November 30, 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 Power introduces Revised Scheme for Flexibility in Generation and Scheduling of Thermal/ Hydro

The 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**"):

1. 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;

Power Stations through bundling with Renewable Energy and Storage Power

2. 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;
3. 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;
4. 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;
5. 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;
6. 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;
7. 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;
8. 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;
9. 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;

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 08.11.2021, 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.

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 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.

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

The CERC, vide order dated 18.11.2021 in Petition No. 05/SM/2020 , in pursuance of the directions issued by APTEL vide judgment dated 09.11.2021 in *Indian Wind Power Association v. Central Electricity Regulatory Commission and Ors.*, clarified that the RECs which were still valid for trading at the power exchange under the REC Regulations 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.

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.

Supreme Court holds that a party is not barred from raising new grounds

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

to set aside an arbitral award in appeal under Section 37 of the 1996 Act

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.

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:

1. 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;
2. 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
3. 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.
4. 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.

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.

A-142, Neeti Bagh
New Delhi – 110 049, India
T: +91 11 4579 2925 F: +91 11 4659 2925
E: mail@neetiniyaman.co
W: www.neetiniyaman.com

Office No. 51, 4th Floor, Nawab Building,
327, Dr. D.N. Road,
Opp. Thomas Cook, Flora Fountain
Mumbai – 400 023, India
T: +91 22 4973 9114