Legal Updates

CERC (Terms and Conditions of Tariff) (First Amendment) Regulations, 2020

The Central Electricity Regulatory Commission ("**CERC/Commission**") promulgated the CERC (Terms and Conditions of Tariff) (First Amendment) Regulations, 2020 ("**First Amendment Regulations**"), to amend the CERC (Terms and Conditions of Tariff) Regulations, 2019 ("**the Principal Regulations**"). The First Amendment Regulations seek to introduce separate tariff stream for revised emission standards which requires determination of separate capital cost, fixation of date of operation of emission control systems, financial parameters and operations parameters. It *inter alia* includes:

- Definitions of 'Auxiliary energy consumption for emission control system' (AUXe), 'Date of Operation' (ODe), 'emission control system' and 'Plant Load Factor' (PLF).
- Stipulation of 'Supplementary Capacity Charges' derived on the basis of the annual fixed cost for emission control system.
- Any expenditure incurred for the emission control system during the tariff period if admitted by the CERC as additional capital expenditure for determination of supplementary tariff, to be serviced in the manner specified in Regulation 18(1) of the Principal Regulations.
- Un-discharged liability, if any, on account of emission control system shall be allowed as additional capital expenditure during the year it is discharged, subject to prudence check.
- Formula for computation of the Plant Availability Factor for a Month (PAFM).
- 'Computation and Payment of Supplementary Capacity Charge for Coal or Lignite based Thermal Generating Stations' stipulates that the fixed cost of emission control system shall be computed on annual basis based on the norms specified under the Principal Regulations and recovered on monthly basis under supplementary capacity charge. The total supplementary capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share or allocation in the capacity of the generating station.

APTEL holds that CERC REC Regulations, 2010 have been contemplated to encourage purchase of RECs. Strict compliance is contemplated, non-compliance cannot be surpassed or overlooked

The Appellate Tribunal for Electricity ("**APTEL**") while disposing of the Appeal in *Techno Electric & Engineering Company Ltd. v. APERC & Ors. in Appeal No. 99 of 2020* challenging the recommendation of Andhra Pradesh Electricity Regulatory Commission ("**APERC**") dated 04.01.2020 recommending for issuance of Renewable Energy Certificates ("**RECs/RE Certificates**") in favour of Andhra Pradesh Southern Power Distribution Company Limited ("**APSPDCL**"), *inter alia*, has held:

- Recommendation of the concerned commission is a pre-requisite for issuance of RE Certificates, which shall be in accordance with the procedure contemplated under CERC's regulations and so also State Commission's regulations, if any. If on the same subject, both the Central Commission and the State Commission have conflicting regulations, then the regulations of the Central Commission will be followed.
- The state agency i.e., State Load Dispatch Centre ("**SLDC**") will have all the details of renewable energy purchased by the distribution company and it has to inform the concerned commission about the renewable purchase obligation ("**RPO**"). If the distribution company has not complied with the obligations/procedures as contemplated under the regulations, it is not open to the State Commission to recommend issuance of RECs in favour of obligated entity.
- It is incumbent upon the central agency to satisfy itself before according registration for issuance of RECs that the obligated entity has complied with the requirement for such registration and State Commission has properly assessed the case of the obligated entity while recommending for issuance of RE Certificates. In case of rejection of application, applicant can appeal before the CERC within 15 days from the date of such order.
- Regulation 5 (1A) (b) of the of the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("**CERC REC Regulations, 2010**") refers to a prerequisite that an entity is entitled for issuance of RECs only if there is a recommendation certifying that the procedure contemplated for obtaining such RE Certificates is complied with.
- If an obligated entity seeks RECs for a relevant year/performance year i.e., FY 2018-19 in terms of Regulation 5(1A)(a) of the CERC REC Regulations, 2010, the distribution licensee must establish that it had procured renewable energy in the previous financial year i.e., FY 2017-18 in excess of its purchase obligation at a tariff determined under Section 62 or adopted under Section 63 of the Electricity Act, 2003.
- While observing that APERC rather granted incentive to APSPDCL in spite of RPO deficit in the previous FY 2017-18, the APTEL held that the CERC REC Regulations, 2010 are contemplated to encourage purchase of RE Certificates provided requisite conditions are complied with. Since strict compliance is contemplated, one cannot surpass / overlook non-compliance. Therefore, the APTEL held that in the first place APERC ought not to have recommended the case of APSPDCL for issuance of RE Certificates for the performance year i.e., FY 2018-19.

APTEL allows installation of FGD system as 'Change in Law' event

APTEL in *Talwandi Sabo Power Ltd. v. PSERC & Anr. in Appeal No. 21 of 2019 and Appeal No. 73 of 2019* held that the Ministry of Environment & Forests and Climate Change notification dated 07.12.2015 ("**Notification**") is a 'Change in Law' event under power purchase agreements ("**PPAs**") executed between appellants i.e. Talwandi Sabo Pvt. Ltd. and Nabha Power Ltd. and then Punjab State Electricity Board with respect to the facts and circumstances of the case. APTEL held that as per the records and the documents relied upon by the appellants, a standard clause was introduced in the Environmental Clearances ("**EC**") regarding only the provision for space for the installation of Flue Gas Desulphurization ("**FGD**") plant. Accordingly, APTEL held that there was no clarity on any of the norms for sulphur oxide ("**SO_2**") and nitrogen oxide ("**NO_x**") emission, which required specific FGD system and/or Selective non-catalytic reduction ("**SNCR**"). APTEL concluded that installation of FGD and funds for the same were not contemplated or envisaged in the ECs, which were issued six year prior to the Notification.

With regard to the NOx emission control measures, APTEL observed that the appellants seemed to be having primary NO_x control measures as on date and have not claimed any amount as 'Change in Law'

event. APTEL held that in case installation of SNCR/any other suitable technology for NOx levels control system is brought in, it would amount to Change in Law.

APTEL, while opining that the installation and operation of the FGD and associated system to comply with emission levels of SO_2 is 'Change in Law', further held that additional expenditure for the same including all allied costs like taxes, duties etc., has to be included as 'Additional Capital Cost' to be incurred by the appellants. The APTEL further opined that the appellants are entitled to carrying cost in terms of provisions of the PPAs. APTEL further held that in case technology for installing and operating SNCR and/or any other appropriate technology is mandated in future for complying with the emission levels of NOx, it also amounts to a 'Change in Law' event. Accordingly, APTEL directed the PSERC to devise a mechanism for payment of above amounts by the procurers to both the appellants towards additional cost and other expenses in relation to procurement, installation, commissioning, operation and maintenance of FGD for SO_2 as approved by the concerned authority, after prudence check.

Supreme Court holds that the purpose of Change in Law is to restore through monthly tariff payment the same economic position had such a change in law not occurred

The Supreme Court in *Jaipur Vidyut Vitran Nigam Ltd. & Ors. v. Adani Power Rajasthan Ltd. & Anr. Civil Appeal Nos. 8625/8626 of 2019*, while considering the documents on record, observed that the bid submitted by Adani Power Rajasthan Limited ("**APRL**") was premised only on domestic coal. It was evaluated as such, and the PPA also records the same. The court observed that APRL relied upon Memorandum of Understanding ("**MoU**") entered into with the Government of Rajasthan for development of the Kawai Power Project and other projects, and the government assured its support for allocation of the captive coal block or coal linkage. An arrangement of Fuel Supply Agreement ("**FSA**") relating to imported coal for at least 50% of the total requirement was relied upon; however, the bid was premised and accepted on domestic coal, which did not change the bid's nature. The parties agreed *ad idem* that bid was evaluated based on domestic coal, and escalations were also based on domestic coal. Accordingly, the PPA was entered into, and primary fuel in the PPA was mentioned to be domestic coal from captive coal block/coal linkage and imported coal as a fallback support arrangement. It was binding on both the parties. Accordingly, the court held that APRL would be entitled to relief under the change in law provision to the extent of shortage in supply in domestic linkage coal.

Further, the court, while upholding the orders passed by the Rajasthan Electricity Regulatory Commission and the APTEL to the extent they held that APRL was entitled to compensatory tariff in respect of PPA with the Respondent-Discom, further opined that the purpose of change in law is to restore through monthly tariff payment to the extent contemplated that the affected party is placed in the same economic position as if such a change in law has not occurred. The court held that as monthly tariff was worked out on domestic law, the requirement is to compensate on that basis due to change in law. The same is based on the principle of restitution. The court also held that carrying cost is payable from the date the change in law has taken place, and carrying cost is passed on the restitution principle as Article 10.2.1 of the PPA in question is similar to Article 13.2 considered in the case of *Energy Watchdog v. Central Electricity Regulatory Commission and Ors., (2017) 14 SCC 80*. The court observed that carrying cost is nothing but a compensation towards the time value of month/deferred payment. Accordingly, the court directed the Respondent-Discom to pay the interest/late payment surcharge and the rate of interest/late payment surcharge would be at SBAR, not exceeding 9 per cent per annum, to be compounded annually, and the 2 per cent above the SBAR (as provided in Article 8.3.5 of PPA) would not be charged in the present case.

Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 notified along with amendments to seventh schedule of the Companies Act, 2013

The amendment to Companies (Corporate Social Responsibility Policy) Rules, 2014 ("**Rules**"), inserts a proviso to Rule 2, Sub-Rule (1), clause (e) of the Rules which defines 'corporate social responsibility ("**CSR**") Policy' as activities undertaken by the company in areas or subjects specified in Schedule VII of the Companies Act, 2013 ("**CA**") and the expenditure thereon, excluding activities undertaken in pursuance of normal course of business of a company. The amendment now provides that any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23 subject to the conditions that-

- Such research and development activities shall be carried out in collaboration with any of the institutes or organisations mentioned in item (ix) of Schedule VII of the CA;
- Details of such activity shall be disclosed separately in the annual report on CSR included in the board's report.

The amendment to the Rules omits the expression "*excluding activities undertaken in pursuance of its normal course of business*" from Rule 4, Sub-Rule 1 of the Rules, which states that CSR activities shall be undertaken by the company as per its stated CSR policy, as projects or programs or activities (either new or ongoing). Accordingly, the amendment further omits first proviso to Rule 6, Sub-Rule (1) altogether which stated that CSR activities do not include the activities undertaken in pursuance of normal course of business of a company. The word 'further' from the second proviso has also been omitted.

The amendment to Schedule VII of the CA, which provides for 'Activities which may be included by companies in their Corporate Social Responsibility Policies', substitutes item (ix) wherein the scope of contribution to incubators as has been expanded by adding "*Contribution to incubators or research and development projects in the field of science, technology, engineering and medicine"*. Further, Department of Pharmaceuticals, Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH) has been added to public funded universities.

We believe that the amendment has been brought about to encourage corporates to spend on development of new vaccine, drugs and medical devices as part of CSR activities, providing them with an incentive, especially in the wake of COVID, that the same may be done even in the normal course of business.

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