers. The KERC may specify providing lower hours of supply to certain categories of consumers like agriculture as per the guidelines issued by the Government of Karnataka;

e) The distribution licensee will be required to comply with the minimum standards as specified in Schedule – I to the Draft KERC Regulations. The compensation amount shall be paid to the consumers by the distribution licensees for violation of standards of performance as per Section 57(2) of the Electricity Act, 2003;

f) After it is successfully established that there is a default in performance of the distribution licensee, the consumer will be automatically compensated for those parameters which can be monitored remotely. The distribution companies will be required to develop a suitable mechanism for automatic payment of compensation and also to register the claim for compensation in case of non-compliance of Standards of Performance, within 90 days from the date of notification of the regulations, for approval of the KERC;

g) The payment of compensation will be made by adjustment against current and / or future bill(s) for supply of electricity, within the stipulated time from the determination of claim, which will not be more than 30 days;

h) The distribution licensee will be required to create an online facility on which consumers may register and claim the compensation amount, within 6 months from the date of notification of the Draft KERC Regulations. Information in this regard is to be widely circulated among consumers through appropriate means including mass media, bills, SMS, emails or by uploading the same on the licensee's website;

i) The Draft KERC Regulations also provide the procedure for handling of complaints and establishment of a call centre for consumer services by the distribution licensee.

UPERC declares peak and off-peak hours for the purpose of banking and withdrawal of energy

The Uttar Pradesh Electricity Commission ("**UPERC**"), vide its order dated 16.11.2021, has held that the time of day ("**TOD**") slots, as specified by the UPERC vide its tariff orders, are not applicable to the provisions of banking and withdrawal of power under the UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2019 ("**CRE Regulations, 2019**"). The UPERC observed that the requirement of TOD slots for banking by the captive generation stations is different from the treatment of TOD as contained in the DISCOMs' tariff orders which concern demand management on the consumer side.

The UPERC further observed that the energy that is being retrieved by the captive user is actually the energy that has been banked with the DISCOMs and is not purchased from the DISCOMs. Therefore, application of TOD structure as prescribed in the UPERC tariff orders on withdrawal of banked energy in case of captive users is not justifiable and will result in defeating the purpose of the CRE Regulations, 2019. The UPERC held that for the purpose of the CRE Regulations, 2019, there has to be only two slots i.e., peak and off-peak hours depending on peak and off-peak of the U.P. power system based upon the historical data without any identification of time slot as opposed to the CRE Regulations, 2014. Accordingly, the UPERC declared peak period as 18:00 to 24:00 hours (midnight) and off-peak hours as 00:00 to 18:00 hours for the purpose of banking and withdrawal of energy.

The UPERC further held that the Captive Generating Plant ("**CGP**") shall not be required to apply for separate open access for availing banked energy if:

a) The injection point and withdrawal points are not getting changed; and

b) The quantum of power generated by the CGP does not exceed the quantum and duration for which open access has been granted.

Only in case of deviation from the above, there will be a requirement of fresh open access.

RERC invites comments / suggestions on the amendments proposed to the "Procedure for implementation of framework on forecasting and scheduling for renewable energy generating stations (wind and solar)"

Rajasthan Electricity Regulatory Commission ("**RERC**") has invited comments/ suggestions on the following amendments proposed by State Load Despatch Centre ("**SLDC**") in the "Procedure for implementation of framework on forecasting and scheduling for RE generating stations (wind and solar)" ("**Procedure**"):

a) Clause 14(b) of the Procedure providing for 'Scheduling and Despatch' has been amended to provide that where electrical separation of schedules for inter-state and intra-state is not possible and a combined schedule with bifurcated schedule is allowed, then the actual generation of the connected generators shall be considered and adjusted in the following order:
   i. Inter-state
   ii. Intra-state

b) In light of a new sub-clause 21 (1) (g) providing for 'RE generators are having any dues with licensee, Rajasthan Renewable Energy Corporation (RREC) and SLDC', Clause 21 (2) (b) has been amended to provide that:

   i. in case of default by RE generator as per Clause 21 (1) {(a) to (d) & (f) and (g)}, SLDC shall not certify energy generation as mentioned in Clause 14(j) of the Procedure till the rectification of default; and

ii. if default persists up to 3 months by RE generator and SLDC issues a notice of period not less than 15 days for disconnection of RE generators, then adequate opportunity shall be given to the generator to present its case before SLDC / Chairman and Managing Director of Rajasthan Rajya Vidyut Prasaran Nigam Limited ("**RVPN**")/ concerned Director of RVPN.

Ministry of Law and Justice releases 'Draft Mediation Bill, 2021'

Ministry of Law and Justice vide a notification dated 05.11.2021 has sought comments on the Draft Mediation Bill, 2021 ("**the Bill**"). The Bill is divided into four parts each dealing with domestic mediations, Community Mediation, Mediations under the Singapore Convention and Miscellaneous Regulations. Some relevant sections of the Bill include:

a) Section 6 which mandates the parties to take steps to settle disputes by Pre-Litigation Mediation before filing a suit or proceeding in Courts or Tribunals. However, Section 8 enumerates that in exceptional circumstances, parties may approach Courts or Tribunals to seek urgent interim reliefs both before the commencement of or during mediation proceedings;

b) Section 20 of the Bill stipulates a period of ninety days for completion of mediation, subject to a further extension of ninety days in case the parties consent to the same. Section 21 of the Bill defines 'Mediated Settlement Agreement' ("**MSA**") as a written agreement /interim agreement resulting from mediation between some or all parties which settles some or all of the disputes between such parties and is authenticated by the mediator; and

c) Section 28 provides that such agreements shall be final and binding on the parties and persons claiming under them and shall be enforceable in the same manner as judgements or decrees passed by a Court. Section 29 enumerates the limited grounds of challenge under the heads of fraud, corruption, gross impropriety, and impersonation.

The Bill has dedicated a chapter on Online Mediation to be conducted through applications and computer networks, resorted to either wholly or in part during the mediation process. All such mediations shall be governed by the provisions of the Information Technology Act, 2000. The Bill also provides for the establishment and incorporation of the Mediation Council of India under Section 35.

While Part II deals with Community Mediation, Part III of the Bill deals with the recognition and enforcement of mediation settlement agreements authenticated under the Singapore Convention. It is stated that International commercial settlement agreements are binding for all purposes on persons claiming under them and may be relied upon by the said persons in any legal proceedings in India.

In order to merge the mediation laws that are spread over various legislations the Bill proposes amendments to the Indian Contract Act, 1872, Arbitration and Conciliation Act, 1996, Code of Civil Procedure, 1908, and the Commercial Courts Act, 2015 and the Legal Services Authorities Act, 1987 to include references to the Mediation Act, 2021.The comments and suggestions may be sent at the email address: parijat.diwan@nic.in

IBBI clarifies requirement of seeking NOC/NDC during voluntary liquidation process

Insolvency and Bankruptcy Board of India ("**IBBI**"), vide Circular dated 15.11.2021, has clarified that that as per the provisions of the Insolvency and Bankruptcy Code, 2016 and the IBBI (Voluntary Liquidation Process) Regulations, 2017 read with Section 178 of the Income-tax Act, 1961, an Insolvency Professional handling voluntary liquidation process is not required to seek any No Objection Certificate or No Dues Certificate from the Income Tax Department as part of compliance in the said process.

TRAI extends deadline for implementation of NTO 2.0

The Telecom Regulatory Authority of India ("**TRAI**") has, vide communication dated 10.11.2021, directed all broadcasters and distribution platform operators ("**DPOs**") to comply with the provisions of the new regulatory framework notified in 2020 ("**NTO 2.0**"), and report compliance to TRAI as under:

a) All broadcasters are required to report to TRAI any change in name, nature, language, maximum retail price ("**MRP**") per month of channels, composition of bouquets and MRP of bouquets of channels as per the NTO 2.0, by 31.12.2021 and simultaneously publish such information on their websites. The broadcasters who have already submitted their reference interconnect offers ("**RIOs**") in compliance with the new regulatory framework may also revise their RIOs by 31.12.2021;

b) All the DPOs are required to report to TRAI, the distributor retail price ("**DRP**") of pay channels, composition of bouquet of pay channels / free-to-air channels and DRP of bouquets of pay channels, as per the NTO 2.0 by 31.01.2022; and

c) All DPOs are required to offer and obtain the option for subscription of new bouquets or channels from subscribers in compliance with the provisions of the NTO 2.0 from 01.02.2022 to 31.03.2022 and shall ensure that with effect from 01.04.2022 services to the subscribers are provided as per the bouquets or channels opted by the subscribers.

Such implementation plan has been issued pursuant to TRAI receiving representations from many service providers and their associations such as broadcasters, DTH operators, multi-system operators and other DPOs who raised practical issues in terms of time constraints in migrating consumers to the NTO 2.0 framework. In view of the same, TRAI has decided to provide sufficient time to service providers to upgrade their IT systems and incorporate various channels / bouquets before offering the same to consumers.

TRAI extends time for receiving comments on Consultation Paper on Market Structure/ Competition in Cable TV Services

TRAI, vide press release dated 23.11.2021, has extended the last date for submission of written comments on 'the Consultation Paper on Market Structure/ Competition in Cable TV Services' dated 25.10.2021 ("**Consultation Paper**"). TRAI had issued the Consultation paper to seek the comments of the stakeholders on monopoly / market dominance / competition issues in cable TV services. In view of the requests for time extension received from various stakeholders, TRAI has extended the deadline for submission of written comments up to 06.12.2021 and for counter comments up to 20.12.2021. The comments and counter-comments are required to be sent on the email IDs: advbcs-2@trai.gov.in and jtadv-bcs@trai.gov.in

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