LINK LEGAL

Analysis & Perspectives on Court Orders.

Sector:

Renewable Energy.

For Orders passed in India by the Supreme Court and various electricity adjudicating authorities upto May 21st, 2021.

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FOREWORD.

Promotion of and preferential treatment for the environment friendly renewable sources of power is declared State policy for India, it being directly connected with our national goals and commitments in relation to climate change, the dependence on fossil-fuel based energy impeding the former initiative. All organs and agencies of the State are duty-bound to conduct themselves such that their actions are veered to sub-serve the cause espoused by the public policy rather than be in detriment thereof. From the legislative scheme enshrined in the Electricity Act, 2003, particularly sections 61(h) and 86(1)(e), it is quite clear that the mandate to the Regulator is to promote generation of electricity from renewable sources of energy. However, the unforeseeable outbreak of the Covid-19 pandemic had a debilitating impact on the growth of the renewable sector in India. In light of the pandemic, this compendium analyses the role played by the Indian Judiciary to address problems plaguing the RE sector in the last one and a half years from January 2020 to May 2021.

In certain instances, the Indian judiciary acted as a brim of hope in such strenuous times, by passing orders such as providing much-needed extensions; exemption and 'Change in Law' relief; by enabling RE Generators to map their flexibility with respect to generation; and robustly holding that denial of the banking facility to a third party sale is contrary to the Sections 86 and 49 of the Electricity Act; and furthermore, it gave due attention to the unconventional approach of mediation to settle commercial and technical disputes within the parties. It further tackled numerous ambiguities pertaining to dispute resolution of Corporate Debtors with Distribution Licensees, pending payments of SPDs in terms of their valid change in law claims.

Ironically, in few cases, the Judiciary acted as a breeding ground for confusion by passing contradictory judgments such as the denial of rights of Open Access. Moreover, a few orders eroded the level playing field of the RE Sector such as directing developers to convert all overheard powerlines into underground power lines. So, in a nutshell, the Indian judiciary has passed orders both in favour and against the sustainable growth of Renewable Energy sector.

This document comprehensively lays down the judgments and orders passed by Indian Judiciary, from the Supreme Court to the State Electricity Regulatory Commissions, to holistically encapsulate the orders passed in the last one and a half year, which would shape the renewable energy sector dramatically in the coming years.

ATUL SHARMA
MANAGING PARTNER
LINK LEGAL
May 28th, 2021.

THE FIRM: AN OVERVIEW.

Link Legal is a full service corporate and commercial law firm that has been thriving for over twenty years, with 36 partners and 170 lawyers across multiple practice areas. Our principal office is in New Delhi, with others at Mumbai, Hyderabad, Bangalore, Gurugram and Chennai.

We blend our legal proficiency with deep commercial insight, so our practice provides you with responsive advice to assist you in achieving your business objectives.

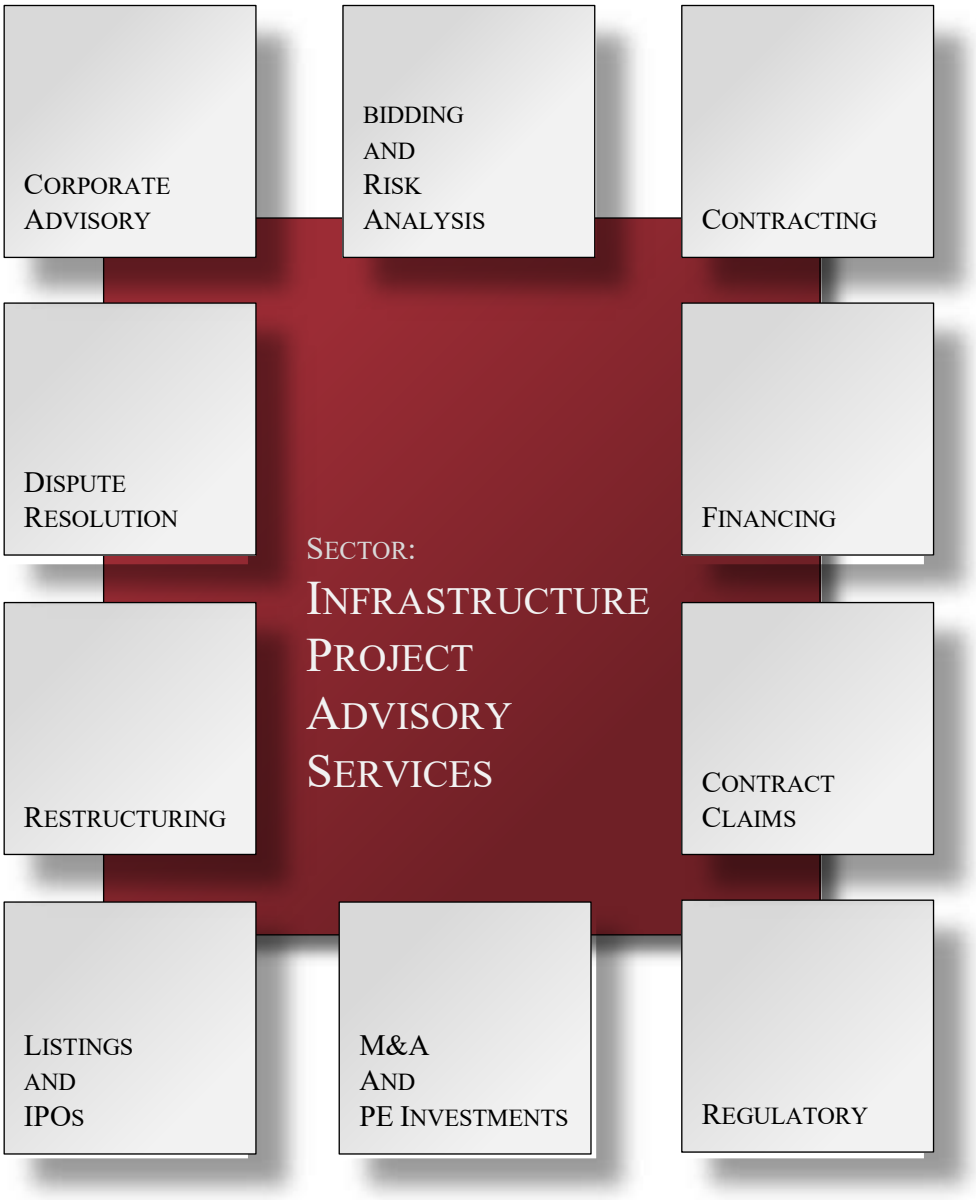
Our clientele includes some of India's leading corporate groups, public sector undertakings, public sector and private banks, private individuals, and multinational corporations across the world, particularly from the United States of America, the United Kingdom, France, Germany, the Netherlands, Australia, China, Indonesia, Canada, Hong Kong, Japan, and the United Arab Emirates.

Our strength lies in our team of experienced, well-trained and qualified lawyers, who integrate their skills to provide comprehensive legal advice and strategy on complex commercial issues that meet your needs and expectations. The partners bring a hands-on expertise and approach to each transaction from a strategic perspective, by understanding your objectives and identifying potential issues in areas of public policy or litigation. Each client enjoys a high level of personal service with the advantage of discussing matters directly with their assigned partner.

We have advised clients globally under its various practice heads, such as infrastructure projects, private equity, mergers & acquisitions, debt & capital markets, project finance, litigation, arbitration & alternate dispute resolution, and contract management, in diverse sectors such as water and wastewater, airports, metro rail & urban transport, roads, ports, oil, gas, energy, power, aviation, media, broadcasting, advertising, pharmaceutical, information technology, business process outsourcing, consumer goods, mining, software, entertainment, insurance, and banking. We also regularly advise clients in obtaining regulatory approvals from the Central Government or the Reserve Bank of India for establishing legal entities or any other form of business presence in India.

OUR SERVICES IN THE RENEWABLE ENERGY SECTOR.

Link Legal has been advising clients in the Renewable Energy sector for over twenty years, acting for clients on all sides of Project and Infrastructure transactions. This allows us to bring a broad perspective on projects and a strong understanding of the market overall.



STRATEGY AND ADVISORY.

We counsel and deliver pragmatic solutions to stakeholders in the energy and natural resources market on a full range of legal issues. Our lawyers

understand the market structures in which our clients operate and therefore, are ready to advance complete and holistic risk management solutions.

We provide due diligence reviews of transactional, financial, environmental and tax related issues in the energy market.

BID PROCESS MANAGEMENT.

We assist our clients in bidding for energy projects including negotiations, evaluation and finalisation of bid documents.

EQUITY TRANSACTIONS.

We advise developers on every aspect of equity transactions including mergers, acquisitions, demergers, asset sales, business transfers, joint ventures, partnership structures, strategic business combinations, auction sales, distressed M&A transactions, InvIT structures, highly structured equity investments, and the issuing of equity securities.

DEBT TRANSACTIONS.

As a market leader for debt transactions in the Energy Sector, we have advised on some of the largest and most complex project finance transactions, and combine a strong industry, market, and practice knowledge to advise on your debt transaction requirements.

PROJECT DEVELOPMENT AND PROJECT FINANCE.

Representing investors, banks and financial institutions and developers in all phases of every type of energy project across the renewable & conventional sectors, we apply a multi-disciplinary approach by forming a collaborative team of attorneys with the requisite background and experience for all aspects of project development including construction, procurement, regulatory, environmental, local government, and intellectual property.

We cover all of the development specialties for energy, including major Project Agreements, such as Power Purchase Agreements 4 (PPAs), Interconnection Agreements, O&M Agreements, Engineering Procurement Contracts, and Equipment Supply Agreements. As a full-service firm, we also have seasoned real estate practitioners in our project development team.

REGULATORY AND POLICY.

Our lawyers have represented clients in various precedent-setting energy sector matters before various judicial and quasi-judicial fora, including the Supreme Court, High Courts, APTEL, SERCs, and CERCs.

With the practical knowledge and strategic expertise required to provide nuanced advice on regulatory issues, we have been engaged by the industry in various complex dispute proceedings.

We have also advised multiple government authorities in framing of the sector regulations.

REAL ESTATE.

Assisting our clients in a wide array of matters relating to general laws regulating land and property in India, as well as on aspects of real estate transactions including land acquisition and title due diligence, our team also advises on stamp duties and the registration process, with complete legal procedural advice for regular pre/ post purchase/ sale and all relevant documentation including the issuance of Letters of Intent, Public Notices, Agreements to Sale, Sale Deed, etc., legal structuring and counselling for domestic as well as cross-border joint ventures and joint development agreements.

CONTRACT & CLAIMS MANAGEMENT.

We advise clients on project related contractual issues during the life-span of the project, including project conceptualisation, structuring, risk analysis, bankability, and related areas in various sectors. We offer a single point of contact and our services span contract management, claim management and management of dispute review board proceedings, mediation, arbitration proceedings (including international arbitrations) and court related proceedings under the arbitration laws.

RECOGNITION AND ACCOLADES IN THE ENERGY SECTOR.

Partners of the Firm are highly ranked by Chambers and Partners, The Legal 500, Benchmark Litigation, India Business Law Journal, Asian Legal Business, IFLR1000, Asialaw, among others.

ASIAN LEGAL BUSINESS:
One the Largest Law Firms in India in Asia's Top 50 Largest Law Firms list.
Ranked #13 in the Top 50 Indian Law Firms.

ASSET TRIPLE A INFRASTRUCTURE AWARDS 2020:
Utility Deal of the Year.

INDIA BUSINESS LAW JOURNAL:
2021, 2020 Indian Law Firm Awards in Aviation, Energy & Natural Resources, and Infrastructure & Project Finance.

TOP RANKED LEGAL 2020:
Ranked #15 in Top Ranked Law Firms: India.

LEGAL ERA INDIAN LEGAL AWARDS 2019-20:
Infrastructure & Project Finance Law Firm of the Year.

BENCHMARK LITIGATION ASIA PACIFIC 2020:
Ranked high for various practice areas.

ASIALAW PROFILES:
Ranked as Outstanding firm in Construction.

RSG CONSULTING: 2019:
Ranked #14 among the Top 40 Indian law firms.

CHAMBERS AND PARTNERS ASIA PACIFIC:
Consistently ranked high for various practice areas.

IFLR1000:
Consistently ranked high for various practice areas.

LEGAL 500 ASIA PACIFIC:
Consistently ranked high for various practice areas.

BEST BRANDS SUMMIT 2019:
One of the Best Brands ranked by the Economic Times.

IDEX LEGAL AWARDS: 2019:
Runner Up in the Best Law Firm of the Year - Large category.

IDEX LEGAL AWARDS: 2018:
Law Firm of the Year - Domestic.

GLOBALAW:
Firm of the Year (Asia Pacific).

KEY PARTNERS SPECIALIZING IN THE RENEWABLE ENERGY SECTOR.

To ensure that we provide you with the most comprehensive expertise and advice, a team of specialists in this sector consisting of our lawyers and associates have been selected to work on energy projects.

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OUR ANALYSIS & PERSPECTIVE ON ORDERS FROM COURTS & COMMISSIONS.

POWERLINES IN THE GREAT INDIAN BUSTARD HABITATS IN GUJARAT AND RAJASTHAN SHOULD BE LAID UNDERGROUND.

Suit:	M.K. RANJIT SINGH & ORS. V/S UNION OF INDIA & ORS. I.A. NO. 85618 OF 2020 IN W.P. (C) NO. 838 OF 2019
Decided by:	The Hon'ble Supreme Court of India.
Decided on:	April 19th, 2021.
Rules:	*Article 32 of the Constitution of India.*

ISSUES.

Environmentalists were pressing for closure of all generation activities along with the conversion of all overhead powerlines to underground in the Great Indian Bustard Habitats.

ANALYSIS.

- The Supreme Court was approached by a few environmentalists seeking protection of two species of birds, namely the Great Indian Bustard ("GIB") and the Lesser Florican, which are on the verge of extinction, from overhead transmission lines.

- The environmentalists sought directions be issued to the states of Rajasthan and Gujarat to prohibit the development of solar and wind assets in the GIB Habitat Region in order to ensure the protection of these birds from extinction. The Supreme Court, relying upon the sustainable development principle, refused to accept this prayer. However, it recognised that the overhead lines are the primary reason for extinction of these birds.

CONCLUSION.

The SC issued the following directions to save the birds from extinction:

- All overhead low voltage & high voltage powerlines would have to be converted into underground powerlines within one year.
- If there were certain feasibility issues in conversion of overhead lines, then the concerned authority would refer the matter to a Supreme Court appointed committee. This Committee would examine the case and subsequently recommend a course of action. Discretion was given to this Committee to obtain technical reports from the experts in the field of electricity supply.
- Till the time that the matter is pending before the Committee for evaluation, divertors would be hung on those powerlines on an immediate basis.

OUR PERSPECTIVE.

This order does not only impact the timeline for construction of projects, but also has an impact on project costs. The Supreme Court has made it very clear that it is upon the developers to find mitigation measures for the issue. For future projects, developers would have to necessarily factor in the impact of this order in their bids. As far as its impact on awarded projects is concerned, it would require an assessment of the contractual documents. It is to be seen and assessed whether the project developers can rely on the Change in Law clause of their Power Purchase Agreements to claim a reimbursement of the costs incurred due to compliance of these directions.

A reading of the standard bidding documents reflects that developers may get relief under clauses of Force Majeure and Change in Law.

The Supreme Court has exhibited a benevolence towards the environment while adjudicating this matter, and awarded more than what was prayed for. This order contains certain contradictory statements which need to be clarified/ rectified by the Apex Court. For example, one para of the order appears to list the names of the power lines upon which diverters are required to be installed, however the final paras of the order appear to

suggest that all powerlines are required to be installed underground. Further, there are regulatory challenges in the implementation of the order which was not pointed by the petitioners at the time of the hearing.

PPAs CANNOT BE TERMINATED DURING THE PERIOD OF MORATORIUM.

Suit:	GUJARAT URJA VIKAS NIGAM LIMITED ("GUVNL") V/S AMIT GUPTA CIVIL APPEAL NO. 9241 OF 2019
Decided by:	The Hon'ble Supreme Court of India.
Decided on:	March 8th, 2021.
Rules:	*Section 86(1)(f) of the Electricity Act, 2003;* *Section 60(5)(c) and 238 of the Insolvency & Bankruptcy Code 2016.*

ISSUES.

In this matter, the Supreme Court was assessing the validity of the order of the NCLAT/ NCLT wherein the NCLAT and NCLT assumed jurisdiction to adjudicate a dispute between the Distribution Licensee and the Generating Company, and further refused to recognise the right that arises from the PPA of the Distribution Licensee to terminate the PPA of the Corporate Debtor.

ANALYSIS.

- GUVNL and Astonfield Solar (Gujarat) Private Limited (Corporate Debtor) had executed a PPA, based on which the Corporate Debtor was to generate and supply solar power to GUVNL. Due to heavy rainfalls and floods, the Corporate Debtor was unable to generate the required amount of power. Consequently, it also failed to pay debts to its financial parties, and thus, became a Non-Performing Asset ("NPA").
- Upon the application of the Corporate Debtor, the NCLT initiated a Corporate Insolvency Resolution Process ("CIRP") against the Debtor, and Amit Gupta was appointed as the Insolvency Resolution Professional ("IRP").

- During the pendency of the CIRP, GUVNL terminated the PPA with the Corporate Debtor. The termination was challenged by Amit Gupta, and the NCLT passed an order in his favour. On appeal, the NCLAT also passed the order in favour of Amit Gupta. The NCLAT order was, thus, challenged by GUVNL before the Supreme Court.
- The Supreme Court recognised that Section 86(1)(f) of the Electricity Act, 2033 ("Act") provides jurisdiction to the Gujarat Electricity Regulatory Commission ("GERC") to adjudicate the dispute. But it also observed that under Section 60(5)(c) of the IBC, the NCLT/ NCLAT had jurisdiction over contractual disputes which relate solely with the insolvency proceedings against the Corporate Debtor. It further stated that Section 238 of the IBC has an overriding effect.
- The Supreme Court further stated that the residuary jurisdiction of NCLT under Section 60(5)(c) of the IBC provided it with a wide discretion to adjudicate questions of law or fact in relation to insolvency proceedings.

CONCLUSION.

The Supreme Court observed that the dispute arose solely out of the Insolvency Proceedings against the Corporate Debtor, and thus the NCLT/ NCLAT were right in exercising their jurisdiction. The SC further held that the tribunals were right in staying the termination of the PPA by the GUVNL, since allowing it to terminate the PPA would certainly result in the corporate death of the Corporate Debtor due to the PPA being its sole contract.

OUR PERSPECTIVE.

This precedent will have to be weighed by the other tribunals (other than the NCLT/ NCLAT) whilst determining their jurisdiction over matters having a flavour of insolvency. In the present case, the NCLT restrained GUVNL from exercising its rights available under the PPA. This case is also an exception to the rule that all disputes between the Distribution Licensee and the Generating Company will be adjudicated by electricity regulatory commissions.

In all future cases, the NCLT will have to be wary of setting aside valid contractual terminations which would merely dilute the value of the Corporate Debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract.

ELECTRICITY REGULATORY COMMISSIONS CANNOT INITIATE PUBLIC HEARINGS WHILE ADOPTING TARIFFS DISCOVERED UNDER THE COMPETITIVE BIDDING PROCESS.

Suit: AYANA ANANTHAPURAMU SOLAR PRIVATE LIMITED & ORS.
V/S
ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION ("APERC") & ORS.
APPEAL NO. 368 TO 373 OF 2019

Decided by: The Appellate Tribunal For Electricity ("APTEL").

Decided on: February 27th, 2020.

Rules: *Competitive Bidding Guidelines;*
PPAs;
Section 63 of the Electricity Act, 2003.

ISSUES.

Whether or not APERC was right in holding a public hearing during the competitive bidding process.

ANALYSIS.

- Various SPDs were declared as successful bidders in the bidding conducted by the NTPC, and were accordingly allotted solar power projects for different quanta. NTPC had entered into Power Sale Agreement ("PSA") with AP DISCOMs for supply of the SPDs' power. AP DISCOMs filed a PPA for approval of APERC. APERC initiated a public hearing. While approving the PPAs, APERC directed AP DISCOMs to consider the objections raised in those public hearings.

- The Tribunal observed that if a tariff is discovered in a Bidding Route under Section 63 of the Act, the appropriate Commission is required to adopt the tariff discovered and applicability of Section 86(1)(b) is limited to consider the merits of the case vis-à-vis the guidelines.

- The Tribunal stated that it is clear that the general regulatory powers which could be exercised by the State Commission comes into the picture only if there are no guidelines framed at all or where the guidelines do not provide a procedure to deal with that issue. Therefore, in light of the guidelines

prescribed by the Ministry of Power ("MoP") for a specific procedure to be followed in the procurement of solar power in question, there was no scope for the State Commission to hold a public hearing that called for objections/ suggestions from public. The only requirement of the State Commission in such a situation would be to see whether the bidding process initiated was in accordance with the MoP guidelines and whether these guidelines were complied with strictly.

CONCLUSION.

APTEL held that APERC was wrong in calling a public hearing for the competitive bidding process. It set aside the impugned order and held that there was no need to incorporate the amendments/ modifications on account of objections raised in a public hearing.

OUR PERSPECTIVE.

The Tribunal reiterated that when the tariff has been discovered via a competitive bidding process, the Commission is bound to accept such a tariff if the terms of the bidding guidelines have been followed in their entirety.

It is also made clear that the Commission had no right to conduct any public hearings in a competitive bidding process.

OPEN ACCESS IS NOT AN UNFETTERED RIGHT OF THE CONSUMER.

Suit:	SRIKALAHASTI PIPES LIMITED ("SKPL") V/S ANDHRA PRADESH STATE POWER DISTRIBUTION COMPANY LIMITED ("APSPDC") & ANR. APPEAL NO. 92 OF 2021
Decided by:	The Appellate Tribunal For Electricity ("APTEL").
Decided on:	April 27th, 2021.
Rules:	*Section 42, 61, 62 and 63 of the Electricity Act, 2003; APERC (Terms and Conditions of Open Access) Regulation, 2005.*

ISSUES.

Whether or not consumers can be denied the right to Open Access and can be compelled to procure power only from the Distribution Licensee.

ANALYSIS.

- SKPL has a ferro alloys plant and is a consumer of AP DISCOM. Ferro-alloy units have not been allowed to draw power through Open Access by APERC. APERC observed that Ferro Alloy units were already enjoying benefit of a lower tariff, and thus, there was no point in allowing them to draw power from Open Access. Aggrieved by the order, SKPL filed the appeal.
- The Appeal was heard by two-member bench and both Members reached different verdicts, with each Member writing a separate opinion:
  - Technical Member:
    The Technical Member placed reliance on the objective of the Electricity Act and Section 42 of the Electricity Act. He observed that SKPL is a consumer and as consumer, they were free to exercise their right to select the supplier of their power. The selection exercise is a commercial decision which the consumer would make after considering all aspects in his favour. The decision of the State Commission to force a consumer to procure power only from the Distribution Licensee is therefore against the very spirit of the Electricity Act, 2003 and is therefore illegal and bad in law. Thus, SKPL should be free to procure their power from the DISCOM or from other sources through Open Access.
  - Legal Member:
    The Legal Member differed from the view of Technical Member, and held that right to open access is not an absolute right. The Legal Member opined that Section 42(2) of the Electricity Act read with the fifth proviso did not confer an absolute right to Open Access, and the Electricity Regulatory Commission has the authority to consider all the relevant factors before allowing Open Access. Thus, the Legal Member observed that ferro alloy industries were getting special treatment, and in consideration of this special treatment, they should forego their right to Open Access.

CONCLUSION.

The two members of the bench reached different verdicts due to which the matter was referred to the Chairman to constitute a larger bench.

OUR PERSPECTIVE.

This Judgment is not for the renewable energy industry. However, this judgment shall have an impact on renewable energy Open Access projects. If the view of the Legal Member prevails, it will have a severe impact on the Open Access industry. This Judgment goes against very basic principle of the Electricity Act, 2003 which speaks of non-discriminatory Open Access to consumers.

BANKING OF ENERGY IS A RIGHT OF THE RENEWABLE ENERGY GENERATING STATIONS FLOWING FROM PROVISIONS OF THE ELECTRICITY ACT, 2003.

Suit:	TAMIL NADU SPINNING MILLS ASSOCIATION ("TNSMA") V/S THE TAMIL NADU ELECTRICITY REGULATORY COMMISSION ("TNERC") (BATCH APPEALS) APPEAL NO. 191 OF 2018
Decided by:	The Appellate Tribunal For Electricity ("APTEL").
Decided on:	January 28th, 2021.
Rules:	*Competitive Bidding Guidelines;* *Power Purchase Agreements;* *Section 49, 61, 86 of Electricity Act, 2003.*

ISSUES.

Whether or not renewable energy generating stations can claim banking facilities as a matter of right.

ANALYSIS.

- An appeal was filed against the Wind Tariff Order dated April 13th, 2018 passed by TNERC for determining the tariff components and other issues related to Wind Energy Generators ("WEGs").

- TNERC increased the banking charges from 12% to 14%; declared that any WEG installed or commissioned after March 31st, 2018 would not be eligible for the banking facility; withdrew the banking facility to the existing WEGs; increased the Scheduling and System Operation Charges from 40% to 50%; increased the cross subsidy surcharge to 60% from existing 50% and determined the 'Feed in Tariff' ("FIT") for sale of power to the utility retaining the payment period at 60 days. TNERC however, reduced the delayed payment levy to 1% interest from 1.5%.
- The order was challenged before the Tribunal.
- The Tamil Nadu Generation And Distribution Corporation Limited ("TANGEDCO") submitted that the Banking of Energy was causing losses to the DISCOM and was against consumer interests. APTEL observed that if consumer interests and financial health of distribution licensee are important, then the provisions concerning third party sale, open access and renewable energy sources are of equal significance. It further relied on various judgments and concluded that TNERC was wrong in its judgment.

CONCLUSION.

- The Tribunal set aside the Tariff Order to a major extent. It held that banking facilities and open access charges would be governed in terms of regulations which were in existence prior to the pronouncement of the TNERC order, such as continuation of banking facilities, cross subsidy charges at 50%, open access charges at 40%, banking charges at 12%, and so on.
- The Tribunal also directed TNERC to not bring any changes in the rules for power banking in order to bypass the decision of this court and upheld its original order.
- It held that the banking facility should be provided for the whole year, since a one month banking period affected the fundamental functioning of wind (and solar) power projects.
- Further, the Tribunal requested the Central Government to call upon the Central Electricity Authority to undertake the necessary study and recommend a fair and equitable solution for balancing the competing interests.

OUR PERSPECTIVE.

This judgment is significant for the renewable energy industry not only because of the banking provisions, but also for the other incentives which have been provided through this order.

This judgment has also shown a path to electricity commissions, which were under the impression that they were being charitable by providing a banking facility. APTEL in clear terms, held that denial of a banking facility to a third party sale is contrary to Sections 86 and 49 of the Electricity Act.

CARRYING COSTS CANNOT BE GRANTED IF THERE IS NO PROVISION IN THE PPA.

Suit:	PRAYATNA DEVELOPERS PRIVATE LIMITED ("PDPL") V/S NATIONAL THERMAL POWER CORPORATION LIMITED ("NTPC") & ORS. PETITION NO. 43/ MP/ 2019
Decided by:	The Central Electricity Regulatory Commission ("CERC").
Decided on:	January 21st, 2020.
Rules:	Clauses of PPA; Principles of Contract Law.

ISSUES.

Whether or not a developer is entitled to Carrying Costs if the PPA does not have a specific clause providing for the same.

ANALYSIS.

- PDPL entered into two PPAs with NTPC for setting up of 20 MW Solar PV Projects. After the introduction of Goods & Services Tax ("GST"), PDPL sent a notice to NTPC regarding the Change in Law event.
- Thereafter, a declaration was sought from the Commission that the introduction of GST Law was a Change in Law event, along with other consequential reliefs.
- The Commission allowed the relief regarding the 'Change in Law'. However, it observed that PDPL had not made any claims regarding Carrying Costs. Hence, PDPL approached the Commission to claim carrying costs vide a separate petition.

- The Commission placed reliance on findings of the Supreme Court in *Uttar Haryana Bijli Vitran Nigam Limited & Anr. v/s Adani Power Limited & Ors. in Appeal No. 6190 of 2018* ("Adani Power SC Judgment") for rejecting the claim of PDPL, by holding that a developer can only claim carrying costs if the PPA contains a restitution clause. The restitution clause states that the developer should be restored to the same economic position as if no Change in Law event had occurred.

CONCLUSION.

The Commission rejected the claim of PDPL seeking Carrying Costs due to absence of restitution clause in the PPA.

OUR PERSPECTIVE.

The Hon'ble Commission misread the order of the Supreme Court to justify its conclusion.

In the Adani Power SC Judgment, the Supreme Court was concerned with the limited question as to whether a generator can claim carrying costs if there is a specific restitutionary clause in the PPA. In the Adani Power matter, CERC did not grant carrying costs on a restitutive principle from the date of change in law till the date of the decision on the ground, because there was no provision in the PPA for payment of carrying costs. APTEL reversed the order of CERC and held that Article 13.2 of the PPA which allowed restoring the generation company to the same economic position as if Change in Law had not occurred was in consonance with the principle of 'restitution'. The Supreme Court merely affirmed the finding of APTEL, that Article 13.2 allows payment of carrying costs. The Supreme Court specifically held at various places of this order, that it would not dwell upon the issue of whether carrying costs could be allowed if there was no specific clause in the PPA.

A TARIFF CANNOT BE REDUCED RETROSPECTIVELY.

Suit: ESWARI GREEN ENERGY LLP
V/S
THE KARNATAKA ELECTRICITY REGULATORY COMMISSION ("KERC") (BATCH MATTERS)
APPEAL NO. 180 OF 2018 (BATCH)

Decided by: The Appellate Tribunal For Electricity ("APTEL")

Decided on: November 13th, 2020.

Rules: *Clauses of the PPA:*
Section 63 of the Electricity Act, 2003.

ISSUES.

Whether or not KERC was right in reducing the tariff rate with retrospective effect.

ANALYSIS.

- Certain wind-based generators ("WBG") entered into PPAs with Hubli Electricity Supply Co Limited ("HESCOM") for the sale of electricity. The tariff agreed in their PPA was INR 4.50 per KWH which was determined by a KERC order for PPAs signed between October 10th, 2013 and October 9th, 2018. The PPAs were sent for approval of KERC.
- During the pendency of the PPA approval, KERC vide an administrative order dated September 4th, 2017 determined a tariff of INR 3.74 per KWH for all projects which injected power into the grid after March 31st, 2017. This order reversed the findings of the earlier KERC order and had an impact on the vesting rights of the developers who had made their investments while placing their reliance on the earlier KERC Order. Aggrieved by the Order, the WBGs approached the Tribunal.
- APTEL held that it was patently arbitrary and capricious that KERC had proceeded to apply the tariff determined by the impugned order to such projects which had entered PPAs with ESCOMs prior to the date of the order.
- APTEL observed that KERC was passing orders of its whim and fancy and passing different orders for similarly placed generators.
- On the Commission's argument of actual injection into the grid, APTEL stated that the DISCOM had participated in the process of issuance of synchronisation and connectivity to the grid, and without the actual generation of the electricity, synchronization and connectivity were not possible to be achieved.

CONCLUSION.

Thus, APTEL held that Commission was wrong in passing the order and the tariff determined later in time could not be applied retrospectively.

OUR PERSPECTIVE.

This judgement confirms to the principles of fairness and propriety. The Tribunal has held that no Commission is allowed to differentiate or discriminate between similarly placed projects with respect to anything, be it the approval of the PPA or the revision of tariffs.

It further made clear that the appropriate commissions are bound by their orders and cannot subsequently deviate from it. This order further made it clear that the actual injection of the grid is not the sole criterion to determine generation of the electricity.

ENERGY INJECTIONS WITHOUT A VALID ENERGY PURCHASE AGREEMENT ("EPA") CANNOT BE COMPENSATED.

Suit:	BOTHE WINDFARM DEVELOPMENT PRIVATE LIMITED ("BWDPL") V/S MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED ("MSEDCL") CASE NO. 28 OF 2020
Decided by:	The Maharashtra Electricity Regulatory Commission ("MERC").
Decided on:	July 1st, 2020.
Rules:	Wind Policy, 2014; Govt. of Maharashtra's RE Policy, 2015, Electricity Act, 2003.

ISSUES.

- Whether or not the Commission can direct MSEDCL to sign Energy Purchase Agreements ("EPAs") with BWDPL;
- Whether or not BWDPL is entitled to receive compensation for the energy already injected.

ANALYSIS.

- BWDPL had set up various wind projects in Maharashtra. All the projects were commissioned under MSEDCL's Wind Policy 2014. EPAs were signed for all the projects, except three aggregating to 6.3 MW. MSEDCL refused to sign the same despite BWDPL's repeated requests.
- The commission observed that it could not conclude that the wind developer had set up these projects solely on the assurance of MSEDCL's Wind Policy, 2014. It further noted that BWDPL has failed to comply with the relevant mandates.
- The commission further observed that MSEDCL had switched to acquiring power to meet its RPOs target through competitive bidding in 2017, therefore, it need not compensate the developer for power consumed after this point. It also noted that the power used by MSEDCL from the financial year 2017-2018 onward was an "energy injection without a valid EPA".

CONCLUSION.

The Commission held that MSEDCL need not sign an EPA for the 6.3 MW with the developer under either the Wind Policy 2014 or the RE Policy 2015.

It further held that MSEDCL was not liable to compensate BWDPL.

OUR PERSPECTIVE.

MERC has reiterated the law that Energy Injection without a valid Energy Purchase Agreement would not be compensated. However, MERC should have relied on the principle of unjust enrichment to provide a relief to developers in respect of the energy injected into the grid.

STATE COMMISSIONS TO HAVE JURISDICTION OVER PROJECTS SET UP UNDER THE JNNSM IF 100% OF THE POWER IS SUPPLIED WITHIN THE SAME STATE.

Suit: MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED ("MSEDCL")
V/S

SOLAR ENERGY CORPORATION OF INDIA LIMITED ("SECI")
CASE NO. 346 OF 2019

Decided by: The Maharashtra Electricity Regulatory Commission ("MERC").

Decided on: September 14th, 2020.

Rules: *Section 65 and 108 of the Electricity Act, 2003.*

ISSUES.

Whether or not the State Commission has jurisdiction over generating stations set up under Jawaharlal Nehru National Solar Mission.

ANALYSIS.

- The Ministry of New and Renewable Energy ("MNRE") announced the Jawaharlal Nehru National Solar Mission ("JNNSM") in 2009. Under the mission, the MNRE announced a Scheme for 'Setting up of 2000 MW Grid-connected Solar PV Power Projects-State Specific Viability Gap Funding Scheme' which was proposed to be implemented by SECI.
- SECI and MSEDCL entered into two PSAs under which SECI had to sell its solar power to MSEDCL by buying it from selected SPDs. After approval, SECI started supplying power to MSEDCL. However, the commissioning of some of the projects got delayed which led to shortfall in supply of power.
- MSEDCL sought to claim compensation from SECI, but SECI denied all these claims and claimed itself to be only a trading licensee/ inter-state trader.
- The Commission observed that a generating company could not recover any trading margin, but could only recover tariffs for sale of electricity.
- Relying on the Supreme Court judgement in *Energy Watchdog vs. CERC (2017 (4) SCALE 580)*, the Commission stated that in the present case, 100% capacity was to be provided to MSEDCL; thus, by simply having an enabling feature of supply of energy to a third party under JNNSM would not make it a 'composite scheme'.
- The Commission further stated that SECI's right to sell to a third party could be exercised only if MSEDCL defaulted. Therefore, the provision providing for such a right could not be used to decide nature of the agreement. It observed that 100% capacity of power was to be provided to MSEDCL.

CONCLUSION.

The Commission held that SECI was acting as a trading licensee, that no 'composite scheme' exists, and that the transactions are Intra-State transactions where the State Distribution Licensee is involved in procurement of power within the State. Therefore MERC had jurisdiction in the instant case.

OUR PERSPECTIVE.

In this judgment, MERC took a contrary view from CERC with respect to the issue of jurisdiction over projects like the current scenario under the JNNSM Guidelines.

CERC held that the mere presence of an enabling provision of third party sale would make the arrangement a 'composite scheme'. However, MERC has stated that a mere enabling feature of inter-state supply of energy under JNNSM scheme would not make it a 'composite scheme' to attract jurisdiction of CERC.

Various appeals against CERC Change in Law orders are pending for adjudication before APTEL, wherein DISCOMs are submitting the same points that have been highlighted by MERC to assume its jurisdiction.

CERC'S DENIAL TO ASSUME JURISDICTION ON SECI PROJECTS .

Suit:	SOLAR ENERGY CORPORATION OF INDIA LIMITED ("SECI") V/S SHAPOORJI PALLONJI INFRASTRUCTURE CAPITAL COMPANY PRIVATE LIMITED ("SPICCPL") & ORS. PETITION NO. 52/ AT/ 2021
Decided by:	The Central Electricity Regulatory Commission ("CERC").
Decided on:	April 15th, 2021.
Rules:	*Competitive Bidding Guidelines;* *Power Purchase Agreement;* *Section 63 of the Electricity Act, 2003.*

ISSUES.

Whether or not CERC has jurisdiction to adopt the tariff for such SECI Projects which are located in the same state in which they are supplying electricity.

ANALYSIS.

- SECI filed a Petition for adoption of tariff for 150 MW grid-connected floating solar power projects selected through a competitive bidding process, at the behest of Uttar Pradesh Power Corporation Limited ("UPPCL").
- CERC, relying on the Supreme Court judgement dated April 11th, 2017, in *Energy Watchdog v. Central Electricity Regulatory Commission and Ors. [(2017 (4) SCALE 580)]*, stated that in the present case, all the generating companies were located in the State of Uttar Pradesh and would be selling power to the end procurer (being UPPCL), which was also situated in the same State. The Commission observed that this transaction would be entirely intra-state in nature.
- CERC further observed that the right to sell to a third party was available only as a recourse in cases of payment defaults, which would get triggered only in certain events of default and not otherwise.
- It is a well-established principle that the parties cannot confer the jurisdiction by consent, and the power of CERC can only be traced to the provisions of the Electricity Act and Guidelines.
- CERC did not dispute the fact that SECI is an inter-state trading licensee, however it clarified that this alone was not enough to expel the jurisdiction of the State Commission.
- CERC clarified that the cases in which its jurisdiction was exercised in cases with a similar set up, were the set ups which came under the Jawaharlal Nehru National Solar Mission ("JNNSM") Phase-II, Batch-III State Specific Viability Gap Funding ("VGF") Scheme. It explained that the JNNSM Scheme itself envisaged that the power from the project developed under the Scheme could be supplied to more than one State. So, even if the power was factually supplied to only one State where it was produced, this Commission exercised jurisdiction. However, the present set-up was not under the JNNSM Scheme, instead being under the bidding conducted by UPPCL in terms of the Competitive Bidding Guidelines.

CONCLUSION.

The Commission, therefore, held that this arrangement does not qualify as a 'composite scheme' and due to this reason, it does not have the jurisdiction to adopt tariffs in the above-mentioned scenario.

OUR PERSPECTIVE.

This order will have a significant impact on past, pending and future matters. CERC has exercised its jurisdiction on various similarly placed projects, and has provided extensions and granted a Change in Law relief. DISCOMs have filed appeals in most of such cases and this case can be cited by DISCOMs for showing the inconsistency of CERC to seek reliefs in their matter from APTEL.

COMMISSIONING OF A SOLAR PLANT IS DEPENDENT UPON THE INTENSITY OF SUNRAYS.

Suit:	AMP SOLAR CLEAN POWER PRIVATE LIMITED ("AMP SOLAR") V/S THE UTTAR PRADESH POWER COMPANY LIMITED ("UPPCL") & ORS. PETITION NO. 1644/ 2020
Decided by:	The Uttar Pradesh Electricity Regulatory Commission ("UPERC").
Decided on:	February 24th, 2021.
Rules:	*UP Electricity Grid Code, 2007:* *Electricity Act, 2003.*

ISSUES.

Whether or not a solar project is considered as commissioned if it has injected power into the grid.

ANALYSIS.

- AMP Solar sought a direction to declare that their AMP Solar plants had been commissioned.

- UPERC vide its interim order held that in view of the intermittent nature of renewable energy generation, the developer was required to establish that their project had the ability to maintain the peak output in line with its installed capacity for at least one 15 minute time block for three days within a continuous period of two weeks to claim the commissioning of their plant.
- UPERC observed that the AMP Solar did not declare the commissioning of the projects in compliance of the above stated interim order.
- The Commission also observed that Clause 4.8.5 of the UP Electricity Grid Code, 2007 clearly stated that no generating units would be synchronized with the state power grid without the necessary instructions from the SLDC to inject power into the grid without declaration of the COD.

CONCLUSION.

UPERC applied its test of commissioning which requires developers to maintain peak output for 15 minutes time block for 3 days, and denied the AMP Solar's claim of full commissioning of the plant

It further held that the Petitioner would provide the generation data to SLDC which would be verified by the SLDC from the data available with it and consequently, it would provide clearance for issuance of the COD in accordance with the relevant procedure and regulations and granted connectivity.

OUR PERSPECTIVE.

This order of UPERC defies any logic and rationale. The Supreme Court and Appellate Tribunal, in various judgments, have held that the injection of power into the grid is a sufficient reason to claim the commissioning of the plant. Except for the UPERC, no other Commission has ever linked the generation peak with the commissioning status. The terms "Part Commissioning" and "Full Commissioning" were never linked to the actual generation, instead being linked to the ability of generation (demonstration of CEIG certificates of full capacity, Evacuation Approval for full capacity etc.).

In essence, UPERC has held that prevailing weather conditions would decide the date of the commissioning of the solar plant, and the engineer's report would have no significance whatsoever to determine the date of the commissioning. UPERC, in one of the strangest orders, has made it impossible for solar plants to be commissioned during the winters or monsoons.

THE STATE ERC CANNOT DELEGATE THEIR RESPONSIBILITY TO DETERMINE THE QUANTUM OF COMPENSATION IN A CHANGE IN LAW DISPUTE.

Suit:	FORTUM SOLAR INDIA PRIVATE LIMITED ("FORTUM") V/S THE KARNATAKA ELECTRICITY REGULATORY COMMISSION ("KERC") APPEAL NO. 104, 105, 108, 111 & 112 OF 2021
Decided by:	The Appellate Tribunal For Electricity ("APTEL").
Decided on:	May 21st, 2021.
Rules:	*Section 97 of the Electricity Act, 2003.*

ISSUES.

An appeal was filed on the ground of various infirmities in an order. However, APTEL dwelled upon following a singular issue whilst disposing of the appeal, being whether or not KERC could ask parties to reconcile the Change in Law claim.

ANALYSIS.

- Fortum filed a petition in KERC to declare the imposition of SGD as a 'Change in Law', and claimed compensation for SGD, and integrated GST levied on the SGD along with the carrying costs.
- KERC accepted the imposition of SGD as a 'Change in Law'. However, it granted lower compensation to what was claimed by Fortum. It also denied the carrying costs. KERC further asked the parties to determine the 'additional tariff' by consensus. Aggrieved by the order, Fortum filed the appeal.
- The Tribunal observed that the Commission cannot delegate its power to adjudicate. It further observed that it was the Commission's duty to adjudicate whether event came under 'Change in Law', and if affirmative, then it was the Commission's duty to determine the quantum of the additional tariff. Once the conclusion regarding an event was reached by the Commission, then there was no scope for the parties to determine the

quantum, which would amount to sitting in review of the decision already determined by the Commission.

- This order of the Tribunal goes against the standard practice being followed by Regulatory Commissions for declaration of Change in Law. Commissions declare a Change in Law and ask parties to reconcile the claim, and post reconciliation parties present the final amount for the blessings of the Commission. The Tribunal took a strong objection of this practice and cautioned KERC in the matter.
- The Tribunal held that KERC had delegated its responsibility to the parties. The proceedings before the Commission should not have been terminated before complete adjudication of the matter i.e. determination of incremental tariff.

CONCLUSION.

The Tribunal set aside KERC Order and directed the Commission to take further steps to determine the incremental tariff. It further held that any communication among the parties in compliance of the said Order is inconsequential.

It further gave liberty to Fortum to approach the Tribunal on remaining issues like inadequate compensation and denial of carrying costs after the Commission passed the final order, pursuant to the compliance of the Tribunal's directions.

OUR PERSPECTIVE.

CERC, in its Change in Law orders, has clearly held that developers are entitled to reimbursement of all expenditure they incurred in respect of the import of all modules which are installed on or before the commissioning date. MERC has relied on the AC capacity of the plant to provide a rational formula for the compensation. KERC's reliance on the DC capacity would severally affect developers, and it forgets that the generator's obligation to supply power is in AC capacity, and that there will always be conversion losses from DC to AC.

CHANGE IN LAW PETITION CANNOT BE ADMITTED IF THERE IS UNCERTAINTY ON THE IMPACT OF ANY CHANGE IN LAW ON THE PROJECT.

Suit: ACME HEERGARH POWERTECH PRIVATE LIMITED ("AHPPL") V/S MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED ("MSEDCL") CASE 175 OF 2020

Decided by: The Maharashtra Electricity Regulatory Commission ("MERC").

Decided on: May 19th, 2021.

Rules: Clauses of the Power Purchase Agreement, Electricity Act, 2003.

ISSUES.

Whether or not the Electricity Regulatory Commission is under an obligation to declare Change in Law if the impact of such a Change in Law is uncertain on the project.

ANALYSIS.

- MSEDCL floated a tender for the procurement of solar power, and AHPPL emerged as one of the successful bidders. Accordingly, the PPA was executed, and the SCOD of the project was June 21st 2021.
- However, due to outbreak of COVID-19, the supply chain for solar modules was affected and the delivery date of equipment could not be ascertained. Thereafter, the Central Government imposed a Safeguard Duty on import of solar cells and modules between July 30th, 2020 and July 30th, 2021 ("SGD 2020").
- Pursuant to this, AHPPL issued a Change in Law notice to MSEDCL and approached MERC seeking a declaration of the change in law due to imposition of SGD 2020.
- The Commission observed that SGD is levied on the arrival of solar modules/ panels in the Indian jurisdiction. AHPPL had merely placed the

purchase order with a Chinese supplier in December 2019, and due to COVID-19 its delivery had not yet been made till the date of filing of the petition.

- Considering that the SCOD of the project was June 21st, 2021, which was just one month before the expiry of the applicability of SGD 2020, the SGD was now expected to be extended by at least five months in view of the MNRE advice providing a 5 month blanket extension to project developers. Therefore, there was a possibility that the date of import of solar panels/ modules would actually be beyond the last date of applicability of the SGD 2020, i.e, July 29th, 2021 and hence, no SGD would apply.
- It further held that in its previous order in Case 218 of 2020 on which AHPPL was relying, SGD was declared as a Change in Law event and the relief was allowed because the SCOD of the project in the said matter was July 3rd, 2021 i.e before the last date of applicability of SGD 2020. Therefore, that case was different.
- It observed that in this case, it was most likely that SCOD would be revised beyond the applicability of SGD 2020.

CONCLUSION.

The Commission held that the possibility of incurring additional costs on account of SGD 2020 was doubtful, and holding such a notification as a Change in Law event for this matter would be extremely premature. However, it stated that in case any expenses were incurred on account of SGD 2020, then AHPPL would be free to approach the Commission and seek compensation.

OUR PERSPECTIVE.

This Order appreciates the concern of the developer for filing this petition at an advanced stage, however whilst appreciating the concern, it did not provide any relief. The Commission should have appreciated that declaration of the Change in Law would have helped developers to raise funds and would have accelerated the process of actual compensation.

There is no doubt on the proposition that the Developer cannot approach MSEDCL for the release of an advance payment in respect of the safeguard duty payment, and it can only seek reimbursement.

However, an advanced declaration would have expedited the reimbursement process.

SAFEGUARD DUTY IS CONSIDERED AS A 'CHANGE IN LAW'.

Suit: FORTUM SOLAR INDIA PRIVATE LIMITED ("FORTUM")
V/S
BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED ("BESCOM")
OP 48/ 2019

Decided by: The Karnataka Electricity Regulatory Commission ("KERC").

Decided on: December 31st, 2020.

Rules: *Clauses of the Power Purchase Agreement; Section 86(1)(f) of the Electricity Act, 2003.*

ISSUES.

Whether or not a developer is eligible for reimbursement due to the 'Introduction of Safeguard Duty'.

ANALYSIS.

- Fortum approached KERC for seeking a reimbursement of the expenses incurred due to introduction of the safeguard duty.
- KERC relied on various judgments/ orders, and following the precedence declared that introduction of safeguard duty as a Change in Law event. It further observed that the PPA does not contain any specific clauses for carrying costs.
- It further observed that Fortum procured more quantity of modules than required under the terms of the PPA and the RfP.

CONCLUSION.

The Commission concluded that Fortum is entitled to be reimbursed for the expenditure it incurred for payment of the safeguard duty to the extent required under the clauses of the PPA & the RfP. For this, KERC relied on the DC capacity of the plant to provide a ceiling of the permissible module to be imported. It further held that Fortum is not entitled to recover their Carrying Costs. Fortum had filed appeal against this order, and APTEL returned this matter to KERC with a direction to pronounce an order on the compensation amount.

OUR PERSPECTIVE.

CERC, in its Change in Law orders, has clearly held that developers are entitled to reimbursement of all expenditure they incurred in respect of the import of all modules which are installed on or before the commissioning date. MERC has relied on the AC capacity of the plant to provide a rational formula for the compensation. KERC's reliance on the DC capacity would severally affect developers.

CUSTOM BONDS COULD BE ACCEPTED FOR PAYMENTS OF SGD.

Suit: ACME CHITTORGARH SOLAR ENERGY PRIVATE LIMITED ("ACME")
V/S
MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED ("MSEDCL")
CASE NO. 7 OF 2020

Decided by: The Maharashtra Electricity Regulatory Commission ("MERC").

Decided on: June 15th, 2020.

Rules: *Clauses of the Power Purchase Agreement;*
Competitive Bidding Guidelines;
Electricity Act, 2003.

Issues.

- Whether or not a developer is eligible for compensation of SGD paid by it through custom bonds;
- Whether or not a developer is eligible for compensation in regard to the interest accrued on the bonds.

ANALYSIS.

- ACME sought reimbursement of the cost incurred as a result of the imposition of Safeguard Duty ("SGD") under a Change in Law event under the terms of the PPA. ACME had imported certain modules by making a part payment of the SGD in cash and part by executing bonds to the customs department.

- The Commission relied on the principle of 'Change in Law' and stated that the affected party has to be restored to the same financial position by way of compensation as if the event of Change in Law had not occurred.

CONCLUSION.

The Commission allowed ACME's claim for compensation on account of additional costs incurred due to imposition of the SGD under Change in Law under the provision of the PPA.

The Commission also directed MSEDCL to reimburse the amount claimed under the bond. However, the Commission rejected ACME's request for the reimbursement of interest accrued on the bonds submitted with the Customs Department for the import of solar modules, and further, observed that the decision for the cost of financing the purchase needs to be borne by the developers.

OUR PERSPECTIVE.

It is noteworthy that this is the first time that a Commission has accepted the payments made through Customs Bonds, and further, allowed reimbursement of the amount claimed under the bonds.

RE-TENDERING PROCESS CAN BE CONDUCTED FOR THE BENEFIT OF THE PUBLIC AT LARGE.

Suit:	GUJARAT URJA VIKAS NIGAM LIMITED ("GUVNL") PETITION NO. 1906/ 2020
Decided by:	The Gujarat Electricity Regulatory Commission ("GERC").
Decided on:	January 29th, 2021.
Rules:	*Section 63 and 86(1)(b) of the Electricity Act, 2003.*

ISSUES.

Whether or not GUVNL can be allowed to rebid after the completion of the bidding process.

ANALYSIS.

- GUVNL had floated a tender to purchase solar power of 1 GW. In the first two tender offers, Tata Power Renewable Energy Limited ("TPREL") became the successful bidder by bidding for 300 MW with the quoted tariff of INR 2.75 per KWH. GERC approved and adopted the tariff discovered in these two bidding rounds.
- A third round of bidding was held by GUVNL and there were five successful bidders for the balance 700 MW of energy, and a Letter of Award was issued to them. GUVNL submitted the tariff for adoption before GERC. In December 2020, comparatively low tariffs of INR 1.99 / KWH were recorded in a bidding process conducted by SECI. This prompted GUVNL to change its mind, and GUVNL approached GERC seeking permission to initiate a separate re-tendering process for 700 MW capacity in light of the recent price trends wherein lower tariffs were recorded.
- GERC observed that the claim of GUVNL is in the larger interests of the public as a lower tariff would eventually reduce the burden on the end consumers.
- In December 2020, comparatively low tariffs of INR 1.99 / KWH were recorded. As a result, GUVNL reviewed the auction.
- GUVNL thus approached GERC seeking permission to start a separate re-tendering process for 700 MW capacity in light of recent price trends where lower tariffs were recorded. It was GUVNL's case that the re-tendering process was in the interests of the consumers at large.

CONCLUSION.

The Commission allowed the re-tendering process, and further granted GUVNL with the liberty to approach GERC for adopting fresh tariffs after taking appropriate actions regarding bidding in accordance with the law.

OUR PERSPECTIVE.

The Developers have filed an appeal against this order and the Tribunal has restrained GUVNL from creating any third party rights over the bid capacity. The next scheduled hearing is slated for June 2021. APTEL should take this opportunity to lay down the law in respect of the rights of bidders to cancel the tender after announcement of the successful bidder, and further, APTEL should also clearly lay down the role of the Commission in adoption of the tariff. Commissions have forgotten the fact that there is a difference between tariff determination and tariff adoption. Moving the goalposts should not be allowed.

PAYMENT TO SOLAR POWER DEVELOPERS BY A TRADER IS NOT CONDITIONAL UPON THE PAYMENT BY THE PROCURER TO THE TRADER.

Suit:	ACME KURUKSHETRA SOLAR ENERGY PRIVATE LIMITED ("ACME") V/S NATIONAL THERMAL POWER CORPORATION LIMITED ("NTPC") & ORS. 138/ MP/ 2019
Decided by:	The Central Electricity Regulatory Commission ("CERC").
Decided on:	January 28th, 2020.
Rules:	*Section 142 of Electricity Act, 2003; Clauses of PPA; Competitive Bidding Guidelines.*

ISSUES.

Whether or not the NTPC is liable to pay compensation on account of Change in Law events if the procurer has not made payments to NTPC.

ANALYSIS.

- By virtue of its order dated October 9th, 2018, CERC upheld the introduction of the Goods and Services Tax Act, 2017 ("GST") as a valid 'Change in Law' event under the PPA of the respective Solar Power Developer companies, herein ACME entities. Accordingly, it directed NTPC and distribution companies to make payments to the Change in Law claims of the ACME entities.
- In absence of payments by the NTPC and DISCOMs, the ACME entities approached CERC through a petition under Section 142 of the Electricity Act, 2003 seeking compliance of the CERC Order.
- CERC held that the PPA and Power Sale Agreement ("PSA") being 'back-to-back' in nature are interconnected, implying thereby that the DISCOMs are liable to pay to the NTPC all that the NTPC has to pay to ACME entities; however, payment to ACME entities by the NTPC was not conditional upon the payment to be made by the concerned DISCOMs to NTPC.

CONCLUSION.

CERC held that the NTPC is liable to pay the due claims to the ACME entities along with LPS through supplementary invoices within 30 days date of the order. However, payment to ACME entities by the NTPC is not conditional upon the payment by the concerned DISCOMs to the NTPC.

Furthermore, CERC clarified that this decision will also be applicable in similar cases wherein the Commission has already allowed GST laws as 'Change in Law' under article 12 of the PPAs.

OUR PERSPECTIVE.

This order addresses the ambiguity which plagued the issue of pending payments of SPDs in terms of their valid GST claims. Moreover, this order sets up a precedent by clarifying that its findings shall be applicable on all similar cases, consequently benefitting the entire solar power industry.

SCOD EXTENSION SHOULD BE GRANTED FOR DELAY IN ISSUANCE OF GOVERNMENTAL APPROVALS.

Suit: CHENNAMANGATHIHALI SOLAR POWER PROJECT LLP ("CSPP")
V/S
BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED ("BESCOM")
APPEAL NO. 351 OF 2018

Decided by: The Appellate Tribunal For Electricity ("APTEL").

Decided on: September 14th 2020.

Rules: *Competitive Bidding Guidelines;*
Clauses of the Power Purchase Agreement;
Electricity Act, 2003.

ISSUES.

- Whether or not KERC was right in taking a suo-moto cognizance of the issue of extension of SCOD;

- Whether or not a generating company is entitled to claim extension in the scheduled commissioning date of their project due to delay in issuance of the governmental approvals.

ANALYSIS.

- CSPP was formed as a Special Purpose Vehicle {"SPV") to undertake a solar power project in Karnataka. The project of the CSPP commissioned within the extended SCOD of 6 months which was allowed by BESCOM.
- KERC took a suo-moto cognizance of the issue of extension of SCOD and rejected the same for CSPP's solar power project along with imposing liquidated damages.
- Aggrieved by KERC's order and its unsolicited intervention, CSPP approached APTEL.
- APTEL analysed the particular factual matrix of the case and noted that there were considerable delays, both on the part of the Government agencies/ DISCOM, and CSPP. The Tribunal observed that KERC failed to analyse all the issues in a just and proper manner and the SPV could not be punished for negligence of the governmental authorities in issuance of the requisite approvals.
- APTEL further stated that the mandate upon the state electricity regulatory commissions to promote co-generation and power from renewable sources. However, by passing the impugned order, KERC failed to do so.

CONCLUSION.

The Tribunal held that KERC was well within its rights to take the suo-moto cognizance of the case at hand. However, it held that KERC was wrong in its conclusion of rejecting the extension and imposing the damages on CSPP. Therefore, the tribunal set aside KERC's Order.

OUR PERSPECTIVE.

APTEL reiterates the mandate upon the State Commission to promote co-generation and generation of power from renewable sources of energy. Electricity regulatory commissions have forgotten this principle and have been acting against the interests of the renewable energy developers.

Commissions have forgotten the fact that Section 86 (1)(e) has not been deleted from the Electricity Act, and they are still required to promote renewable energy stations.

SCOD EXTENSION CAN BE GRANTED IF THERE IS DELAY IN ISSUANCE OF GRID CONNECTIVITY.

Suit:	RENEW VAYU URJA PRIVATE LIMITED ("RENEW") V/S MAHARASHTRA STATE ELECTRICITY DISTRIBUTION CO. LIMITED ("MSEDCL") & ORS. CASE NO. 102 OF 2020
Decided by:	The Maharashtra Electricity Regulatory Commission ("MERC").
Decided on:	July 14th, 2020.
Rules:	*Provisions of the RFP and Power Purchase Agreement;* *Competitive Bidding Guidelines;* *Electricity Act, 2003.*

ISSUES.

Whether or not a petitioner is entitled for SCOD extension due to the delay in issuance of the grid connectivity approval.

ANALYSIS.

- Renew was a successful bidder for 76 MW for a bid carried out by MSEDCL for grid connected wind power projects. Subsequently, a PPA dated July 17th, 2018 was executed between Renew and MSEDCL.
- As per the Request for Selection ("RFS"), Financial Closure ("FC") and SCOD was to be achieved within 7 months and 18 months from the date of the signing of the PPA respectively.
- After passage of approximately 9 months, on March 7th, 2019, the Transmission Licensee granted the grid connectivity approval for a 50 MW capacity wind power project. Thereafter, Renew served a notice to MSEDCL towards the Force Majeure on account of delay in grid connectivity and requested MSEDCL to extend SCOD up to 31st December 2019. MSEDCL rejected it and invoked Article 3.3 of PPA whereby it was entitled to forfeit bank guarantees or levy liquidated damages in case there was a delay in achieving SCOD.

- MERC observed that one of the primary reasons for the delayed commissioning was the delay in issuance of the grid connectivity approval.

CONCLUSION.

The Commission recognised the delay in grid connectivity approval as a valid reason to grant an extension of SCOD for the Project. It further held that Renew should not be subject to any penalty on account of delay in the commissioning of the project.

OUR PERSPECTIVE.

In this order, the Commission took into account the ground reality of the issues faced by developers after projects are allotted to them. The Commission provided a major relief to Renew and other similarly placed developers, given that project timelines are often adversely impacted due to delays in grid connectivity.

SCOD CANNOT BE EXTENDED ON THE BASIS OF COVID-19 IF THE COMMISSIONING DATE FALLS OUTSIDE THE PANDEMIC PERIOD.

Suit:	SOLITAIRE BTN SOLAR PRIVATE LIMITED ("SOLITAIRE") V/S THE TAMIL NADU GENERATION AND DISTRIBUTION CORPORATION LIMITED ("TANGEDCO") DRP NO. 05 OF 2020
Decided by:	The Tamil Nadu Electricity Regulatory Commission ("TNERC").
Decided on:	November 24th, 2020.
Rules:	*Clauses of the Power Purchase Agreement;* *Electricity Act, 2003.*

ISSUES.

- Whether or not Solitaire is liable for the delay in the evacuation of power;
- Whether or not Solitaire is entitled to the relief of extension of SCOD.

ANALYSIS.

- Solitaire approached TNERC to direct TANGEDCO to complete construction/ commissioning of the requisite infrastructure for the evacuation of 100 MW of power. It further stated that there was a delay on behalf of the respondent to provide the evacuation facility, therefore, the Petitioner could not be held liable for the delay.
- It further prayed for an extension on of the SCOD on the ground that the commissioning got delayed due to the force majeure event of COVID-19.
- The Commission observed that the SCOD of the project lay outside of the period of the COVID-19 pandemic.
- It further relied heavily on TANGEDCO's submission to hold that the requisite evacuation infrastructure is available.

CONCLUSION.

Thus, the Commission held that the Respondent fulfilled its obligations in providing support to the Petitioner, therefore, the Petitioner was liable to pay damages for the delay in the evacuation of power.

The Commission further held that the SCOD of the project cannot be extended due to force majeure event of COVID-19.

OUR PERSPECTIVE.

Solitaire has filed an appeal against this order and there is stay in the operation of this order by APTEL. Arguments have been concluded and order has been reserved.

A COMMISSION CAN REFER A CASE FOR ARBITRATION IF IT DEEMS FIT.

Suit: GREEN INFRA WIND ENERGY LIMITED ("GIWEL")
V/S
MP POWER MANAGEMENT COMPANY ("MPPMCL")
PETITION NO. 52/ 2018

Decided by: The Madhya Pradesh Electricity Regulatory Commission ("MPERC").

Decided on: January 4th, 2021.

Rules: *Clauses of the Power Purchase Agreement;*
Section 86(1)(e) and 86(1)(f) of the Electricity Act, 2003.

ISSUES.

Whether or not MPPMCL is liable to pay the Late Payment Surcharge ("LPS") along with the carrying costs.

ANALYSIS.

- GIWEL sought directions to MPPMCL to clear its outstanding dues of the LPS along with the carrying costs in terms of the PPAs executed between the parties.
- MPPMCL pressed for referring the matter to arbitration which was opposed by GIWEL. The Commission acceded to the request of MPPMCL, and referred the matter for arbitration placing reliance on the Supreme Court judgment in the case of *Gujrat Urja Vikas Nigam Limited v/s ESSAR Power Limited*. The Commission observed that this Supreme Court Judgment gives a discretion to the Commission to hear the matter itself or refer it to the arbitration.
- The Commission acknowledged that the case was a matter where contractual obligations involving financial/ contractual/ commercial issues that would require a detailed examination and would involve a substantial amount of time and due diligence. Moreover, the requisite expertise would have to be brought in to deliberate and appreciate the issues involved before taking an informed decision.

CONCLUSION.

The Commission held that the contractual dispute would be best adjudicated by arbitrators, and thus referred the matter for arbitration in terms of the provisions under MPERC (Conduct of Business)(Revision-I) Regulations, 2016.

OUR PERSPECTIVE.

This case was a pure tariff dispute and there was no denial of the liability by DISCOM. The Commission has abdicated its responsibility to adjudicate, by referring this matter to arbitration.

MATTERS RELATED TO TARIFF CAN BE SOUGHT OUT THROUGH MEDIATION.

Suit:	SALASAR GREEN ENERGY PRIVATE LIMITED ("SALASAR") V/S THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION ("UPERC") & ORS. APPEAL NO. 129 OF 2018
Decided by:	The Appellate Tribunal For Electricity ("APTEL").
Decided on:	June 29th, 2020.
Rules:	*Section 89 of CPC;* *Section 30 and Section 74 of the Arbitration & Conciliation Act.*

ISSUES.

Whether or not the Commission has the competence to reduce a tariff discovered through the competitive bidding process.

ANALYSIS.

- After a successful competitive bidding process, the tariff was discovered at INR 8.496 per KWH for 12years, and accordingly, the PPA was executed between Salasar and UP Power Corporation Limited ("UPPCL").
- A petition was filed for adoption of tariff before UPERC, whereby, it reduced the tariff from INR 8.496 to INR 7.02. Aggrieved by the said order, Salasar filed an appeal with APTEL. UPPCL opposed the appeal on the submission that the appeal was based on a complete misreading of the provisions of Section 63 of the Act.
- APTEL opined that that this was a fit case where parties could sort out their differences sitting across the table over a dialogue.
- Further, APTEL observed that though it was not bound to follow all the provisions of the Civil Procedure Code, 1908 ("CPC") in letter and spirit, but it was well settled that it could take guidance from the provisions of the CPC while adopting its own procedures. This power was vested with APTEL in terms of provisions of the Electricity Act.

- APTEL placed reliance over the Supreme Court judgement in the case of *Afcons Infrastructure Limited & Anr. vs. Cherian Varkey Construction Company Limited* to highlight that Section 89 vested the choice of reference to Court and moreover, the alternate dispute resolution process does not cause a case go out of the stream of the court's purview if a settlement is not reached.

CONCLUSION.

Therefore, based on the Supreme Court judgment, APTEL directed this dispute for mediation and stated that the tariff would be adopted based on the results of the mediation.

OUR PERSPECTIVE.

For the first time since it started hearings, APTEL has referred a matter for mediation. APTEL should elect for this process whenever it feels that there may be the possibility of settlement in a matter.

PGCIL IS OBLIGED TO RETURN THE CONSTRUCTION PHASE BANK GUARANTEE AFTER IDENTIFICATION AND SIGNING OF A DEFINITIVE AGREEMENT WITH THE PROCURER.

Suit:	POWER GRID CORPORATION OF INDIA LIMITED ("PGCIL") V/S ACME SOLAR HOLDINGS LIMITED ("ACME") I.A. NO. 91/ 2019 IN PETITION NO. 108/ MP/ 2019
Decided by:	The Central Electricity Regulatory Commission ("CERC").
Decided on:	May 9th, 2020.
Rules:	*Regulation 12 and 27 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009.*

ISSUES.

Whether or not the Construction Phase Bank Guarantee should be returned to developers who have submitted such Bank Guarantees at the time of filing their application and have subsequently firmed up their supply.

ANALYSIS.

- An interim application was filed by PGCIL seeking appropriate directions on whether an exemption from submission of the construction phase Bank Guarantee ("BG") can be extended to phases between the making of LTA application to the LTA grant, or to signing of the LTA Agreement, or further to the last due date for submission of the construction phase Bank Guarantee in the ordinary course, keeping in mind its implications on ISTS Licensees and beneficiaries (DISCOMs).
- CERC observed that an important aspect for the non-requirement of the construction phase BG is that the augmentation of the transmission system, as identified for grant of LTA, shall be undertaken only after agreement of the beneficiaries in the Standing Committee on Power System Planning/ Regional Power Committee, and that the transmission charges shall be borne by them and the LTA Agreement shall be signed directly by beneficiaries with the CTU.
- In case of competitively bid projects through intermediary agencies, fulfilling these conditions may not be possible at the time of making the LTA application, since in such cases the PPA is signed by the intermediary agency with generators, first on the basis of bidding, followed by the PSA with beneficiaries. There could be, and often there is a time lag between signing the PPA and the PSA due to the requirement of getting the approval of the PSA by respective State Electricity Regulatory Commissions.

CONCLUSION.

CERC, therefore, held that construction phase BG could not be waived for an LTA applicant, where

(a) augmentation of the transmission system is identified for grant of LTA; and
(b) there is no PPA with beneficiaries, or a PPA exists only with an intermediary agency without a back-to-back PSA with the beneficiaries.

However, CERC gave relief to those developers who had furnished the BG at the time of the application, but had subsequently firmed up the PPA by directing the CTU to return the construction BG.

OUR PERSPECTIVE.

This order reaffirms the fact that CERC truly believes in its obligation to promote the renewable energy sector.

Placing reliance on this order, developers will be able to seek the return of their construction BG after signing a definitive agreement with the beneficiary.

The intent of CERC can be seen in the following para from their Order:

> *"If any application BG or construction phase BG has been furnished by the LTA applicant, BG corresponding to the quantum, for which PPA or PSA with beneficiaries has been signed and submitted to CTU, shall be returned to such LTA applicant."*

APPROVAL OF GREEN-TERM AHEAD MARKET (RENEWABLE ENERGY) CONTRACTS.

Suit:	POWER EXCHANGE INDIA LIMITED ("PEIL") PETITION NO. 228/ MP/ 2020
Decided by:	The Central Electricity Regulatory Commission ("CERC").
Decided on:	March 19th, 2021.
Rules:	*Regulation 6 and 7 of CERC (Power Market) Regulations, 2010.*

ISSUES.

PEIL sought approval for the introduction of Green-Term Ahead Market (Renewable Energy) Contracts ("GTAM Contracts") on its platform.

ANALYSIS.

- PEIL filed a petition under Regulation 6 and 7 of CERC (Power Market) Regulations, 2010 ("PMR Regulations") seeking an approval for the introduction of GTAM Contracts on its platform to provide avenues to renewable energy ("RE") generators for sale of RE through PEIL's platform and obligated entities to fulfil their Renewable Purchase Obligations ("RPOs").

- The Commission relied on PEIL's proposal and considered the objections raised by various stakeholders. It observed that the introduction of GTAM Contracts would be for the betterment and increase in growth of the RE trading market sector.

CONCLUSION.

- The Commission granted permission to the petitioner to introduce GTAM Contracts on its platform.
- The different types of GTAM Contracts are:
  - Green Intra-Day Contracts;
  - Green Day-Ahead Contracts;
  - Green Daily Contracts;
  - Green Weekly Contracts.

OUR PERSPECTIVE.

This will help the RE Generators to map their flexibility with respect to generation, and at the same time, purchasers will have an added option to meet their RPOs.

CERC APPROVES CERTAIN DEVIATIONS FROM THE SOLAR BIDDING GUIDELINES.

Suit:	REWA ULTRA MEGA SOLAR LIMITED ("RUMSL"); INDIAN RAILWAYS; AND MADHYA PRADESH POWER MANAGEMENT COMPANY LIMITED ("MPPMCL") PETITION NOS:. 91/ MP/ 2020; 631/ MP/ 2020; AND 672/ MP/ 2020
Decided by:	The Central Electricity Regulatory Commission ("CERC").
Decided on:	April 25th, 2021.
Rules:	*Clause-18 of the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' ("Competitive Bidding Guidelines").*

ISSUES.

Whether or not the Petitioners are allowed to deviate from the Solar Bidding Guidelines.

ANALYSIS.

- The Petitioners sought an approval for deviation from the Solar Bidding Guidelines.
- CERC, on their request allowed many deviations from the provisions of the Solar Bidding Guidelines keeping in mind the current sectoral developments.

CONCLUSION.

CERC allowed the Petitioners to deviate from the Solar Bidding Guidelines in the following manner:

- It allowed the request of the Petitioners vis-à-vis Indian Railways to issue a 'Letter of Mandate' as a Payment Security Mechanism. However, others were still required to comply with the provisions of the Solar Bidding Guidelines.
- It allowed the extension of the time period for a party to notify occurrence of force majeure event from 7 days to 15 days.
- It allowed the Petitioners to extend the obligation of procurers to offtake excess generation from three years to the remaining term of the PPA until they were fully compensated for generation losses. It observed that these changes would provide greater certainty to investors, which in effect would lead to an efficient price discovery.
- It allowed the deviations from the event of default and termination as it observed that the same was proposed as an attempt at further detailing the consequences of default and termination.
- It allowed the addition of RUMSL's additional conditions, subsequent detailing of timelines, and extension of commissioning timelines.
- It included the phrase *"pandemic resulting in lockdown or similar action ordered by Govt. authority"* which was a slight modification.
- It allowed the extension of the time period from 180 days to 365 days in the event of a termination due to a non-natural force majeure event.

However, deviations with respect to applicability of the bid responsiveness conditions to affiliates of the bidder, the bidder's affiliate, the definition of 'control', the control of shareholding of a listed company, and the quantum and mechanism for Change in Law relief were not allowed.

OUR PERSPECTIVE.

CERC's order is a welcome move and would be appreciated by the solar industry and its investors. It aims at increasing project certainty which in turn would increase competition, to ultimately benefit consumers in Madhya Pradesh.

CERC'S APPROVAL FOR THE THIRD POWER EXCHANGE IN INDIA.

Suit:	PRANURJA SOLUTIONS LIMITED ("PSL") V/S INDIAN ENERGY EXCHANGE LIMITED ("IEEL") & POWER EXCHANGE INDIA LIMITED ("PEIL") PETITION NO. 287/ MP/ 2018
Decided by:	The Central Electricity Regulatory Commission ("CERC").
Decided on:	May 12th, 2021.
Rules:	*Power Market Regulations, 2010;* *Electricity Act, 2003.*

ISSUES.

Whether or not the Petitioner is entitled to operate as a Power Exchange in India.

ANALYSIS.

- PSL filed a petition seeking grant of registration to establish and operate as a power exchange, and during the pendency of the petition, to grant a provisional registration to the Petitioner's Company to align its structure, management and activities in accordance with the Power Market Regulations, 2010.

- The Commission stated that PSL has to comply with the conditions mentioned in Regulation 21 (i) of the Power Market Regulations, 2010 in order to operate as a Power Exchange in India.

CONCLUSION.

The Commission granted the approval to PSL to register itself and operate as a Power Exchange. If PSL complied with the conditions of Power Market Regulations, it could continue as a Power Exchange for 25 years from the date of its registration.

OUR PERSPECTIVE.

The Central Commission in this order granted approval for the third Power Exchange in India.

There has been a market shift in the power purchase trend, with states preferring short-term and medium contracts over long-term power purchase agreements. With real-time electricity contracts coming in, more states are getting interested in an exchange driven purchase.

PARTIAL EXEMPTION FROM DSM REGULATIONS ALLOWED TO BAGASSE-BASED CO-GENERATION PLANTS.

Suit:	CO-GENERATION ASSOCIATION OF INDIA ("CAI") V/S THE MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED ("MSEDCL") & ORS. CASE NO. 110 OF 2020
Decided by:	The Maharashtra Electricity Regulatory Commission ("MERC").
Decided on:	November 9th, 2020.
Rules:	*MERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2019 ("DSM Regulations"); Electricity Act, 2003.*

ISSUES.

Whether or not bagasse-based co-generation plants can be exempted from DSM Regulations.

ANALYSIS.

- CAI filed a petition seeking an exemption to the bagasse-based co-generation plants' DSM Regulations, due to the difficulties faced by such plants.
- The difficulties faced by these plants are primarily the uncertain stoppages due to the unavailability of cane supply, and also the fact that the cane harvest cannot be stored.
- These co-generation power plants have no fuel linkage, unlike fossil fuel-based power plants.
- MERC considered the difficulties faced by such plants and provided a partial relief to such plants with certain conditions.

CONCLUSION.

- MERC provided a partial relief to co-generation plants and held that the applicability of the DSM Regulations on bagasse based cogenerating stations should be based on the exportable capacity of the generating unit instead of the installed capacity for these plants. Hence, where the time block is 25 MW or above, the provisions of the DSM Regulations shall apply. For the rest of the time blocks, the provisions of the DSM Regulations relating to the applicability of DSM charges shall not apply.
- MERC further clarified that the provisions of the Scheduling and Despatch Code under MERC (State Grid Code) Regulations, 2020 related to scheduling, curtailment, etc. would continue to be applicable.

OUR PERSPECTIVE.

The partial exemption from the DSM Regulations to bagasse-based co-generation plants will provide a certain amount of relief to the said generators of power.

LEVY OF GREEN POWER TARIFF APPROVED.

Suit: TATA POWER CO LIMITED (DISTRIBUTION) ("TPC-D")
CASE NO. 134 OF 2020

Decided by: The Maharashtra Electricity Regulatory Commission ("MERC").

Decided on: March 22nd, 2021.

Rules: *Section 64 of the Electricity Act, 2003.*

ISSUES.

Seeking an in-principal approval for levying the 'Green Power Tariff' ("GPT") on consumers opting for 100% green energy.

ANALYSIS.

- TPC-D filed a petition to seek approval for levying of GPT on consumers opting for 100% green energy for meeting their entire demand.
- MERC observed that GPT would motivate Distribution Licensees to incur a high cost of power purchase from RE sources whilst not impacting the general tariff.
- It further observed that the Distribution Licensees would have to incur additional expenses for arranging RE for such consumers, therefore such expenses would need to be recovered from those consumers without burdening others.
- However, the Commission also noted that the Distribution Licensee would be able to use such power to fulfil its RPO target, therefore a certain benefit would be transferred to the concerned consumers.

CONCLUSION.

The Commission approved the levy of GPT. It also decided to levy only 50% of the charge determined in order to transfer the benefit of RPO target fulfilment.

OUR PERSPECTIVE.

This order will help in the promotion of RE sources, which is one of the mandates of the Commission under the Electricity Act, 2003.

POWER CONSUMED FROM CO-GENERATION SOURCES CAN BE USED TO SET OFF RENEWABLE PURCHASE OBLIGATION REQUIREMENTS.

Suit:	ULTRATECH CEMENT LIMITED ("ULTRATECH") V/S ANDHRA PRADESH STATE LOAD DESPATCH CENTRE ("APSLDC") O.P. 11 OF 2020
Decided by:	The Andhra Pradesh Electricity Regulatory Commission ("APERC").
Decided on:	September 7th, 2020.
Rules:	*Section 86(1)(e) of the Electricity Act, 2003.*

ISSUES.

Whether or not the power consumed form a co-generation unit can be used to set off the RPO requirements.

ANALYSIS.

- Ultratech approached APERC to seek clarification on whether the power consumed by itself from its Waste Heat Recovery Boiler Plant ("WHRB") could be considered to set-off its RPO requirements towards the energy consumed from conventional sources.
- It stated that MNRE had approved its plant as 'Green Energy' under the Clean Development Mechanism. Therefore, energy consumed from the WHRB Plant should be considered a set off against its RPO requirements.
- APERC relied on various APTEL judgments and on Section 86(1)(e) of the Act, and stated that irrespective of whether the co-generation sources were renewable sources or otherwise, under the statutory scheme, co-generation sources would be treated on par with renewable energy

generation sources. It further stated that irrespective of the fuel, the co-generation plants were entitled to be exempted from the RPO requirements.

CONCLUSION.

Thus, the energy consumed by Ultratech from its WHRB plants is eligible to be set-off against its RPO requirements.

OUR PERSPECTIVE.

The Commission reaffirmed the law laid down by APTEL. However, in this order, it has gone to the extent of providing relief of set-off against a power plant's RPO requirements towards energy consumed from conventional sources.

NO SCOPE FOR EITHER ADOPTING A LIBERAL OR A NARROW APPROACH IN CONSTRUING CLAUSES OF THE POWER PURCHASE AGREEMENT.

Suit:	BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED ("BESCOM") V/S E.S. SOLAR POWER PRIVATE LIMITED ("ESSPPL") C.A. 9273 OF 2019
Decided by:	The Hon'ble Supreme Court of India
Decided on:	May 3rd, 2021.
Rules:	*Clauses of the Power Purchase Agreement;* *Rules of Interpretation of Contract;* *Electricity Act, 2003.*

ISSUES.

- Whether or not the developers commissioned their project within the prescribed time limit of 12-months from the date of approval of the PPA, and whether the SCOD was October 16th, 2017 or October 17th, 2017.
- If the injection of power into the grid is a necessary condition for deciding the Date of Commissioning of a project.

ANALYSIS.

- Emvee Photovoltaic Power Limited incorporated two SPVs which entered into two PPAs separately with BESCOM, which were approved by KERC on October 17th, 2016. As per the PPA(s), the SCOD of the project was 12 months from the date of grant of PPA approval by KERC.
- The Project was commissioned on October 17th, 2017. According to BESCOM, the SCOD was October 16th, 2017 as the date of approval of the PPA, October 17th, 2016, was also to be included in determining the SCOD. Therefore, there was a delay of 1 day due to which liquidated damages were imposed on the developers.
- Developers approached KERC, and KERC held that the SCOD of the Project was on October 16th, 2017. It further held that the injection of power into the Grid from a Solar Power Project was a necessary condition for declaring that the Project was commissioned. In the Appeal, the Tribunal held that commissioning of the power project was done within the stipulated timeline and set aside the KERC order. As a result, BESCOM challenged the Tribunal's order before the SC.
- The Supreme Court relied upon various provisions of the PPA and held that the definition of 'month' in the PPA states "excluding the date of the event". Therefore, the 12 months need to be calculated after excluding the date of approval.

CONCLUSION.

The Supreme Court relied upon various provisions of the PPA and held that the date of the PPA approval had to be excluded from the calculation of 12 months to determine the SCOD of the Project. Consequently, it held that if the date of the event i.e. October 17th, 2016 was excluded, the Scheduled Commissioning Date would be October 17th, 2017. Therefore, it dismissed the appeal filed by BESCOM.

The Court did not delve into the question of injection of power into the grid as the court dismissed the appeal on the first issue itself.

OUR PERSPECTIVE.

The Apex Court laid emphasis on the exercise to be undertaken in construction and interpretation of a contract. The Supreme Court, while dismissing the appeal reiterated that the exercise is to determine what the words used mean, i.e., to say expressed intentions have no scope for either adopting a liberal or a narrower approach.

An interesting question of law was whether the injection of power is sine qua non for the declaration of the commissioning. This question was not answered by the Supreme Court since in the first issue itself it dismissed the appeal.

Unfortunately, the Supreme Court in another judgment (*Madhya Pradesh Power Management Co. Ltd. & Anr. v/s Dhar Wind Power Projects Pvt. Ltd. & Ors.*) has held that the injection of the electricity in the grid is essential for claiming the commissioning of the plant, and has refused to recognise the Commissioning Certificate as proof of the commissioning.

PARTIES CANNOT TAKE ADVANTAGE OF THEIR OWN WRONGDOINGS.

Suit:	AZURE SUNRISE PVT LIMITED ("ASPL") V/S CHAMUNDESHWARI ELECTRICITY SUPPLY CORPORATION LIMITED ("CESCOM") & ANR. APPEAL NO. 340 OF 2016
Decided by:	The Appellate Tribunal For Electricity ("APTEL")
Decided on:	February 28th, 2020.
Rules:	*Clauses of PPA, Electricity Act, 2003.*

ISSUES.

Whether or not a Generating Company is entitled to claim an extension in the scheduled commissioning date of their project for a delay due to the inaction of the Distribution Company.

ANALYSIS.

- ASPL filed an appeal against a KERC order, wherein KERC had reduced CESCOMS's approved 137 day extension of the project to 25 days.
- The project was delayed by 137 days due to inaction of CESCOM in getting PPAs approved by KERC. Thus, CESCOM agreed to provide the extension. However, KERC vide a letter directed CESCOM to not provide any extension and to reduce the tariff. Placing reliance on KERC's communication, CESCOM reduced the tariff, and against this backdrop, ASPL filed a petition before KERC.

- KERC did not consider CESCOM's inaction, and reduced the extension from 137 days to 25 days.
- The Tribunal observed that the central dispute between the two parties revolved around KERC's decision to revise and reduce the extension period retrospectively from 137 days to 25.
- APTEL noted that there was no need for ASPL to be penalized for the fault of CESCOM. The Tribunal specifically relied on KERC's communication to CESCOM wherein it was observed that the delay in approval of the PPA was solely attributable to CESCOM, since the required documents and details were not received by the Commission from CESCOM.

CONCLUSION.

The Tribunal held that the order of KERC was not in line with the facts and circumstances presented before it and held that neither the reduction in the extension of time, nor the reduction in tariff was justified.

OUR PERSPECTIVE.

This Judgment reiterates the principle that no one can take advantage of its own wrong and this judgment also affirms the fact that approval of the PPA made it an effective, executable and valid document, and that the timeline for completion of any milestone should be counted from the date of the PPA approval.

ORDER OF THE GOVERNMENT UNDER SECTION 108 OF THE ELECTRICITY ACT, 2003 IS NOT BINDING ON THE STATE ERC.

Suit:	*Suo Moto Order.*
Decided by:	The Rajasthan Electricity Regulatory Commission ("RERC").
Decided on:	March 05th 2020.
Rules:	*Rajasthan Solar and Wind Hybrid Policies, 2019; Section 65 and 108 of the Electricity Act, 2003.*

ISSUES.

RERC took suo-moto cognizance to further the directives issued by the State Government.

ANALYSIS.

The State Government of Rajasthan issued directions where it provided various concessions and facilities to Solar, Wind, and Solar-Wind Projects under the Rajasthan Solar and Wind Hybrid Policies, 2019. The State Commission passed the order regarding the directives issued by the state government for the banking of power, transmission and wheeling charges, power projects with storage systems, and rooftop solar projects.

CONCLUSION.

RERC vide its suo moto order disallowed various exemptions given by Rajasthan Government to the renewable energy sector under its Renewable Energy Policy.

OUR PERSPECTIVE.

This order reaffirms the principle that Section 108 concerning tariff matter is not binding on Electricity Regulatory Commissions.

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