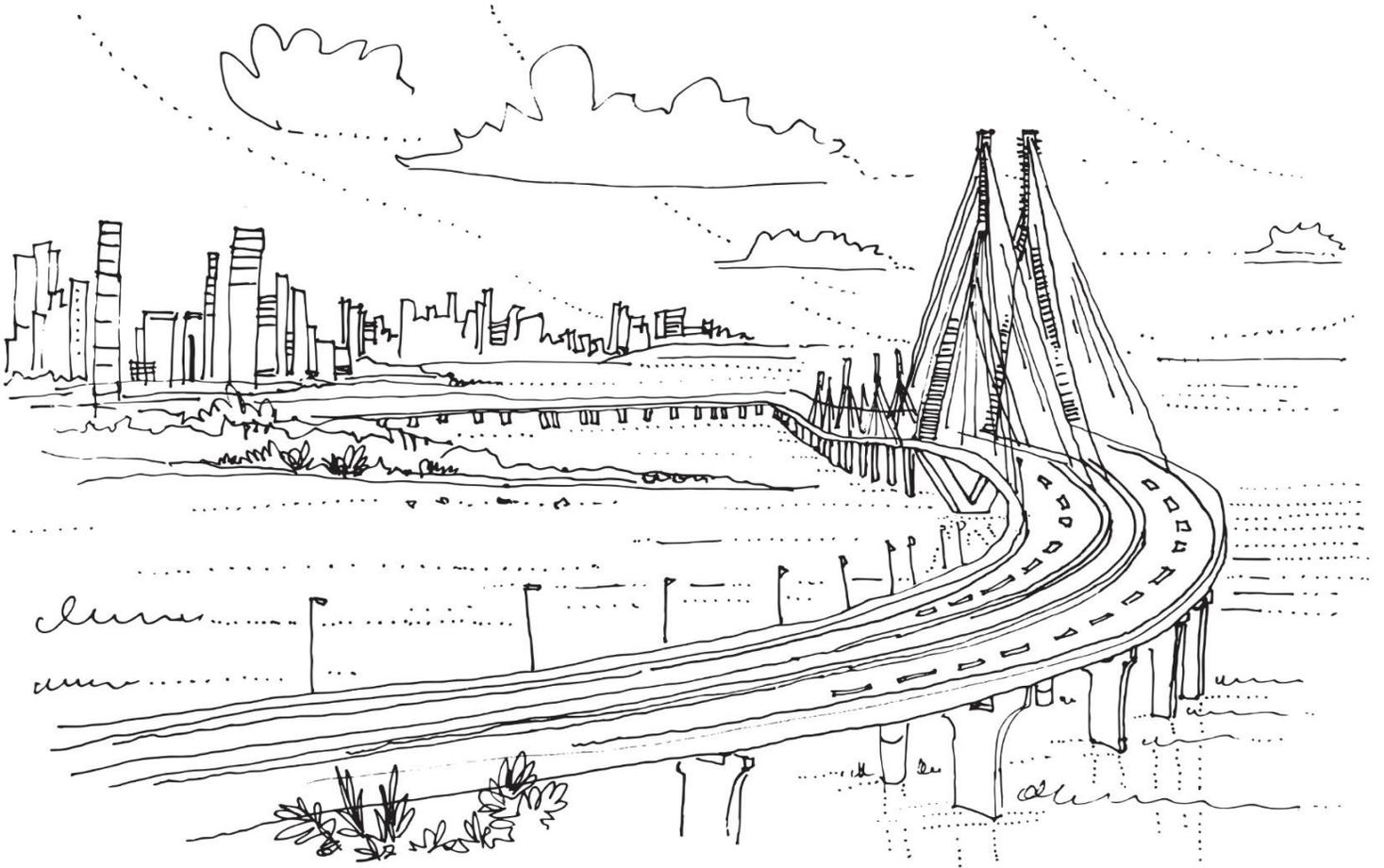




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Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

September 2019

INFRASTRUCTURE



Union of India & Anr. v. Tarsem Singh & Ors

The Supreme Court recently passed an order in relation to grant of solatium and interest on lands acquired under the National Highways Act, 1956 (**NH Act**). The decision sets to rest the controversy on whether an entitlement to them exists given the provisions of the NH Act on the question as to whether the NH Act is an entire code on its own or whether reference to land acquisition laws is required for acquisition of land thereunder.

What were the main issues that were decided by the Supreme Court in the matter of *Union of India & Anr. v. Tarsem Singh & Ors.*?

- Whether non-grant of solatium and interest on lands acquired under the NHA Act is bad in law?
- Whether Section 3J of the NH Act should be struck down as being violative of Article 14 of the Constitution of India?

What were the contentions of the Appellant?

- In 2004, a notice was issued wherein certain lands were intended to be acquired by the Central Government for the purpose of the 4 laning National Highway 1-A on certain stretches of the Jalandhar-Pathankot and Pathankhot-Jammu section.
- In 2006, the Competent Authority passed an award determining compensation of the land at the rate of INR 4,219 per marla. The Respondents disputed the aforementioned compensation and thus, an arbitrator was appointed. The arbitrator valued the compensation at the rate of INR 1.5 lakhs per marla.
- The Appellants filed petitions before the High Court of Punjab and Haryana (High Court) for setting-aside the award passed by the arbitrator. However, both a single judge bench and the division bench of the High Court dismissed the petition.

What were the contentions of the Appellant?

- NH Act is a complete code that expressly excludes the application of the Land Acquisition Act, 1894 (LA Act) and therefore does not violate Article 14
- One cannot choose between an acquisition act and another. The NH Act specifically applies to National Highways and thus is the relevant statute
- Solatium and interest are merely statutory rights that are awarded only when the statute enjoins and not be awarded when a separate special statute expressly excludes them.

What were the contentions of the Respondent?

- Excluding solatium and interest from the NH Act that is awarded under the LA Act, discriminates between persons on equal footing as the asset being acquired in both cases is land.
- The rationale for not awarding solatium and interest for acquisitions under the NH Act does not match and is not in consonance with the objectives laid down in the National Highways Law Amendment Act, 1997 (Amendment).
- Solatium is awarded due to the compulsory nature of acquisition that is present where land is acquired for national highways or any other public purpose and thus forms an integral part of compensation.

What were the Findings?

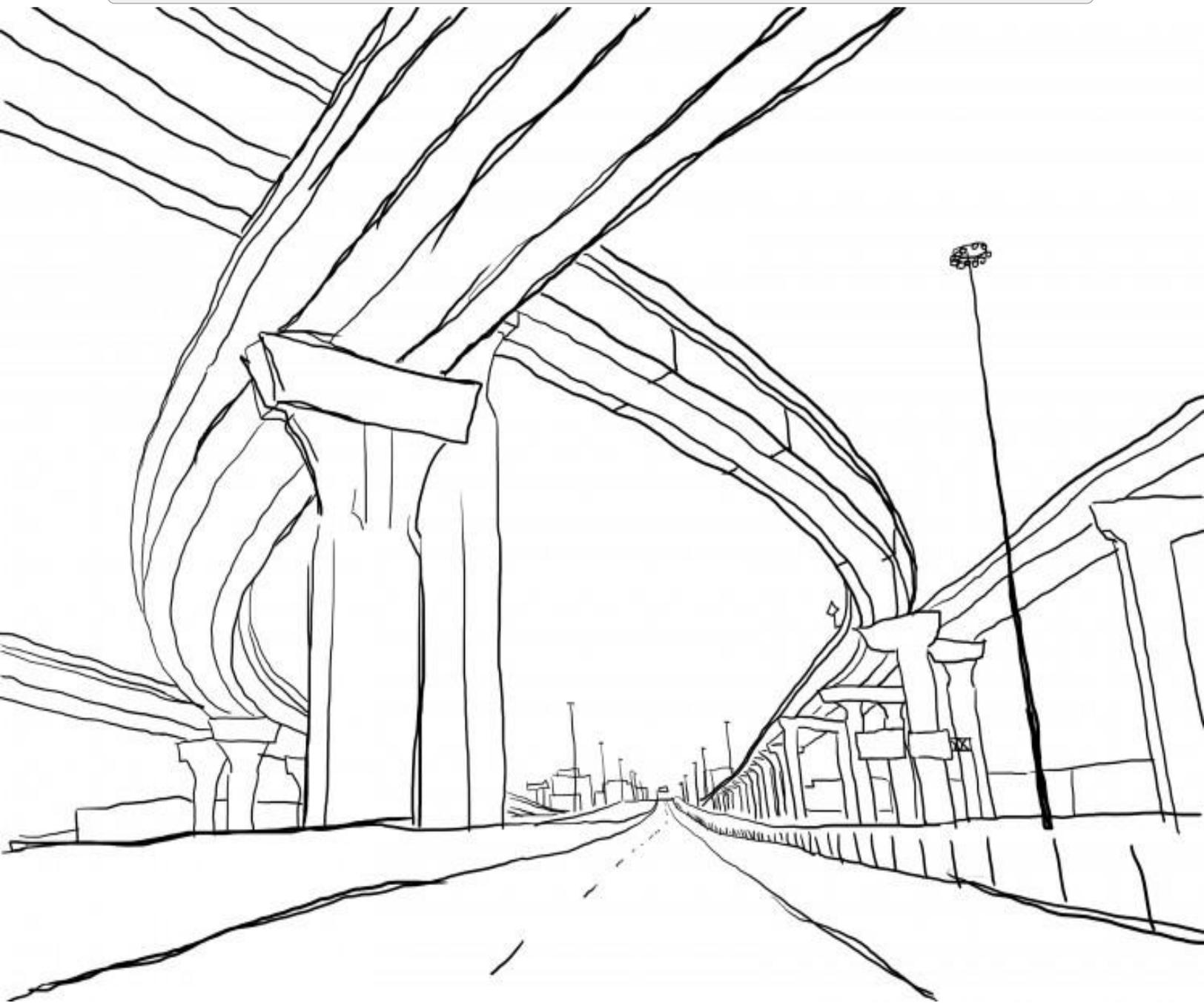
The Supreme Court was of the view that:

- Acquisition of land under the NH Act would be subject to the LA Act. Accordingly, solatium and interest were to be paid to the landowners in addition to the market value of the land. However, the Amendment to the NH Act took the rights of solatium and interest away from the landowners;
- Solatium paid to a landowner is on account of the fact that the landowner who may not be willing to part with his land, has to now do so. Further, he has to do so at a value that is fixed legislatively and not through negotiation and thus, he must get the best price for the property to be sold. Thus, solatium forms a part and parcel of compensation that is compulsorily payable for the compulsory acquisition of the land;
- The LA Act has been repealed and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR) has come into force. The First Schedule of the LARR helps in

the determination of compensation to be paid to landowners which shall apply to cases of land acquisition under the enactments specified in the Fourth Schedule;

- Thus, the result is that both before the Amendment and after the enactment of the LARR in 2013, solatium interest is payable to landowners whose property is compulsorily acquired for the purpose of National Highways.
- Classification made between different sets of landowners whose lands happen to be acquired for the purpose of National Highways and landowners whose lands are acquired for other public purposes has no rational relation to the object sought to be achieved by the Amendment Act, i.e. speedy acquisition of lands for the purpose of National Highways. On this ground alone, the Amendment falls foul of Article 14.
- In conclusion, it will be noticed that awarding of solatium and interest has nothing to do with achieving the object of the Amendment. It is neither the case of the Appellants or the Respondents that land acquisition for the purpose of national highways slows down as a result of award of solatium or interest. Thus, the same is violative of Article 14.

Our view: This decision clarifies an issue that has plagued landowners who have had their land acquired. Given the ambitious approach of the Central Government for road and highway building, safeguards to the rights of landowners are required for a true balance of interests between stakeholders.



ENERGY



CERC notifying the CERC (Power System Development Fund), Regulations, 2019

With a view to creation of necessary infrastructure and necessary transmission systems of strategic importance, the Central Electricity Regulatory Commission (CERC) has, (vide its notification dated August 28, 2019) enacted the CERC (Power System Development Fund) Regulations, 2019 (CERC PSDF Regulations 2019).

The CERC PSDF Regulations 2019 have not yet been brought into effect.

What are salient features of the CERC PSDF Regulations?

- The CERC PSDF Regulations make provision inter alia for
- The constitution of a Power System Development Fund (PSDF)
- The manner of utilization of the PSDF and its funding
- The constitution of a Nodal Agency for implementing projects and schemes

What amounts would be credited to the PSDF?

- The following amounts would be credited to the PSDF in accordance with the relevant regulations notified by the CERC
 - Congestion charges in surplus, after payment to eligible regional entities along with interest, if any
 - Congestion amount resulting from the difference in the market prices of different regions, owing to market splitting in power exchanges
 - Deviation Settlement Charges in surplus, after final settlement of claims
 - Reactive energy charges to the credit of the Regional Energy Charges Account
 - Additional transmission charges arising out of the explicit auction process in short-term open access advance bilateral transactions
 - Charges notified by the CERC from time to time
- Guidelines regulating transfer of funds to the credit of PSDF
 - The aforesaid amounts would be credited by the respective regulatory bodies to the PSDF as per the applicable guidelines
 - Such credit would be done on a monthly basis or as per frequency decided by the Central Government
- Maintenance and operation of PSDF
 - The PSDF would be maintained and operated through the Public Account of India

How would the PSDF be utilized and funded?

- Funding of projects in the form of grant
- Grant amount to be reduced from the capital cost of the project

What projects or schemes would be funded by PSDF?

- Projects proposed by distribution utilities which are incidental to the inter-State transmission system and impact grid safety and security, and where such projects are not covered under any other scheme of the Government of India or respective State Government(s)
- Central Government scheme which requires support from PSDF as part of the scheme
- Transmission infrastructure projects of strategic importance
- Installation of shunt capacitors, series compensators and other reactive energy generators
- Installation of standard and special protection schemes
- Installation of pilot and demonstrative projects
- Setting right the discrepancies identified in the protection audits on regional basis
- Renovation and modernization of transmission and distribution systems for relieving congestion

- Any other project in furtherance of the above objectives

What projects are not eligible to be funded by PSDF?

Private sector projects are not eligible for assistance from PSDF

What would be the priority of making payments by PSDF?

- The disbursement of funds by PSDF would be in accordance with the priority for sanction and release of funds indicated by the Central Government, on the basis of the importance of the project or the scheme and quantum of fund involved
- The application, processing, sanction, disbursal, appraisal and monitoring of funds from PSDF would be in accordance with procedures or guidelines framed by the Central Government directly or through the Nodal Agency (description hereinafter)

Who will act as the Nodal Agency?

The National Load Despatch Centre or other agency designated by the Central Government will be the nodal agency for implementation of projects and schemes.

What would be the functions of the Nodal Agency?

- To recommend proposals to the Monitoring Committee (after scrutiny of the proposals by the Appraisal Committee) after applying the procedures approved by the Central Government¹ for disbursement of funds and the CERC PSDF Regulations 2019
- To prepare an Annual Report of the PSDF and submit the same to the Central Government and the CERC
- To keep a record of the business transacted out of the PSDF
- To prepare a procedure for the preparation of budget, accounting and audit
- To perform other functions assigned to it by the Central Government

Our view: The fund, is a big encouragement for stakeholders who have been given the responsibility setting up renewable energy as well as conventional power projects in the country. It also geared towards improving transmission related issues – a pain point – which the sector has been grappling with.

Power Ministry puts conditions to ring fence package for stressed units

The Ministry of Power (**MoP**) (vide office memorandum dated August 30, 2019) laid down conditions to check possible misuse of the rescue package for stressed coal-fired power stations as well as to ensure fair play on the behalf of both generation and distribution companies with regard to making timely payments.

What was the rescue package?

The Union Government had approved a host of measures recommended by a high-level committee in March 2019, to de-stress power plants possessing an aggregate capacity of 40,000 mega watt .According to the package, coal linkages of power plants that cancel power purchase agreements (**PPAs**) due to payment default by distribution companies (**DISCOMs**) were to be valid for 2 years. This was done with a view to allow generation companies adequate time to look for alternative PPAs.

¹ Vide Office Memorandum dated September 18, 2014.

What conditions did the MoP stipulate?

The MoP laid down the following adequate safeguards:

- The reason for cancellation of the PPA is to be treated as a 'default in payment' by the DISCOM as per provisions of the relevant PPA.
- In case of a termination of the PPA by a generator on account of a default in payment by the DISCOM, the generator would not be entitled to exchange power bilaterally. However, the generator could exchange power through the Discovery of Efficient Electricity Price (DEEP) portal or on the power exchange at a market determined price for a period of a maximum of 2 years.
- The existing Letter of Assurance (LOA)/ Fuel Supply Agreement (FSA) conditions are to continue for a further period of a maximum of 2 years. Necessary modifications may be made to the same.
- Linkage post the 2-year period is to be cancelled in case the generator is unable to secure a long/medium term PPA during that period.
- In case of a long term PPA, the aforesaid provisions would not be applicable during the terminal 2 years of the PPA

Our view: The MoP has issued the aforementioned safeguards with a view of addressing the specific recommendations of the High Level Empowered Committee constituted to deal with the issue of Stressed Thermal Power Projects. If implemented effectively, one can hope that these safeguards help in reduction of stress in the power sector.

High Court of Andhra Pradesh Provides Interim Relief to Power Developers

What is the background?

ELP's August 2019 Infrastructure and Energy Digest provided an update on the Government of Andhra Pradesh's (**AP Government**) move to review all power purchase agreements (**PPAs**) that had been signed during the earlier Telugu Desam Party (**TDP**) government. We provided a brief overview of the situation, wherein the Indian Wind Power Association and other individual developers approached the High Court of Andhra Pradesh (**AP High Court**) and obtained a stay on the government order setting up the High Level Negotiation Committee (**HLNC**) and the letter requesting the Solar Energy Corporation of India (**SECI**) and the National Thermal Power Corporation (**NTPC**) to revise the existing tariff to INR 2.44 per unit. It was also reported that the AP Government was approached by the Japanese Ambassador, Union Minister for Power, RK Singh, and the Ministry of New and Renewable Energy (**MNRE**) in order to request the AP Government to reconsider its move. News reports indicated that the AP Government softened its stance on the matter and decided that it would only review PPAs with allegations of corruption. The AP Government has also been reportedly curtailing the power sourced from the renewable energy projects.

How has the situation developed?

It has been reported that the AP High Court on September 24, 2019 has quashed the aforementioned government order and letters to SECI and NTPC. It appears that the AP High Court considered the circumstances and arguments of both parties i.e. the financial condition of the state power distribution companies (**DISCOMs**) and the fact that developers have to be paid in order to generate the liquidity required to keep the renewable energy projects functional. Pursuant to these circumstances, the AP High Court reportedly directed the DISCOMs to pay a tariff rate of INR 2.43/kWh to wind power developers, and INR 2.44/kWh to solar developers as an interim measure until the matter is completely resolved. It has also been reported that the AP High Court then directed the Andhra Pradesh Electricity Regulation Commission (**APEREC**) to dispose of the pending batch of petitions within a time frame of 6

months. In addition to these interim measures, the AP High Court has also directed the DISCOMs to stop the curtailing of power sourced from these renewable energy projects.

Our view: While the situation may not have been resolved as yet, the AP High Court seems to have at least provided some relief to developers. With respect to investor concerns, the AP Government still intends to renegotiate the tariff rate, but it appears that the AP Government has tempered the initial intent under pressure from foreign and domestic authorities. While the renegotiation of the tariff rate might raise concerns with respect to potential investment, the reality of the financial condition of the DISCOMs will have to be taken into account. It remains to be seen whether the APERC arrives at an equitable solution.

RENEWABLE ENERGY

APTEL – No Public Hearing for Approval of Solar Tariffs discovered in Competitive Bidding

The Appellate Tribunal for Electricity (**APTEL**) vide its order dated August 29, 2019 (**Order**) ruled that no public hearing was required for approval of solar tariffs discovered in a competitive bidding process.

What was the background to the petition?

SB Energy Solar Private Limited (**SBSPL**), Ayana Kadapa Renewable Power Private Limited (**AKRPPL**) and Sprng Anitra Private Limited (**SAPL**) (collectively the Parties) had successfully bid for implementation of solar projects in solar parks. In this regard, the parties had paid more than INR 100 crores each to the Andhra Pradesh Solar Power Corporation Private Limited (**APSCPL**). Substantial progress had also been made with regard to establishment of the solar plant.

According to the SBSPL, AKRPPL and SAPL, the investment was made after NTPC and Solar Energy Corporation of India (**SECI**) had assured them that the tariff approval would be obtained. However, subsequent to APSPDCL's proposal to cancel the 21 wind power purchase agreements (**PPAs**) the Parties filed a petition against the Andhra Pradesh Electricity Regulatory Commission (**APERC**) fearing a similar course of action against their solar projects.

It was submitted by the Parties that if the respondent distribution companies (**DISCOMs**) were to withdraw the proceedings pending approval/ adoption of tariff pertaining to competitive bidding process, the Parties would suffer irreparable harm.

What was the ruling of APTEL?

The APTEL directed the APERC not to hold a public hearing since the proceedings pertained to the adoption of tariff in a competitive bidding process.

Our view: This order could not have come at a more opportune time. The renewable power developers in Andhra Pradesh have been struggling under a cloud of uncertainty on the AP government's intention to cancel PPAs inked by the previous government. This decision by the APTEL, however has come as panacea for developers and clearly sends out a positive message to industry.

Safeguard Duty to be Considered as Change in Law for ACME's Solar Projects in Karnataka

The Karnataka Electricity Regulatory Commission (**KERC**) has vide its order dated September 17, 2019 (**Order**), stated that the imposition of safeguard duty is to be treated as 'Change in Law'.

What was the background of the petitions?

Independent power producer ACME Solar Holding Limited's (**ACME**) filed petitions with the KERC with respect to 6 of its solar projects located in Karnataka. The petitions were filed against the Bangalore Electricity Supply Company (**BESCOM**).

What were the contentions of the petitioners?

- The petitioners, which were all Special Purpose Vehicles (**SPVs**) of ACME, contended that the imposition of safeguard duty on the import of solar modules be construed as a 'Change in Law' event under the relevant power purchase agreements (**PPA**)
- ACME requested KERC to evolve a suitable mechanism in order to compensate them for the increase in non-recurring expenditure incurred as a result of the 'Change in Law'
- Additionally, ACME prayed for grant of interest/carrying cost from the date of impact up till reimbursement thereof by the BESCOM;

What was the decision taken by the KERC?

- The KERC held that the imposition of safeguard duty on the import of solar modules should be considered as a 'Change in Law' event. However, the KERC rejected ACME's claims for compensation.

Our view: The Order is in keeping with a number of orders passed by the Central Electricity Regulatory Commission (**CERC**) and the Maharashtra Electricity Regulatory Commission (**MERC**) earlier this year, laying down that imposition of solar safeguard duty was to be considered a 'Change in Law' event. It is important to note that on account of non-submission of cogent documents, the KERC rejected ACME's claims for compensation on account of the 'Change in Law' event.

MNRE Exempts BIS Certification for Replacement of Solar Modules

The Ministry of New and Renewable Energy (**MNRE**) has issued a notification (dated August 9, 2019) regarding Bureau of Indian Standards (**BIS**) certification for replacement of solar modules in old projects.

What is the background for issuance of the Notification?

The Central Government had issued the Solar Photovoltaics, Systems, Devices and Components Goods (Requirements for Compulsory Registration) Order, 2017 (**Order**) (vide notification dated September 5, 2017) for 6 specified products. As per the Order, manufacturers storing, selling or distributing the specified goods were required to obtain registration for use of the standard mark (in respect to Indian Standards) by making an application to the BIS.

What are the exemptions for a BIS certification?

Previously, old projects requiring replacement of modules were exempted for replacement up to 2 modules per project. The Notification now exempts projects for replacement of up to 2 modules per megawatt.

The exemption as provided (under the Notification) is valid if the solar modules have valid International Electrotechnical Commission (**IEC**) certificates corresponding to Indian standards.

In case the replacement is with regard to more panels, the manufacturers are to have the product tested in test labs as per Indian standards. In order to avail the exemption, a specific exemption from the MNRE would be required.

Our view: The Notification should further the government's aim to maintain the quality of domestic solar products. Often, developers compromise on quality to reduce the costs of the project. This step by the government will ensure that developers are kept in check.

Timeline for release of Performance Bank Guarantees for solar/wind power projects

The Ministry of New and Renewable Energy (**MNRE**) has, vide its Office Memorandum (dated September 2, 2019) (**OM**), laid down a time frame for release of performance bank guarantees (**PBGs**), in cases where solar or wind power plants have been commissioned. With a view to making the timeline stringent, developers have, in terms of the OM, been called upon to point out instances of delayed release of PBGs to the Secretary, MNRE and the Managing Director of the concerned intermediary procurer.

What is the reason for the MNRE laying down a timeline for release of PBGs?

PBGs should ideally be released promptly after successful commissioning of a project. However, there have been several instances where PBGs given by wind or solar power developers to power utilities have been withheld. This is a matter of common concern to developers even today, since delayed payments often result in huge financial losses for developers.

More recently, terming the retention by National Thermal Power Corporation Limited (**NTPC**) of PBGs of independent power producers as 'entirely arbitrary and illegal', the CERC, (vide its order dated May 7, 2019) in Petition No. 340/MP/2018², directed immediate release of the PBGs. The CERC noted that the retention of the PBGs by NTPC was not premised on any of the grounds for levy of liquidated damages stipulated in the power purchase agreements. Accordingly, the decision of NTPC to levy liquidated damages was not well founded.

The timeline laid down by MNRE for release of PBGs appears to have been reasoned given the above context.

What is the prescribed timeline for release of PBGs? What are the other conditions preceding the release of PBGs?

The MNRE has stipulated 45 days from the Commercial Operation Date (**COD**) for release of PBGs. The release of PBGs is further subject to the submission of all required documents.

Our view: Considering that the grounds for retention of PBGs by power utilities are ambiguous and often not in alignment with contractually authorized grounds for retention of PBGs, the aforesaid timeline of 45 days from the COD is a welcome step in eliminating long arbitrary delays in release of PBGs. This move will also minimize the unwarranted financial burden imposed on developers of solar and wind projects due to a delay in the release of the PBGs.

² Petition filed by Rising Sun Energy Private Limited, Rising Bhadla 1 Private Limited and Rising Bhadla 2 Private Limited

Maharashtra Commission Asks DISCOM to Allow Open Access to Captive Wind Energy Generators

The Maharashtra Electricity Regulatory Commission (**MERC**) has vide its order (dated September 9, 2019) (**Order**), directed the Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) to grant open access and issue Generation Credit Notes (**GCN**) to captive wind energy generators. Such captive wind energy generators were denied Short Term Open Access (**STOA**) and Medium Term Open Access (**MTOA**) on grounds of non-installation of individual Special Energy Meter (**SEM**) for their captive wind mill/generator units.

What was the background of the petitions?

Petitions were filed by Ghatge Patil Industries Limited, Liberty Oil Mills Limited, Siddhayu Ayurvedic Research Foundation, Peethambra Granites Private Limited, and Aquapharm Chemicals Private Limited (collectively **Petitioners**) against MSEDCL who denied STOA/MTOA to the Petitioners on the ground that the Petitioners had not installed the individual SEM metering. Such SEM metering had been made mandatory by MSEDCL in November 2018 for various solar and wind MERC generators installed in solar or wind Parks.

What were the prayers of the petitioners?

The Petitioners contended as follows:

- The act of denial of STOA/MTOA by MSEDCL was illegal, arbitrary and against the law. Accordingly, MSEDCL should be directed to grant STOA/MTOA to the Petitioners for the relevant period, since the MEP metering could not be installed due to delay by MSEDCL in granting the required approvals.
- Further, MSEDCL should also be directed to give GCN for power generated which was not adjusted in the bills of the Petitioners and permit adjustment of such credit notes in the relevant financial year.

What was the decision taken by the MERC?

- The MERC directed MSEDCL to grant STOA/MTOA and issue GCN and adjust them in the ensuing bills of the Petitioners within a month of the Order.
- The MERC held that generating stations having multiple generating units should be fully prepared for installation of SEM for each generating unit within 6 months if they were to avail open access. No further extension after the intervening period of 6 months would be provided.

Our view: The Order is the latest in a long line of favorable orders for the wind generators and power producers. It is a welcome step for developers facing similar issues.

The Ministry of New and Renewable Energy (MNRE) sets up a Dispute Resolution Mechanism (DRM)

Through an order dated June 18, 2019 (**DRM Order**), the Ministry of New and Renewable Energy (**MNRE**) set up a Dispute Resolution Mechanism (**DRM**) to consider unforeseen disputes between solar / wind power developers and the Solar Energy Corporation of India (**SECI**) / National Thermal Power Corporation (**NTPC**). It was set up pursuant to pressure from the SECI and NTPC in order to address disputes that arise from agreements with developers and those beyond the scope of such contracts. The DRM envisages the setting up of a Dispute Resolution Committee (**DRC**) that will hear appeals against decisions of the SECI on 'Extension of Time' requests on account of recognized force majeure events. The DRC is to also consider requests based on events not considered by the contracts e.g. the effect of change in policy and make recommendations to the MNRE.

How is the DRM to be implemented?

On September 20, 2019 the MNRE issued guidelines for the implementation framework for the DRM and the functioning of the DRC under the DRM Order. The highlights of the framework have been provided below.

Who will constitute the DRC?

SECI and NTPC will provide a Secretariat for the DRC, with its head being designated as Secretary (DRC/SECI) or Secretary (DRC/NTPC), as the case may be. SECI / NTPC will make available one officer each, not below the rank of General Manager, who shall function as the Secretary of the DRC.

What is the resolution mechanism?

- The DRC is required to first come to a finding on whether the case is covered under the scope of work of the DRM as per the DRM Order. If the case is outside the ambit of the DRM or if the applicant has approached the DRC without first taking recourse to the SECI / NTPC, the application will be summarily rejected.
- After the application (or applications on similar issues in a particular week) have been heard, the DRC will make its recommendations to the MNRE within 21 days of the first hearing on the application(s). In cases, where the DRC is unable to give its decision within the time frame of 21 days, the Secretary (DRC) appointed by SECI / NTPC shall inform MNRE in this regard and MNRE may provide an additional 14 days within which the DRC will have to take a decision.
- In accordance with the DRM Order, the DRC will be free to interact with the relevant parties of the case and record their views. There shall be no lawyers allowed for the purpose of presenting the case before the DRC. SECI / NTPC will be permitted to present their views and arguments. The DRC will also be allowed to interact with the MNRE if required.
- The DRC is empowered to hear appeals against the orders of the SECI / NTPC within 21 days of the passing of such order(s). As a result, any adverse financial impact on the developers in pursuance to such order passed by the SECI / NTPC will be put in abeyance for 21 days subsequent to the passing of the order in question. In case appeal, is not filed within the said period of 21 days, or appeal is rejected for want of requisite fee, action as appropriate can be taken by SECI / NTPC. Further, no coercive action shall be taken on cases brought before the DRC till the final disposal of the appeal by the DRC and Ministry, where applicable.

Who will bear the expenses?

In order to provide additional comfort to investors, the DRM Order also states that all expenses coming out of the DRM Order, the above guidelines, and expenses relating to the DRC and secretariat thereof will be borne by the SECI/NTPC with no recourse to the Payment Security Fund.

Our view: The DRM has been set up in an effort to expedite disputes between the developers and the SECI / NTPC in a transparent manner. Given the investor concerns and reluctance with respect to the current issues in the renewable energy sector, the DRM boost investor confidence.



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