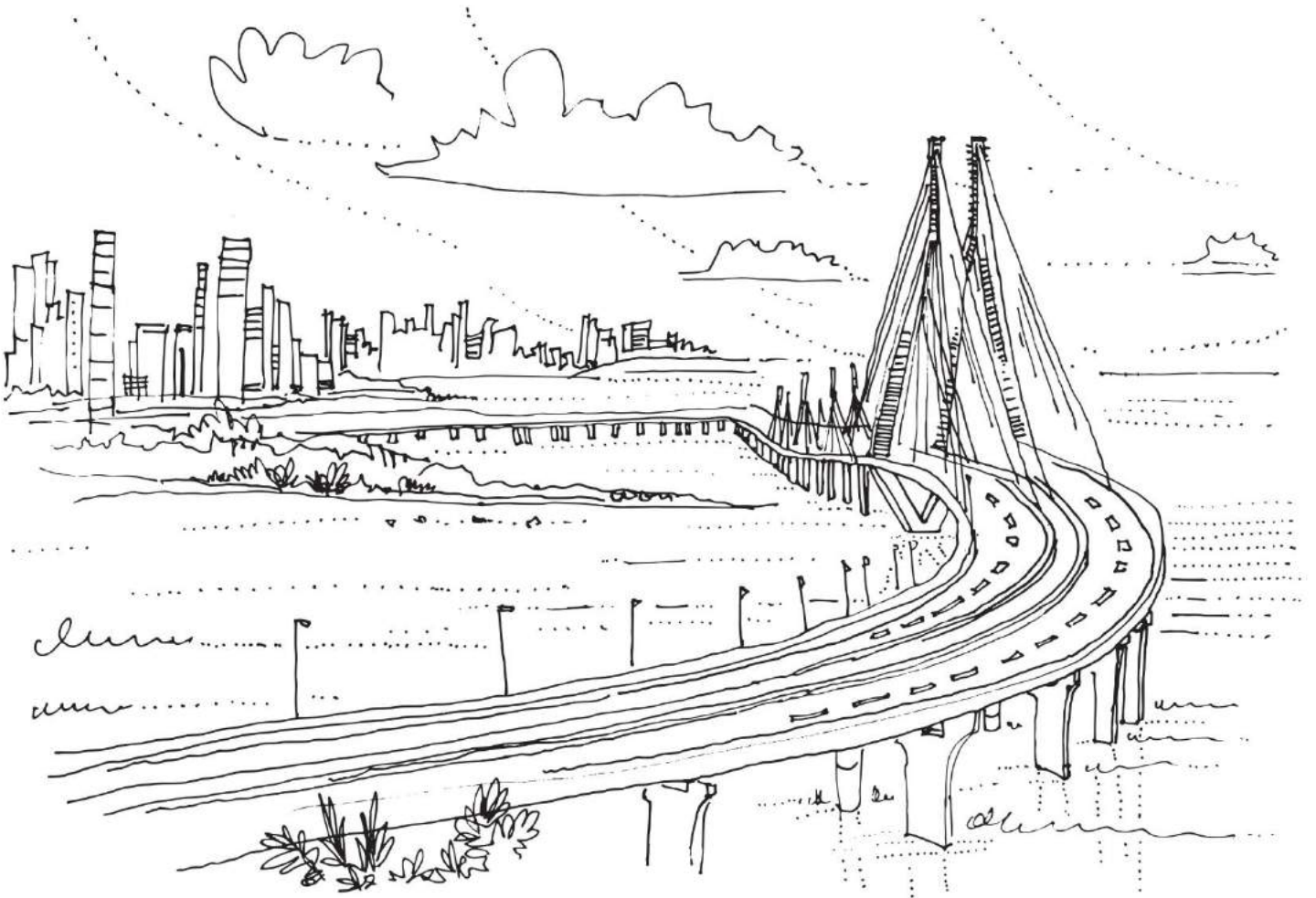




ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS



# **Infrastructure and Energy Digest**

## **Overview of Legal and Regulatory Developments**

NOVEMBER 2018

# ENERGY



## GENERAL

# Recommendations of the High-Level Empowered Committee for Stressed Thermal Power Projects

India's power sector has been plagued with several issues over the past year, including, high capacity addition without tied-up power purchase agreements (PPAs) with distribution companies (DISCOM), coal supply issues, inability of DISCOMs to pay to generators, regulatory challenges, inability of promoters to infuse equity and tardy implementation of projects.

In an attempt to alleviate the stress in the sector, the Government of India constituted a High Level Empowered Committee (HLEC) in July 2018 to consider issues related to stressed thermal power projects. The HLEC, led by its Chairman Mr. P.K. Sinha, submitted its report on November 12, 2018. The key terms of the policy are as follows:

### ▪ Coal Allocation/Supply

With coal starved power projects already taking a toll on this sector, the Government's intervention both in terms procurement and pricing, will provide a much-needed breather for the stressed power sector. The salient points recommended for coal supply include:

- Coal Linkage for short term PPA: In order to enhance supply and enable reduction of prices, the HLEC proposed that linkage coal be allowed to be used against short term PPAs and that power be sold through the Discovery of Efficient Energy Price (**DEPP**) portal for a short term or in a day-ahead market through a transparent bidding process.
- Coal Supply on Payment default by DISCOMs: The HLEC recommended that a generator should be allowed to terminate the PPA in case of a default in payment from the DISCOM and be entitled to use linkage coal for short term PPAs for a period of maximum of 2 years or until they find another buyer of power under a long/medium term PPA, whichever is earlier.
- Procurement of bulk power by a nodal agency: In order to assure supply of coal as well as payments to the generator, the HLEC proposed that as a slight modification to the SHAKTI policy, a nodal agency be designated which may invite bids for procurement of bulk power for a medium term (3-5 years) in appropriate tranches, against pre-declared linkage by Coal India Limited (**CIL**).
- NTPC as an aggregator of power: The HLEC recommended that NTPC can act as an aggregator for procuring power from stressed power plants through a transparent competitive bidding process and offer the same to DISCOMs. This should continue till such time as their own plants or units are commissioned. In order to meet the fuel supply for such plants, NTPC could use bridge linkage if coal linkage is not available for these plants and also meet partial fuel supply from its own basket of linkages/coal blocks.
- Increase in quantity of coal for forward e-auction: As the quantity of coal earmarked for the special forward e-auction was considerably lesser than the quantity earmarked for spot auction, the HLEC proposed that the Ministry of Coal earmark at least 60% of the total coal meant for e-auction (including spot auction and special forward e-auction) for power. This gap can be bridged by concurrent reduction from the spot e-auction quantity.
- Linkage to be provided at notified prices without bidding: Presently, a generator must first bid for linkage and then bid for procurement of a PPA. In order to preclude the uncertainty and fuel supply risk faced by the generator, the HLEC has proposed that the generator should be required to bid only once for the procurement of PPA and the linkage may be granted at the notified price without any further bidding.
- Non-accrual of short supplies of coal: If there is a shortfall in the supply of coal in a month and it is attributable to the Ministry of Coal or the Ministry of Railways, the HLEC proposed that such shortfall need not lapse and be carried over to the subsequent months, up to a maximum of 3 months.

- Annual Contracted Quantity (ACQ) to be determined based on efficiency: In order to encourage the operation of efficient plants and to ensure greater efficiency in the utilization of scarce coal resources, the HLEC recommended that the upper ceiling for the ACQ/MW may be prescribed by the Central Electricity Authority. This ceiling would be based on efficiency parameters and would be irrespective of the capacity and actual consumption of that plant. The coal would be supplied based on the upper ceiling.

### ▪ Retirement of old and inefficient power plants

- The HLEC proposed that old and high heat rate plants not complying with new environment norms may be considered for retirement in a phased and time-bound manner in order to avoid any demand/supply mismatch.

### ▪ Regulatory and DISCOM payment issues

The viability of generators is largely impacted by delay in payments by the DISCOMs. In order to curb this issue, the HLEC recommended that the Ministry of Power may advise the regulators to monitor payments by DISCOMs and frame appropriate regulations. The proposals by the HLEC include:

- Mandatory payment of Late Payment Surcharge: The HLEC further proposed that the Ministry of Power engage with regulators to ensure that late payment surcharge is mandatorily paid in the event of delay in payment by the DISCOMs.
- Payment security mechanism for IPPs: In consonance with the Ministry of Power's suggestion, the HLEC proposed that public financial institutions (PFIs) may discount the receivables from DISCOMs and make upfront payments to the generators. In order to protect the interest of the PFIs, a tri-partite agreement would be entered to ensure that in case of a default, the Reserve Bank of India (RBI) may recover the dues from the account of the states and make payments to the PFIs.

### ▪ Other recommendations

HLEC has also recommended delinking the agreements and clearances, for power stations and therefore keeping them independent of promoters. This is especially relevant for a potential new owner of a power plant, who need not go through the entire process of obtaining clearances and signing agreements again. Non-cancellation of PPAs for delays in commissioning is also a panacea for industry. The details of these recommendations are given below:

- Cancellation of PPA/fuel supply agreement/long term open access post National Company Law Tribunal scenario: The HLEC recommended that DISCOMS, Coal India Limited, Power Grid Corporation of India Limited, Ministry of Environment and Forests and appropriate Governments may be advised not to cancel PPAs, fuel supply agreements, transmission connectivity, environmental clearance, forest clearance and all other approvals including water, even if the project is referred to the National Company Law Tribunal or is acquired by another entity subject to the provisions of the contracted PPA and /or applicable rules. It was also recommended that all clearances may be linked to the plant and not to the promoter.
- Cancellation of PPA for non-compliance of COD: The HLEC proposed that if there is a delay in the commissioning of a project for reasons not attributable to the generator, the DISCOMs may be advised not to cancel such PPAs. The PPA may be kept on hold for a certain period, to enable removal of impediments in the execution of the project.
- Low utilisation of gas plant capacity due to paucity of natural gas: In order to revive gas-based power plants, it was suggested that the Ministry of Power and Ministry of Petroleum & Natural Gas may jointly devise a scheme in line with the earlier e-bid Regasified Liquefied Natural Gas Scheme (supported by the Power System Development Fund).

**ELP Comment:** The recommendations made by the HLEC are surely a step in the right direction. Stranded assets continue to face issues such as working capital and coal availability while short-term PPAs did not have coal linkages. With the recommendations mentioned above, many of these issues can be alleviated and more liquidity can be provided to the value chain. Further, it would provide a fillip to investor confidence in this sector and will also have a positive impact on the valuations of the stressed assets.

The key issue, however, would be the effective implementation of these recommendations. It would have been expedient had the HLEC had laid down timelines for implementation of these recommendations. While various issues have already been referred to the respective ministries for framing of appropriate schemes, the downside is that no timeline has been laid down for implementation of these schemes/initiatives.

Further, the HLEC hasn't specifically focused on creating a level playing field between private and state generators. More often than not, state owned generators are accorded preferential treatment in terms of linkage, allocation of PPAs and supply of coal. This severely impacts private generators. It should also be noted that the Reserve Bank of India (RBI) declined to join the deliberations of the HLEC. Given that the proposals of the HLEC impact areas concerning the RBI, it would be important to see if it concurs with the recommendations of the HLEC. As stated earlier, it has been recommended that the RBI recover dues from Discoms and make payments to public financial institutions.

In conclusion, these recommendations, if effectively executed will have a positive impact on the power sector. Effective implementation will be the key.

## Recent Amendments to the External Commercial Borrowings Framework

Infrastructure funding is critical for economic progress. One of the problems increasingly being faced by industry is of short term projects chasing long term money. To address this inefficiency, The Reserve Bank of India ("RBI") made the following amendments to the external commercial borrowings (ECBs) framework vide its circulars titled "External Commercial Borrowings (ECB)- Review of Minimum Average Maturity and Hedging Provisions" (dated November 6, 2018) and "Review of Hedging Provision" (dated November 26, 2018). The main objective of these amendments is enabling short term loans for infrastructure projects, thus allowing for a more flexible structuring of debt. Salient points include:

1. Minimum average maturity requirement for ECBs in the infrastructure space (raised by eligible borrowers under paragraph 2.4.1(iv) of the Master Direction No.5 dated January 1, 2016 on External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers (ECB Master Directions)) has been reduced from 5 years to 3 years.
2. The average maturity requirement for exemption from mandatory hedging requirements for ECBs (raised by the eligible borrowers under paragraph 2.4.1 (iv) of the ECB Master Directions) has been reduced from 10 years to 5 years. Further, it has been clarified that ECBs falling under the revised provision but raised prior to the date of the circular will not be required to mandatorily roll-over their existing hedges.
3. In addition to this, the mandatory hedge coverage has been amended from 100% to 70% for ECBs raised under Track I of the ECB framework for a maturity period between 3 and 5 years by eligible borrowers (given in paragraph 2.4.2 (vi)). ECBs falling within the aforesaid scope but raised prior to November 26, 2018 will be required to roll-over their existing hedge(s) only to the extent of 70 % of their outstanding ECB exposure.

Accordingly, RBI has announced a downward revision in the minimum average maturity requirement for overseas commercial borrowings from 5 years at present to 3 years under the infrastructure financing scheme. RBI also reduced the average maturity requirement for exemption from mandatory hedging provision applicable to ECBs raised by such borrowers from 10 years to 5 years.

**ELP Comment:** These amendments would enable infrastructure developers to take shorter term loans. This is in keeping with the current status of construction periods for solar and other renewable energy facilities, which have been reducing due to technological advances.

## CERC Notifying the DSM 4th Amendment Regulations

In the backdrop of increased power supply demands, maintaining grid discipline is a big challenge. Indeed, grid discipline is essential to ensure consistent supply and less wastage of power. With an objective to maintain grid discipline and grid security, The Central Electricity Regulatory Commission (CERC) issued its fourth amendment to the deviation settlement regulations (“DSM 4th Amendment Regulations”). These regulations will come into force from January 1, 2019 or on such other date as the CERC may appoint (through a separate notification). A summary of key amendments is given below:

### ▪ Inclusion of New Definitions

- “Area Clearing Price (ACP)” has been defined as the price of a time block electricity contract established on the Power Exchange after considering all valid purchase and sale bids in particular area(s) after market splitting, i.e. dividing the market across constrained transmission corridor(s).
- “Day Ahead Market (DAM)” has been defined as a market where physical delivery of electricity occurs on the next day (T+1) of the date of transaction (T) and is governed by the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 (as amended from time to time), the Rules and Bye-Laws of the Power Exchanges as approved by the Commission.”

### ▪ New definition for “time block”

- “Time block” means the time block as defined in the CERC (Indian Electricity Grid Code) Regulations, 2010 as amended from time to time. NTPC as an aggregator of power.

### ▪ Amendments to Regulations 5 (Charges for Deviations) and 7 (Limits on Deviation volume and consequences of crossing limits) of the Principal Regulations

- The Deviation Settlement Mechanism (DSM) rate vector will have a dynamic slope determined by joining the identified price points at 50 Hz. (daily simple average ACP), frequency of 49.85 Hz (Rs. 8 per unit) and 50.05 Hz (zero) on a daily basis.
- The maximum ceiling limit applicable for average Daily ACP discovered in the DAM segment of Power Exchange at 50.00 Hz shall be 800 Paise/kWh.
- Daily simple average ACP in the day-ahead market (exclusive of any transmission charges and transmission losses) shall be used as the basis for market linked DSM price at 50 Hz.
- The daily simple average ACP of the power exchange having a market share of 80 percent or more in energy terms on a daily basis shall be taken into consideration for linking to the DSM price vector.
- If no single power exchange is having a market share of 80 percent or more, the weighted average day-ahead price shall be used for linking to the DSM price.
- In case of non-availability of daily simple average ACP due to no-trade on a given day, daily simple average ACP of the last available day shall be considered for determining the DSM charge.
- The charges for the deviation for the generating stations whose tariff is not determined by CERC, irrespective of the fuel source, when actual injection is higher or lower than the scheduled generation, shall not exceed the upper cap of 303.04 Paise/kWh.

- The charges for the deviation for the generating stations whose tariff is determined by the CERC, when actual injection is higher or lower than the scheduled generation, shall not exceed the upper cap fixed in Regulation 5 (3) of the Principal Regulations (which provides that the Cap rate for the charges for the Deviation for the generating stations regulated by CERC using coal/lignite or gas supplied under Administered Price Mechanism (APM) as the fuel, shall be the value coinciding with the energy charges on imported coal on Deviation Price Vector).
- In the event of sustained deviation from schedule in one direction (positive or negative) by any regional entity (buyer or seller), such regional entity shall have to change sign of their deviation from schedule, at least once, after every six, time blocks.
- The additional charge for violation of sign change stipulation shall be levied for each such violation during a day.

**ELP Comment:** These amendments are a very welcome move. There are two important criteria where power generation is concerned – the first is affordability and the second is reliability and consistency. Grid discipline is core to this.



## RENEWABLE ENERGY

### Draft Wind Turbine Certificate Guidelines

Wind energy is India's biggest source of renewable electricity by far, accounting for nearly three times as much generating capacity as solar. With the quality of the wind turbines being one of the critical issues in generation of electricity, the Union Ministry of New and Renewable Energy ("MNRE"), in consultation with National Institute of Wind Energy Chennai, has prepared a draft of a new scheme named the Indian Wind Turbine Certification Scheme ("IWTCS"), which incorporates various guidelines of the Turbine Certification Scheme.

The draft is open for comments until December 5, 2018. The certification scheme is a consolidation of both national and international standards (IS/IEC/IEEE), Central Electricity Authority's ("CEA") technical regulations and requirements, MNRE guidelines and other applicable regulations. In these guidelines, the MNRE has incorporated various best practices from other countries to ensure high quality of wind energy projects, right from the concept phase to the lifetime of the wind turbines.

#### Key highlights of the draft scheme

The scheme aims to assist and provide standard best practices to: (i) Original Equipment Manufacturers (OEMs); (ii) End Users - Utilities, SNAs, Developers, IPPs, Owners, Authorities, Investors and Insurers; (iii) Certification Bodies; (iv) Testing Laboratories. With a view to ensuring consistent quality, the draft scheme lists the guidelines for the benefit of all the stakeholders.

These guidelines are divided into four volumes to comprehensively describe the certification requirements for each step of the construction, operation, and monitoring of wind projects. They are as follows:

- Volume-I – Management of IWTCS, Indian Type Approved Model (ITAM) and Recommendation for Grid Synchronization of Prototype Wind Turbine.
- Volume-II – Indian Type Certification Scheme (ITCS)
- Volume-III – Wind Farm Project Certification Scheme (WFPCS)
- Volume-IV – Wind Turbine Safety and Performance Certification Scheme (WTSPCS)

The IWTCS also creates guidelines for wind turbines that comprise of prototype certification and type certification; project certification, failure reporting of installed wind turbines, safety and performance assessment, and the de-commissioning and safe disposal of the wind turbine/wind turbine projects installed onshore and offshore.

With regards to project evaluation, the IWTCS specifies guidelines to assess wind turbines on their, safety, reliability, performance, testing and interaction with electrical power networks.

**ELP Comment:** *The draft scheme, in keeping with international best practices, has set out several recommendations to increase quality and safety of turbines. Manufacturers would now be bound by best practices across the world, indicating a maturing of the Indian market.*





## Custom Duty Concession for Non-Conventional Projects

In order to encourage generation of electricity through non-conventional sources, the Ministry of New and Renewable Energy ("MNRE") has introduced several programmes to promote efficient technologies in the country. In keeping with this intent, the Ministry of New and Renewable Energy ("MNRE") issued a memorandum regarding continuation of issuing concessional custom duty certificates ("CCDC") to set up projects which generate power using non-conventional materials (Non-conventional materials include agricultural, forestry, agro-industrial, industrial, municipal and urban waste, bio-waste and or poultry litter).

**The CCDC will be issued as per the procedure stated in the memorandum, which includes:**

- The developer needs to submit an application containing the details of items certified by the project developer and chartered engineer.
- The application will then be routed through the concerned state department/nodal agency and submitted to the Director (Waste to Energy Division), MNRE.
- MNRE will issue a certificate recommending the grant of CCDC.

**ELP Comment:** Continuation of the CCDC issuance for non-conventional power projects that utilise waste is beneficial for all stakeholders. Additionally, utilising CCDC helps reduce developers' costs.

