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Legal Updates

Ministry of Power (“MoP”) on 05.02.2020 has issued public notice for ‘Draft Revised Standard Bidding Document (“SBD”) in connection with selection of Transmission Service Provider through Tariff Based Competitive Bidding (“TBCB”)’. In this regard, MoP has invited comments from stakeholders by 26.02.2020 on the following draft documents:

- Draft Revised Standard Request for Proposal Document
- Draft Revised Standard Implementation & Service Agreement
- Draft Revised Guidelines for Encouraging Competition in Development of Transmission Projects
- Draft Revised Tariff based Competitive-bidding Guidelines for Transmission Service

The Guidelines for Encouraging Competition in Development of Transmission Projects are being reviewed with the ultimate aim of developing all transmission projects in an efficient and economical manner, pursuant to the provisions of Electricity Act, 2003, National Electricity Policy, 2005 and Tariff Policy.

The Tariff based Competitive-bidding Guidelines for Transmission Service are being issued under the provisions of Section 63 of the Electricity Act, 2003 and shall apply for procurement of transmission services for transmission of electricity through tariff based competitive bidding, through the mechanisms described in this notification and to select the bidder who will acquire status of transmission service provider for a new inter state / intra state transmission system and to build, own, operate and transfer the specified transmission system elements. The guidelines provide for the procedure to be undertaken for the facilitation of tariff based competitive bidding.

The public notice also encloses copies of the Draft Revised Standard Request for Proposal Document and Draft Revised Standard Implementation & Service Agreement.

MoP issues Draft Revised Standard Bidding Document in connection with selection of Transmission Service Provider through Tariff Based Competitive Bidding

GST relief: CERC holds payment by trading licensee to generating company not conditional upon payment by Discom to such licensee

Central Electricity Regulatory Commission (“**CERC**”) vide order dated 28.01.2020 in *Petition No. 138/MP/2019 - ACME Kurukshetra Solar Energy Private Limited & Ors. vs NTPC Limited & Ors.*, while observing that the power purchase agreement and power sale agreement, being on back to back basis, are interconnected and inextricably linked to each other, has held that the distribution licensees (“**Discoms**”) are liable to pay to NTPC the amount that NTPC has to pay to the generator. However, payment to the generator by NTPC is not conditional upon the payment to be made by the Discoms to NTPC. CERC having held that promulgation of Goods and Service Tax Act, 2017 (“**GST**”) is a change in law, directed NTPC to pay to generators as per the decisions of CERC in its order dated 09.10.2018 in *Petition No. 188/MP/2017* and claim the same from the Discoms on a back to back basis. CERC further stated that the said decision will also be applicable in the similar cases wherein it has already allowed GST as ‘change in law’ under the respective power purchase agreements.

Similar orders have been passed by CERC on 28.01.2020 in *Petition No. 67/MP/2019 - Clean Sustainable Energy Private Limited vs Solar Energy Corporation of India Limited & Ors.* and *Petition No. 68/MP/2019 - Fermi Solarfarms Private Limited vs Solar Energy Corporation of India Limited & Anr.*

CERC disallows proprietary membership to Railways Energy Management Company Limited

CERC vide order dated 27.01.2020 in *Petition No. 207/MP/2019 - Railways Energy Management Company Limited & Indian Railways vs Indian Energy Exchange Limited* has rejected the prayer of Railways Energy Management Company Limited (“**REMCL**”) and Indian Railways for grant of proprietary membership of power exchanges. CERC observed that REMCL does not fall under ‘membership’ category as provided in Regulation 26(i)(b) of CERC (Power Market) Regulations, 2010 (“**Power Market Regulations**”), as REMCL is neither a distribution licensee including deemed distribution licensee nor a grid connected entity, which is the requirement for proprietary membership as prescribed under Rule 4.3.1 of the Rules of Indian Energy Exchange. CERC further observed that the power to remove difficulties is exercised to remove difficulties in implementation of provisions of a regulation, and not for introduction of a new provision which amounts to amendment of the regulations. Accordingly, it was held that admitting REMCL as a proprietary member would amount to addition of a new category of entity under the proprietary membership and would, therefore, fall beyond the ambit of the “power to remove difficulty” provision of the Power Market Regulations.

CERC holds amalgamation of two companies amounts to ‘change in legal status’, entailing fresh REC accreditation/ registration

CERC vide order dated 28.01.2020 in *Petition No. 242/MP/2019 - Techno Electric & Engineering Company Limited vs National Load Despatch Centre (NLDC)*, has held that amalgamation of two companies amounts to ‘change in legal status’ of the transferee company for the purposes of Rule 4.1 (h) of the Procedure for Registration of a Renewable Energy Generation or Distribution Licensee (“**REC Registration Procedure**”). Vide the scheme of amalgamation approved by National Company Law Tribunal, Allahabad Bench, of M/s Techno Electric & Engineering Company Ltd. (transferor company) and M/s Simran Wind Project Limited (transferee company), the former merged with the latter. In the said merger, inter alia, the name “M/s. Simran Wind Project Limited” was changed to “M/s. Techno Electric & Engineering Company Limited.” Accordingly, CERC held that it is a change in ownership as the holding company merged with its subsidiary, which has resulted in dissolution of the holding company - Techno Electric & Engineering Company Ltd., which was previously the owner of the subsidiary M/s Simran Wind Project Limited. This amounts to “change in legal status” and not a mere “change in name” for the purposes of Rule 4.1(h) of the REC Registration Procedure.

Accordingly, CERC held that Techno Electric & Engineering Company Ltd. is required to get fresh registration in terms of CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 as well as REC Registration Procedure, in order to take benefit under REC mechanism.

GERC issues Electricity Supply Code and Related Matters (Second Amendment) Regulations, 2020

Gujarat Electricity Regulatory Commission (“**GERC**”) has notified the GERC (Electricity Supply Code and Related Matters) (Second Amendment) Regulations, 2020, which are effective from 17.01.2020. The main features of the amendment are as follows:-

- Regulation 4.95 has been amended to provide that in case of non-demand based LT connections, review of contracted load/sanctioned load shall be carried out once in a year and if it exceeds the contracted load/sanctioned load by 25% or more in case of residential

consumers and 10% in case of other consumers, the licensee shall issue a 60-day notice to the consumer for submitting an application for enhancement of load. If no response is received, then the licensee is entitled to start the procedure for enhancement of load and recover the applicable charges from the consumer.

- Regulation 8.3(6) has been added by which a consumer's electricity connection can be temporarily disconnected if consumer has carried out any construction around the existing service position so as to hinder the access already granted. If such a construction becomes necessary due to remodelling or any other reason, the consumer is required to inform the licensee and then the service position can be shifted at the cost of the consumer to a mutually agreed position. Any contravention thereof entails disconnection after issuance of notice of not less than 7 days.

GERC has issued a discussion Paper on 'Tariff Framework for Procurement of Power by Distribution Licensees from Wind Turbine Generators and Other Commercial issues for the State of Gujarat' ("**Discussion Paper**") on 28.01.2020. The Discussion Paper has been issued to provide clarity on the tariff framework for the prospective period, for procurement of power generated by the wind-based power projects in the state of Gujarat by distribution licensees. GERC has proposed to determine the tariff for all prospective wind power projects, based on the rates discovered through competitive bidding, and discontinue the practice of determining the generic tariff for wind power projects. The Discussion Paper has sought comments on other commercial issues such as wheeling of power, energy metering, banking of surplus wind energy and purchase of surplus power from wind power projects, option for open access for captive use or third-party sale. In this regard, suggestions/objections have been invited and may be filed before GERC latest by 25.02.2020 and thereafter, a public hearing will be conducted on 28.02.2020.

Uttar Pradesh Electricity Regulatory Commission ("**UPERC**") has issued first amendment/addendum to UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2019 ("**CRE Regulations**") on 22.01.2020. The key amendments are as follows:

- The proviso to Regulation 4, which empowered UPERC to determine tariff on case to case basis in case of renewable energy technology approved by MNRE other than those covered under CRE Regulations, has been removed.
- Schedule II A (i) containing tariff for bagasse-based generation & cogeneration plants for FY 2005-06 to FY 2018-19, now includes existing bagasse-based generation & cogeneration plants commissioned earlier than FY 2005-06.
- Point G has been added under Schedule II providing calculation of tariff for renewable energy technologies approved by MNRE, other than bagasse based generation & cogeneration plants, biomass (rice husk based) generation plants, municipal solid waste based generation plants, biogas based generation plants, biomass gasifier based generation plants, small hydro generation plants, solar power generation plants, as the average power purchase cost of the last financial year to be determined by UPERC. This has been added with an exception to renewable energy technology coming subsequent to this notification, in which case UPERC may determine tariff on a case to case basis.

National Company Law Appellate Tribunal ("**NCLAT**") vide order dated 28.01.2020 in *QVC Exports Pvt. Ltd. vs. United Tradeco FZC & Anr.* has held that National Company Law Tribunal ("**NCLT**") has no jurisdiction under Section 31 of Insolvency and Bankruptcy Code 2016 ("**IBC**") to allow 'rectification' of an approved resolution plan, which has been implemented. While holding so, NCLAT has set aside the order passed by NCLT, wherein the application for modification of shareholding pattern as submitted in the resolution plan, on account of a clerical/arithmetical error in calculation of the shareholding pattern, was allowed. NCLT had modified the shareholding pattern on the basis of the investment made by both the parties. However, NCLAT has held that when the parties had jointly submitted the resolution plan for taking over the corporate debtor, which was approved by the committee of creditors and the NCLT, NCLT had no jurisdiction to rectify/modify the same at the instance of one party, without the consent of the other party.

GERC issues Discussion Paper on 'Tariff Framework for Procurement of Power by Distribution Licensees from WTGs and Other Commercial issues for the State of Gujarat'

UPERC issues amendment/addendum to UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2019

NCLAT holds 'approved & implemented' resolution plan cannot be rectified by NCLT

**MCA notifies
Companies
(Winding Up) Rules,
2020**

The Ministry of Corporate Affairs (“MCA”) has notified the Companies (Winding Up) Rules, 2020 (the “Rules”) which shall come into force from 01.04.2020. The Rules lay down the procedure for winding up on grounds other than inability to pay debts prescribed under Section 271 of the Companies Act, 2013 (“CA2013”). Since the promulgation of IBC, the proceedings pertaining to voluntary winding up and winding up on the grounds of inability to pay debts, fall within the ambit of IBC. The Rules have expanded the scope of summary procedure for winding-up prescribed under Section 361 of CA2013. Prior to the notification of these Rules, the said summary procedure for winding-up of a company was only available to companies which had assets of book value not exceeding ₹ 10,000,000 (Rupees Ten Million). With the notification of these Rules, the summary procedure has now been further extended to the following companies, where the company to be wound up has:

- Assets of book value not exceeding Rupees one crore;
- The company has taken deposit and company’s total outstanding deposits are not exceeding Rupees twenty-five lakh;
- The company of which the total outstanding loan including secured loan does not exceed Rupees fifty lakh;
- The company of which turnover is upto Rupees fifty crores;
- The company of which paid up capital does not exceed Rupees one crore.

The summary procedure will help in lessening the burden on the NCLT by enabling summary procedures for liquidation to be filed with the central government. The rules relating to summary procedure mandate that the closure of the company will be carried out by the official liquidator hired by the government, who will take charge of the assets and deal with the claims of the company.

MCA has notified the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020 (“Amendment Rules”) on 03.02.2020, laying down the rules relating to takeover offer process for unlisted companies under Section 230(11) of CA2013. The key amendments are provided below:

- The newly inserted sub-rule (5) of Rule 3 provides that for the purpose of the takeover offer in terms of sub-section (11) of Section 230 of CA2013, a member of the company shall make an application for such an arrangement only when such member along with any other member holds not less than three-fourths of the shares in the company and the application has been filed for acquiring any part of the remaining shares of the company.
- The newly inserted sub-rule (6) of Rule 3 provides for the content of the aforementioned application of arrangement for takeover. The sub-rule provides that such application shall contain report of a registered valuer disclosing the details of the valuation of the shares proposed to be acquired by the member, after taking into account a couple of factors mentioned in the said Amendment Rules and the details of a bank account which is opened separately, by the member wherein a sum of amount not less than one-half of total consideration of the takeover offer is deposited.

Further, MCA has notified that the provisions of sub-sections (11) and (12) of Section 230 of CA2013 shall come into force from 03.02.2020.

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