March 09, 2020

Legal Updates

Draft Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) (First Amendment) Regulations, 2020

Central Electricity Regulatory Commission ("**CERC**") in exercise of its power under Section 178 of the Act has issued Draft Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) (First Amendment) Regulations, 2020 ("**Draft Amendment Regulations**"), prescribing certain amendments to the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 ("**Trading License Regulations**"). The salient features of the Draft Amendment Regulations are as follows:

1. Trading Licence Regulations provides for cap and floor on the trading margin in case of banking of electricity. In this regard, the Draft Amendment Regulations provides that neither party to the banking transaction should be charged trading margin of less than zero (0.0) paise/kWh; and

2. Since in the short term transactions for a duration of more than one month, escrow arrangement or letter of credit equivalent to the contract value for the entire duration of the contract are onerous to the trading licensees, particularly when the transactions are usually settled on the basis of monthly billing cycle, therefore, the Draft Amendment Regulations stipulates that the value of escrow arrangement or letter of credit for transactions with a duration of more than one month should be equal to 1.05 times of the monthly contract value irrespective of the duration of the contract.

CERC has issued notice inviting comments/suggestions/objections from the stakeholders and interested persons on or before 16.03.2020.

Central Electricity Regulatory Commission (Sharing of Revenue Derived from Utilization of Transmission Assets for Other business) Regulations, 2020

CERC has published the Central Electricity Regulatory Commission (Sharing of Revenue derived from Utilization of Transmission Assets for other Business) Regulations, 2020 ("**Regulations**") vide its notification dated 17.02.2020. The Regulations shall be applicable to the inter-state transmission licensees, whose transmission charges are determined under Section 62 or 63 of the Electricity Act, 2003 ("**Act**"). These Regulations will come into force from the date of its publication in the Official Gazette. Some of the salient features of the Regulations are as under:

1. In case the transmission licensee engages in telecommunication business, an amount equal to 10% of the gross revenue from such business in a given financial year shall be shared with the long-term customers;

2. In case of other business, the sharing of revenue shall be decided by the CERC on case-to-case basis, based on transmission assets utilized for such other business, the revenue derived and estimated revenue derived from such other business;

3. The revenue to be shared by the transmission licensee shall be utilised towards reduction of monthly transmission charges payable by the long-term customers of the transmission assets in proportion to the transmission charges payable by them;

4. The transmission licensee shall maintain separate accounts for each of the other businesses and shall submit details of accounts to the CERC for every financial year by 31st October;

5. Any cost or revenue relating to other business shall not be added to the cost or revenue of the transmission business; and

6. Prior approval of the CERC is required in case the transmission licensee intends to form a subsidiary company, for engaging in other business utilizing the transmission assets. The transmission licensee shall indemnify the long-term customers for any additional cost or losses or damages due to such subsidiary company.

Draft PNGRB (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Amendment Regulations, 2020

The Petroleum and Natural Gas Regulatory Board ("**PNGRB**") vide public notice dated 03.03.2020, has issued draft PNGRB (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Amendment Regulations, 2020 ("**PNGRB Draft Amendment Regulations**") and has invited comments from all the stakeholders by 30.03.2020. Open house discussion on the comments shall be held on 07.04.2020.

The PNGRB Draft Amendment Regulations seek to add proviso to Regulation 2(g) of the Petroleum and Natural Gas Regulatory Board (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Regulations, 2008 providing for pipeline connecting from City Gate Station ("**CGS**") to authorized City or Local Natural Gas Distribution Network ("**CGD Network**") to be considered as a part of CGD Network if CGS is established outside the authorized geographical area. However, the authorized entity will not be permitted to supply any customer, outside its geographical area, from the pipeline.

Draft PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Amendment Regulations, 2020

PNGRB vide public notice dated 26.02.2020, has issued the Draft PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Amendment Regulations, 2020 vide public notice dated 26.02.2020 ("**Draft Gas Distribution Amendment Regulations**"). The Draft Gas Distribution Amendment Regulations broadly seek to amend the following provisions:

1. **Regulation 5 (6) (b) (i)** and **(ii)** – The qualifying criteria for an entity to be considered capable of laying and building CGD Network is sought to be amended to include entities that have constructed either hydrocarbon steel pipelines totalling to a length of not less than 300 kms by themselves or as one of the consortium partners authorized by PNGRB for development of CGD Network; have a joint venture (JV) with another entity (having at least 11% equity holding) that having constructed hydrocarbon steel pipelines totalling to a length of not less than 300 kms or which by itself or as one of the consortium partners was authorized by PNGRB for development of CGD Network;

2. **Regulation 5 (6) (f)** – In addition to the earlier condition necessitating a successful bidder to be a registered company under the Companies Act, 1956, the company shall now also have to

comply with the requirement of minimum net worth in respect of the geographical areas under that company as per Regulation 5 (6) (e);

3. **Regulation 9 (1)** – Proviso has been sought to be inserted which sets out that on application of a successful bidder to such effect, PNGRB may agree to submit the Performance Bank Guarantee ("**PBG**") valid for a period of one year and thereafter it shall be renewed at least three months before expiry for another 3 years and so on until period of authorization. It is further clarified that the value of PBG shall stand reduced to 40% after achievement of 100% of the work programme or on expiry of exclusivity from purview of common carrier or contract carrier, whichever is later;

4. **Regulation 11(3) -** providing for the period of achieving financial closure is being sought to be amended from within 120 days from the date of authorization to within 270 days from the date of grant of authorization; and

5. **Regulation 11 (4) -** is sought to be amended to provide a list of detailed documents to be submitted to PNGRB for acceptance of the achievement of financial closure.

PNGRB has invited stakeholders to give their views/ comments on the Draft Gas Distribution Amendment Regulations by 30.03.2020. An open house discussion for the same shall be conducted on 07.04.2020.

MNRE designates NTPC Ltd. as Renewable Energy Implementing Agency

The Ministry of New and Renewable Energy ("**MNRE**"), vide order dated 24.02.2020, designated NTPC Ltd. as the Renewable Energy Implementing Agency so as so facilitate the application of connectivity and long-term access in inter-state transmission system, pursuant to the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Seventh Amendment) Regulations, 2019.

APTEL observes that State Commission under Section 63 of the Electricity Act, 2003 cannot carry out public hearing and direct any amendment / modification to the Power Purchase Agreement and Power Sale Agreement

The Appellate Tribunal for Electricity ("**APTEL**") vide its order in *Ayana Ananthapuramu Solar Private Limited vs. APERC & Ors.*, has set aside the order passed by the Andhra Pradesh Electricity Regulatory Commission ("**APERC**") and held that the APERC under Section 63 of the Electricity Act, 2003 is not entitled to carry out the public hearing and direct any amendment to a Power Purchase Agreement ("**PPA**") and Power Sale Agreement ("**PSA**"). In the present matter the APERC carried out a public hearing for the adoption of tariff under Section 63 of the Act and based on the suggestion and objections received from objectors directed the solar power developers to carry out certain amendments/modifications in their respective PPA and PSA. APTEL considering the fact that the State Commission under Section 63 of the Electricity Act, 2003 is only entitled to check the validity of the bidding process, observed that the public hearing carried out by APERC for adoption of tariff under Section 63 of the Act was beyond the scope of the statute.

APTEL observed that the State Commission to strike a judicious balance between all stakeholders

APTEL vide its order in *Tata Power Delhi Distribution Ltd vs. Delhi Electricity Regulatory Commission* has held that once certain directions have been issued by the Tribunal, through its judgments and the same is not stayed upon by the superior Court, the same is binding on the concerned Commission to implement the same despite the fact that the matter may be pending adjudication before the Apex Court. The Tribunal noted that it is true that the State Commission is required to safeguard the consumer interest in the State but at the same time, it has to strike the judicious balance between all stakeholders including generators, distribution licensees etc. Accordingly, the Tribunal held that the State Commission is not justified in non-implementation of the rulings of this Tribunal given in its judgment dated 10.02.2015 regarding implementation Food and Children Education Allowances for Financial Year 2010-11.

MERC invites comments on Draft Maharashtra Electricity

The Maharashtra Electricity Regulatory Commission ("**MERC**") vide public notice dated 01.03.2020 has invited comments on the Draft MERC (State Grid Code) Regulations, 2020 ("**Draft Grid Code**"). The Draft Grid Code is proposed to supersede the MERC (State Grid Code) Regulations, 2006. The provisions of the Draft Grid Code are sought to be aligned with the

Regulatory Commission (State Grid Code) Regulations, 2020

provisions of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 as amended from time to time. Comments on the Draft Grid Code are invited from stakeholders by 23.03.2020.

GERC disallows relaxation under Regulations 6.1(i), 6.1 (ii) and 6.2 of the GERC (Net Metering Rooftop Solar PV Grid Interactive Systems) Regulations, 2016

The Gujarat Electricity Regulatory Commission ("**GERC**"), vide its order in *Principal Chief Electrical Engineer, Western Railway vs. Gujarat State Electricity Corporation Limited and Anr.*, has disallowed relaxation of Regulation 6.1 (i) & (ii) and Regulation 6.2 of the GERC (Net Metering Rooftop Solar PV Grid Interactive Systems) Regulations, 2016 ("**GERC Net Metering Regulations**"), to the effect that:

1. There is no cap on the installed capacity of 1 MW on the rooftop solar PV systems in order to maximize the generation from single roof of single consumer up to 100% of connected load with respect to the PPA entered into between Petitioner and solar power developer; and

2. Permit the solar power developer to install rooftop solar plants in its establishment through solar power developer on Renewable Energy Service Company ("**RESCO**") model without there being any restriction stated in Regulations 6.1(i) & (ii) of the GERC Net Metering Regulations.

GERC observed that the GERC Net Metering Regulations were specifically issued for small / low tension consumers and provided for a cap of 50% of contracted demand. This limit was increased to 100% for residential consumers only so that such consumers are encouraged to set up rooftop solar plants for self-consumption. Further, it was observed that the GERC Net Metering Regulations do not allow private developers to install rooftop solar plants under the RESCO model.

In light of the above, GERC did not allow the aforesaid relaxations to the Petitioner and the petition was dismissed.

RERC sets out RERC (Terms and Conditions for determination of Tariff) (First Amendment) Regulations, 2020 which are yet to be notified

The Rajasthan Electricity Regulatory Commission ("**RERC**"), has set out the RERC (Terms and Conditions for Determination of Tariff) (First Amendment) Regulations, 2020 ("**RERC Tariff Amendment Regulations**"). The RERC Tariff Amendment Regulations shall come into force from the date of their publication in the Official Gazette. The RERC Tariff Amendment Regulations seek to provide the following:

1. Flexibility to a generating company / licensee / state load despatch centre ("**SLDC**") to file petition for determination of Multi-Year Tariff ("**MYT**") for remaining period of control period at the time of filing Annual Revenue Requirement ("**ARR**") / tariff petition for any year of the control period after notification of the RERC Tariff Amendment Regulations;

2. The managing director of the concerned company opting for MYT determination shall file true up petitions in a timely manner. In case the licensee or SLDC does not do so, they will not be entitled to charge the increased tariff under MYT regime and will also be liable to pay such penalty as determined by the RERC;

3. Any excess earning shall be suitably adjusted in the next true-up petitions and in case it is found that the licensee / SLDC has been earning excessive profits or in case of non-filing of true up petitions, the RERC may issue suo-motu order to revise the tariff suitably;

4. The licensee / SLDC shall be required to file MYT petition for approval of ARR and determination of tariff for each remaining year of the control period in case it has opted for MYT determination; and

5. The transmission licensee / SLDC / distribution licensee shall be required to submit the capital investment plan for each remaining year of the control period in case they have opted for MYT determination for each remaining year of the control period.

APERC observes the date of synchronisation as the date on which the power is let into the grid

The Andhra Pradesh Electricity Regulatory Commission ("**APERC**"), in *M/s Southern Rocks & Minerals Pvt. Ltd. vs. State Load Despatch Center, AP Transco and Ors.*, has held that that there cannot be two dates of synchronization of a plant and that the word "synchronization" connotes letting the power generated from the power plant into the grid. The APERC observed that since the power generated by the Petitioner was first let into the grid on 30.04.2014 and since it is an admitted fact that the Petitioner's solar power plant was synchronized through pre-existing feeder of the Respondents on 30.04.2014 itself, such date would be treated as the Petitioner's date of synchronization. APERC was not inclined to treat the date of commissioning of the 11 kV dedicated feeder erected by the Petitioner, i.e. 16.06.2016, as the date of synchronization of the plant. In light of the above, the petition was dismissed.

The Expression "Place of Arbitration" cannot be basis to determine the 'Seat of Arbitration'

The Hon'ble Supreme Court of India in *Mankastu Impex Pvt. Ltd. v. Airvisual Limited* has held that the "seat of arbitration" and "venue of arbitration" cannot be used inter-changeably and the mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place to be the "seat" of arbitration. The instant proceedings arose from a petition for appointment of Sole Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") filed by the Petitioner, a company incorporated in India, in the background of the Respondent's averment (Respondent's company is incorporated under the laws of Hong Kong) that should the Petitioner wish to resolve the dispute by arbitration, it should refer the dispute to an arbitration institution in Hong Kong. The Hon'ble Court considered the question whether in view of the 'Governing Law and Dispute Resolution Clause' of the Memorandum of Understanding ("**MoU**") entered into between the parties, the Hon'ble Court would have jurisdiction to entertain the present proceedings under Sec. 11(6) of the Arbitration Act and whether Hong Kong would be the seat of Arbitration. The Hon'ble Court observed that the MoU between the parties choosing "Hong Kong" as the place of arbitration by itself will not lead to the conclusion that parties have chosen Hong Kong as the seat of arbitration. However, in line with the provision in the MoU which provides that the *dispute shall be referred to and finally resolved by the arbitration administered in Hong Kong* is an *indicia* that the seat of arbitration is at Hong Kong. Therefore, by virtue of Sec. 2(2) of the Arbitration Act, as amended by the Amendment Act, 2015, Indian courts would not have jurisdiction for appointment of arbitrator. The petition was therefore, dismissed as being not maintainable.

MCA issues clarification on prosecutions filed or internal adjudication proceedings initiated against ID, NEDs, and non-KMPs

The Ministry of Corporate Affairs ("**MCA**") has issued a clarification vide circular dated 02.03.2020 that in absence of Key Managerial Personnel ("**KMP**"), such directors who have expressly given their consent for incurring liability in terms of e-form GNL-3 filed with the Registrar would be liable. However, where the penal provisions in the Companies Act, 2013 ("**CA, 2013**") hold a specific director / officer / any other person accountable for the default, then action should be initiated against such specific director/ officer / person, such as in the case of disclosure of interest by directors under Section 184 of the CA, 2013. The MCA further clarified that Independent Directors ("**ID**") and Non-Executive Directors ("**NED**"), not being promoters or KMP, should not be arrayed in any criminal or civil proceedings under the CA, 2013, unless there is evidence of omission or commission by the company which has occurred with such ID/ NED's knowledge, consent, or lack of diligence

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