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-LAW IN ACTION



Legal Updates

MNRE issues memorandum for extension of time in SCOD of RE Projects considering disruption due to lockdown

Ministry of New and Renewable Energy (“**MNRE**”) vide O.M. dated 30.06.2020, in continuation of its earlier O.M. dated 17.04.2020 vide which extension of time for scheduled commercial operation date (“**SCOD**”) was granted for renewable energy (“**RE**”) projects affected by lockdown due to COVID-19, has clarified the following:

- a) The period of lockdown is to be treated from 25.03.2020, when the lockdown started, to 31.05.2020;
- b) All projects through RE implementing agencies designated by the MNRE and the projects under various schemes of the MNRE are covered under the said O.M.;
- c) The timelines for intermediate milestones of a project may also be extended within the extended time provided for commissioning; and
- d) The RE developers, of the projects covered under (b) above, may also pass on the benefit of such time-extension, by way of granting similar time-extensions, to other stakeholders down the value chain like engineering procurement construction contractors, material/ equipment suppliers, original equipment manufacturers, etc.

MoP issues directions to protect the security, integrity and reliability of the strategically important and critical power supply system &

Ministry of Power (“**MoP**”) vide order dated 02.07.2020 has issued the following directions to protect the security, integrity and reliability of the critical power supply system & network in the country:

- All equipment, components, and parts imported for use in the power supply system shall be tested to check for any kind of embedded malware/trojans/cyber threat and for adherence to Indian standards;
- All such testings shall be done in certified laboratories that will be designated by MoP; and
- Any import of equipment components/parts from "prior reference" countries as specified or by persons owned by, controlled by, or subject to the jurisdiction or the directions of these "prior reference" countries will require prior permission of the Government of India.

network in the country

- Where the equipment, components and parts are imported from "prior reference" countries with special permission, the protocol for testing in certified and designated laboratories shall be approved by the MoP.

This order shall apply to any item imported for end use or to be used as a component, or as a part in manufacturing or assembling of any equipment or to be used in power supply system or any activity directly or indirectly related to power supply system.

CERC extends date of submission of comments to the draft CERC (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2020

Central Electricity Regulatory Commission ("CERC") vide notice dated 30.06.2020, decided to extend the date of submission of comments/ suggestions/objections to the Draft CERC (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2020 by two weeks i.e. from 30.06.2020 to 15.07.2020. The extension has been granted considering extension of restrictions on account of outbreak of COVID-19 and requirement of adequate study by stakeholders to formulate their response to the said draft. Further, date of public hearing will be decided separately in view of the current lockdown situation and restrictions in the country.

CERC issues proposal for determination of leveled generic tariff for RE sources

CERC vide its order dated 28.06.2020, in discharge of the mandate under Regulation 8(1) of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020, has issued a proposal to determine the generic tariff of RE projects for the first year of control period i.e. FY 2020-21.

CERC has sought comments / suggestions / objections from the stakeholders and interested persons on the said proposal and has accordingly directed the stakeholders and interested persons to file their comments / suggestions / objections (if any) on or before 12.07.2020.

CERC further extends timeline for filing of tariff petitions for FY 2019-24

CERC vide order dated 06.07.2020 passed in interlocutory applications filed in *Suo Motu Petition No. 7/SM/2020*, has further granted extension of time to the generating companies for filing tariff petitions for FY 2019-24 along with truing up petitions for FY 2014-19. Earlier, vide order dated 30.06.2020 in *Suo Motu Petition No. 7/SM/2020*, CERC had relaxed the provisions of Regulation 9(2) of the CERC (Terms and Conditions of Tariff) Regulations, 2019 and allowed extension of time until 30.06.2020 for filing of tariff petitions for FY 2019-24 as well as truing up petition for FY 2014-19. This order was also made applicable to transmission licensees vide an addendum order dated 07.04.2020. In view of the unprecedented measures taken by the Government of India to contain the spread of COVID-19 pandemic and the difficulties being faced by the generating companies in filing tariff petitions, CERC has granted further extension of three months i.e. until 30.09.2020 to the generating companies to file tariff petitions for FY 2019-24 period along with truing-up petitions for FY 2014-19 period.

KERC passes order in the matter of carry forward of excess banked energy on account of COVID- 19

Karnataka Electricity Regulatory Commission ("KERC") has, vide order dated 25.06.2020, allowed the carry forward of the banked energy remaining unutilized as on 31.05.2020 up to 31.07.2020, in respect of mini-hydel generators who have executed wheeling and banking arrangements ("WBA"), subject to the condition that any banked energy allowed to be carried forward shall be deemed to have been supplied to the concerned electricity supply company ("ESCOMs") at no cost.

Further, no carry forward of banked energy has been allowed to renewable projects under the renewable energy certificate ("REC") route and to renewable projects under the non-REC route, other than mini-hydel projects.

KERC further noted that as per Article 9 of the standard WBA, in the event of *force majeure* conditions, Karnataka Power Transmission Corporation Limited ("KPTCL") and ESCOMs are not obligated to bank and wheel energy and if normalcy is not restored within 30 days, the agreement is to be temporarily suspended for the period of such *force majeure*. In such a situation, KPTCL / ESCOMs are not liable to pay any compensation / damages / any claims for any direct or indirect loss suffered by the generating company. However, the KERC considered COVID-19 as a special case and allowed amendment to Article 9 of the WBA for mini-hydel projects only (as noted above).

MERC rejects prayer of open access consumer for waiver of fixed demand charges

Maharashtra Electricity Regulatory Commission (“**MERC**”) vide order dated 08.07.2020 in *Case No. 93 of 2020 - Ghatge Patil Industries Limited v. Maharashtra State Electricity Distribution Co. Ltd.* has *inter alia* disallowed the prayer for waiver of fixed demand charges sought by Ghatge Patil Industries Limited (“**GPIL**”), a captive open access consumer. GPIL had filed the petition for seeking such waiver as it could not consume the power contracted and generated from its wind power generators due to lockdown of industries in the wake of COVID-19. MERC, while rejecting the prayer, observed that moratorium on payment of fixed charge for three months has been given balancing the interest of the consumers as well as the distribution licensees. However, complete waiver for the entire period of lockdown would result in socialising this amount which in turn would result in additional recovery from the other consumers of Maharashtra State Electricity Distribution Company Limited (“**MSEDCL**”). MERC also observed that extension of moratorium on payment of fixed charges for a further period until lockdown is completely withdrawn or the situation returns to normalcy would also not be in the interest of the power sector as a whole.

GPIL, by way of this petition, also sought extension of banking period and reduction in its ‘contracted demand’. The extension of banking period has been disallowed in terms of order dated 04.07.2020 passed in Case No. 92 of 2020. MERC has, however, allowed revision in contracted demand by holding that GPIL will be entitled to dispensation for contract demand revision in line with the practice directions dated 21.05.2020. The extent of contract demand revision including reduction in contract demand below open access quantum would be in accordance with the applicable provisions of MERC (Distribution Open Access) Regulations, 2016.

MERC disallows rollover of banking of electricity on plea of COVID-19 as force majeure event

MERC vide order dated 04.07.2020 in *Case No. 92 of 2020 - Indian Wind Power Association (Maharashtra Council) v. Maharashtra State Electricity Distribution Co. Ltd.* has disallowed rollover of banking of electricity, as sought by Indian Wind Power Association (Maharashtra Council) (“**IWPA**”) on account of *force majeure* event of COVID-19. The petition was filed seeking extension of the banking period and permitting adjustment of the banked units of FY 2019-20 and FY 2020-21 till the end of FY 2021-22, on account of the *force majeure* situation prevailing in Maharashtra due to COVID-19 outbreak and lockdown situation. MERC observed that seeking permission or relaxation to roll over banking for more than the permitted ‘one’ month period and adjustment of such banked energy over more than 2 years will impose a commercial liability on the distribution licensee. MERC further opined that strict interpretation of the *force majeure* clause of the open access agreement should spare every party including the distribution licensee out of the unforeseen *force majeure* event and that rollover of banking of electricity cannot be allowed. MERC also noted that the power to relax cannot be exercised arbitrarily in favour of some party and to disfavour some other party. MERC gave reference of the Wind Tariff Order, 2003, which provides that more than 10% of total energy generation from the project will not be banked with the utility at any point of time. The order also states that under *force majeure* conditions, surplus energy in excess of 10% may be purchased by the distribution licensee; however, this does not provide that the entire generated power can be banked in the *force majeure* conditions.

MERC directs MSEDCL to compensate for power supplied to meet RPO targets

MERC vide order dated 01.07.2020 in *Case No. 28 of 2020 - M/s. Bothe Windfarm Development Pvt. Ltd. v. Maharashtra State Electricity Distribution Co. Ltd. and Ors.*, has held that MSEDCL cannot be compelled to sign an energy purchase agreement (“**EPA**”) with the petitioner. Further, the MERC has directed MSEDCL to compensate the petitioner for the energy injected from its three wind turbine generators (“**WTGs**”) during FY 2014-15 to FY 2016-17 which has been considered for fulfilment of non-solar renewable purchase obligation (“**RPO**”) targets, at average power purchase cost (excluding renewable energy) plus floor price of non-solar RECs applicable for respective year. Such compensation would be without any carrying cost. The MERC has further held that the petitioner is not entitled to claim any compensation for the energy injected by it since April, 2017 onwards from its projects in the absence of valid EPA. The petition was filed seeking directions against MSEDCL for executing EPA for supply of power from its 6.3 MW WTGs in terms of the Wind Policy, 2014 dated 03.06.2014 notified by MSEDCL and Comprehensive Policy for Grid-connected Power Projects based on New and Renewable (Nonconventional) Energy Sources – 2015 dated 20.07.2015 issued by the Government of Maharashtra.

APERC renews policy on revival of

Andhra Pradesh Electricity Regulatory Commission (“**APERC**”) vide order dated 03.07.2020, has granted renewal to the ‘Revival of Sick Industries Rationalisation – Procedures’ in respect of collection of minimum charges’ for FY20-21 (“**Policy**”) up to 31.03.2021 with certain modifications. The Policy

sick industries with certain modification

was brought about in 2018, with respect to collection of minimum charges during closure of industrial units due to sickness. Going forward, a new clause has been added which provides that the Policy will be extended to companies which are reviving their activities including by way of change of management as going concerns. However, this will not absolve the new management of payment of development charges as prescribed under general terms and conditions of licensees. Further, for the industrial units under disconnection, which were allowed to revive on payment of consumption charges due up to the date of disconnection, the interest rate payable has been reduced from 1.5% per month to 1% per month. APERC has further directed distribution licensees to strictly implement the modified order in true spirit and to submit a monthly report on the status of implementation of the Policy.

PNGRB invites comments on Concept Paper

Petroleum and Natural Gas Regulatory Board (“**PNGRB**”) has issued a concept paper on the refundable security deposit charged by the city gas distribution entities to provide new domestic piped natural gas connection to customers (“**Concept Paper**”). Stakeholder comments on the Concept Paper have been invited till 20.07.2020. An open house discussion in respect of the same will be held on 27.07.2020 through videoconferencing.

PNGRB vide public notice dated 29.06.2020 has issued the draft PNGRB (Determination of Natural Gas Pipeline Tariff) Amendment Regulations, 2020 (“**Draft Amendment**”). The Draft Amendment proposes changes to the PNGRB (Determination of Natural Gas Pipeline Tariff Regulations, 2008 (“**NGPL Regulations**”). Stakeholder comments on the Draft Amendment have been invited till 26.07.2020. An open house discussion on stakeholder comments will be conducted on 31.07.2020 through video conferencing.

Salient features of the Draft Amendment are as follows:

- Definition of “Integrated natural gas pipeline system” and “Unified Tariff” have been inserted vide clauses (ea) and (j) to Regulation 2(1):
 - “Integrated Natural Gas Pipeline System” defined to mean all the interconnected natural gas pipelines to which these regulations apply.
(List of such integrated natural gas pipelines systems and the natural gas pipelines constituting each such system provided in Part I of Schedule B)
 - “Unified Tariff” defined to mean the unit rate of tariff for the Integrated Natural Gas Pipeline System (excluding statutory taxes and levies) in rupees per million British Thermal Units (Rs. /MMBTU) for transportation of natural gas.
- Application of the NGPL Regulations has been extended to entities “laying, building, operating or expanding an Integrated Natural Gas Pipeline System” vide amendment to Regulation 3.
- Regulation 4A has been inserted to provide for the determination of Unified Tariff in respect of Integrated Natural Gas Pipeline System:
 - PNGRB may determine the unified tariff in respect of an entity’s entire integrated natural gas pipeline system either on application of an entity or on its own motion.
 - Any such application by an entity shall cover all its present and future interconnected natural gas pipelines to that integrated natural gas pipeline system.
 - Such application once made shall not be withdrawn.
 - Special provisions relating to determination of Unified Tariff in respect of each integrated natural gas pipeline system have been provided in Part 2 of Schedule B.

PNGRB issues Draft Amendment to PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008

Relaxation of time gap between two board / Audit Committee meetings of listed entities owing to the COVID-19 pandemic

Securities and Exchange Board of India (“**SEBI**”) vide its circular dated 26.06.2020, in continuation of its earlier circular dated 19.03.2020 has decided to further extend the timeline for relaxation in the requirement of the maximum stipulated time gap of 120 days between two meetings of the board and audit committees of listed entities, as is required under Regulation 17(2) and 18(2)(a) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 till 31.07.2020. Such relaxation was earlier granted for the meetings held or proposed to be held between the period 01.12.2019 to 30.06.2020.

Delhi High Court holds party cannot approach Court

The Delhi High Court (“**High Court**”) vide its order dated 07.07.2020 in *FAO(OS)(COMM) 65/2020 - Ashwani Minda and M/s Jay Ushin Limited v. M/s U-Shin Limited and M/S Minebea Mitsumi Inc.* has dismissed the appeal under section 37 of the Arbitration and Conciliation Act, 1996 (“**Act**”) on the

**after emergency
arbitration**

ground that when the Arbitral Tribunal on an earlier occasion had already denied grant of relief, jurisdiction under section 9 of the Act could not have been invoked in an alternative forum claiming same relief which the Arbitral Tribunal had rejected. The High Court observed that a party is entitled to approach an Indian Court by way of an Application under section 9 of the Act irrespective of the fact the seat of the arbitration is at any foreign country or beyond the boundaries of India, however, the same will not be maintainable if the Arbitral Tribunal has already been constituted, unless the applicant demonstrates that it does not have an efficacious remedy before the Arbitral Tribunal.

The Appellant, aggrieved by certain default on the part of the Respondents under the joint venture agreement had invoked the dispute resolution clause of the said agreement and approached the Japan Commercial Arbitration Association (“JCAA”) for an emergency measure of protection under Articles 75 to 79 of the JCAA Rules. The Appellant later filed an Application under Section 9 of the Act before the High Court claiming same relief which was claimed before the JCAA. JCAA passed an order rejecting the prayer for interim/emergency relief both on the ground of maintainability and merits. On the other hand, the High Court dismissed the Application under section 9 on the grounds of maintainability, finding that the said Application could not be maintained after dismissal of the Appellant’s request for emergency measures before the JCAA. Considering the fact that the relief claimed before the Delhi High Court was the same that JCAA at earlier occasion had rejected, the High Court dismissed the Appeal on the ground of maintainability by holding that an Application under section 9 of the Act cannot be construed as an alternative mean for claiming same relief which the Arbitral Tribunal has rejected.

The High Court vide order dated 07.07.2020 in *FAO(OS) (COMM) 60/2020 - Hero Wind Energy Private Ltd. v. Inox Renewables Limited* has opined on the question of law that if an Arbitral Tribunal has already been constituted to adjudicate the disputes which have arisen out of an agreement or set of agreements containing an arbitration clause, whether the remedy of approaching the Court for interim measures with respect to disputes subsequently arising from the same agreement or set of agreements is barred by section 9(3) of the Act. The High Court relied on the Supreme Court Judgment in *Dolphin Drilling Ltd. v. Oil & Natural Gas Corporation Ltd. (2010) 3 SCC 267*, wherein it was held that the words “all disputes” in arbitration clause can only mean “all disputes that may be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other”. The Supreme Court had opined that it cannot be held that once the arbitration clause is invoked, the remedy of arbitration is no longer available in regard to other disputes that might arise in future. Consequently, the High Court observed that depending on nature of the agreement or obligations to be performed thereunder, it is not necessary that all disputes between parties arise at one point of time, especially in large scale projects. Hence, the High Court held that remedy of approaching the Court for interim measures for subsequent disputes for same agreements is not barred by section 9(3) of the Act.

On the question, whether the matter should be remanded to the Single Judge for decision on the section 9 petition on merits, the High Court observed that a proceeding under section 9 of the Act has a sense of urgency about it and considering the same, it is not deemed appropriate to shuttle the parties to and from the benches of the Court. Disagreeing with the Single Judge on non-maintainability, the High Court decided on the entitlement of Hero Wind Energy Private Ltd. to interim measures.

**Delhi High Court
holds section 9(3) of
Arbitration Act
does not bar remedy
of approaching
Court w.r.t disputes
subsequently arising
from the same
agreement**

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