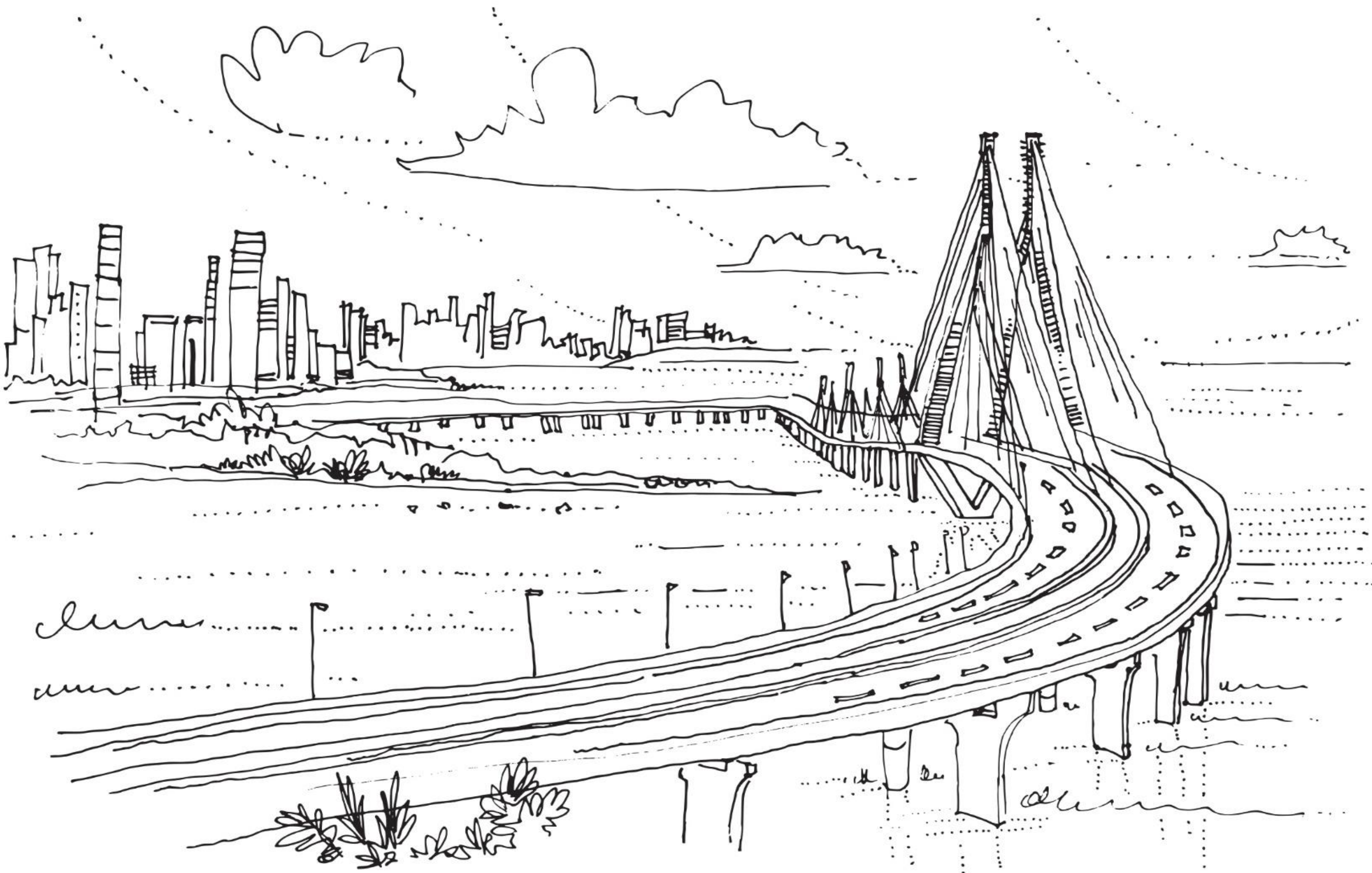
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS



Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

June 2021

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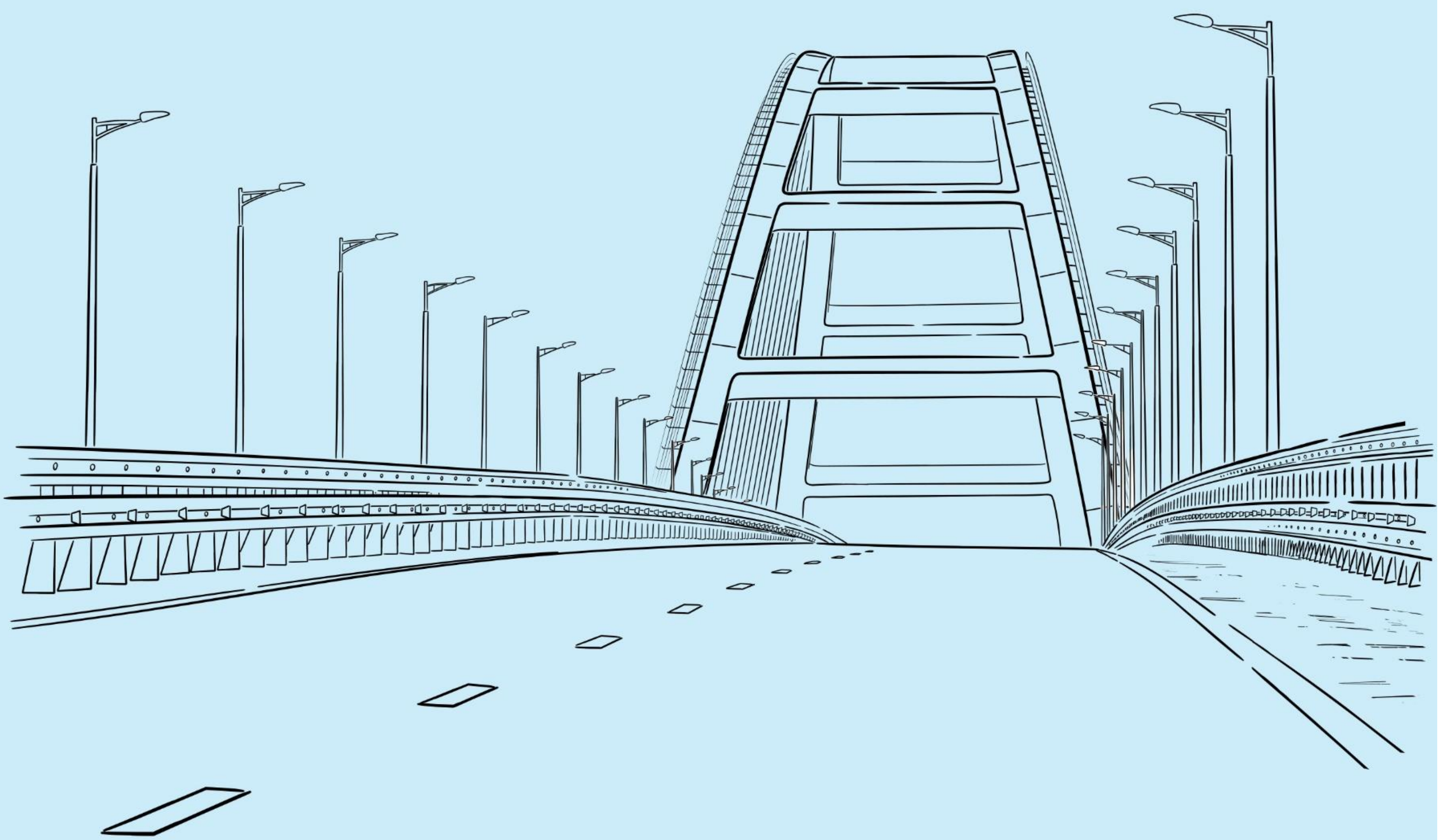


Amendments in FAME II program

Brief Background

The Department of Heavy Industry (**DHI**) vide its notification dated June 11, 2021 has partially modified the Scheme for Faster Adoption and Manufacturing of Electric Vehicles in India Phase II (**FAME India Phase II**).

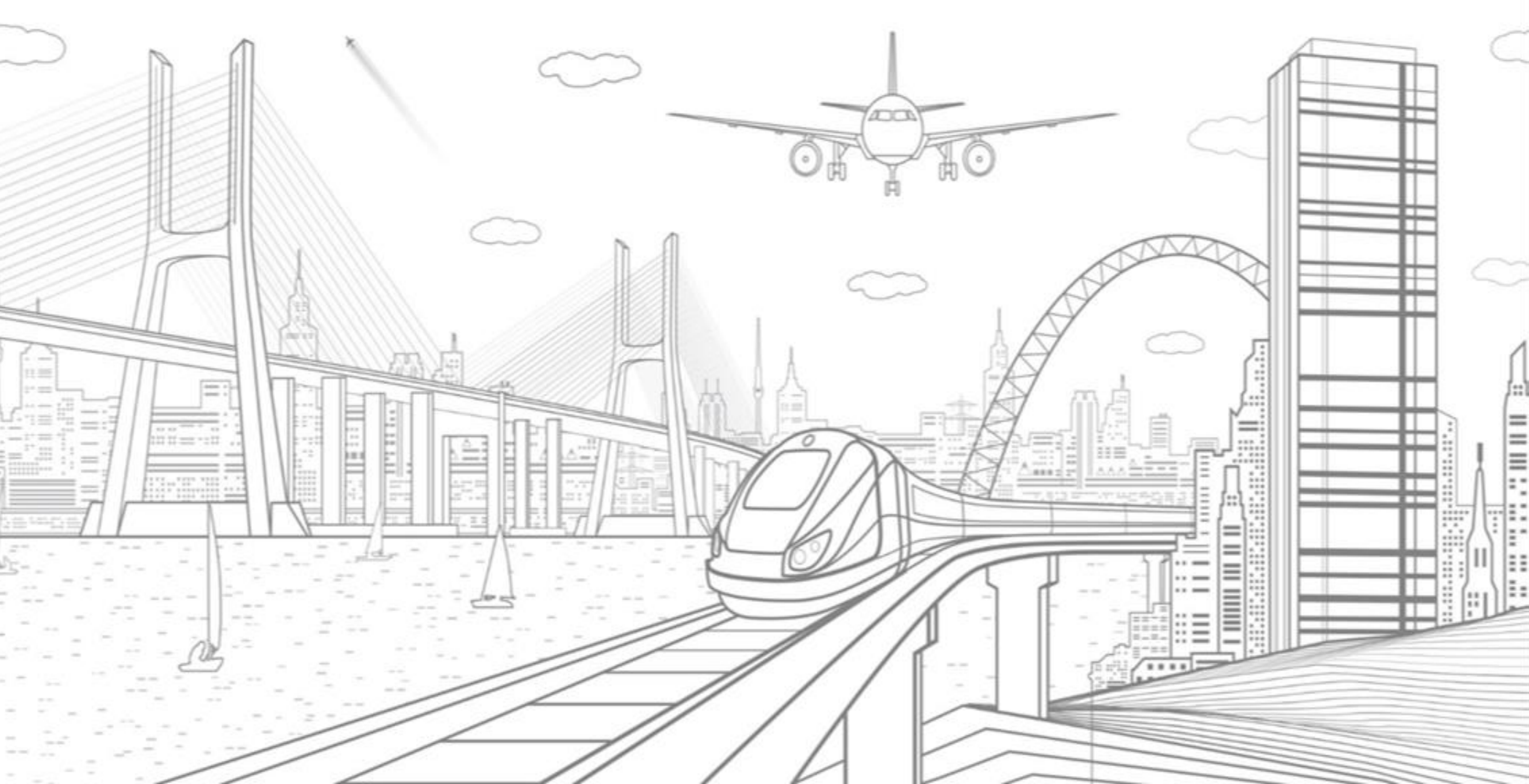
What is FAME India Phase II?

The DHI notified the FAME India Phase II on March 8, 2019 to view to promote electric mobility and development of its manufacturing eco-system in the country. The FAME India Phase II is valid for a period of 3 years commencing from April 1, 2019.

What are the modifications?

- The demand incentive for electric two wheelers has been increased to INR 15,000 per KWh from the earlier uniform demand incentive of INR 10,000 per KWH for all electric vehicles.
- The cap on the demand incentive for electric two wheelers has also been increased to 40% of the vehicle cost from the earlier 20%.
- Further Energy Efficiency Services Limited has been entrusted for aggregation of demand in respect of the following:
  - Aggregate demand for 3 lakhs electric three wheelers for multiple user segments. This is in order to bring the upfront cost of electric three wheelers at an affordable level and at par with internal combustion engine 3 wheelers.
  - Aggregation of demand in 9 cities with population of 4 million or more (Mumbai, Delhi, Bangalore, Hyderabad, Ahmedabad, Chennai, Kolkata, Surat, and Pune) for remaining E-buses under FAME India Phase II on OPEX basis.

Our view: The modifications have been primarily aimed at electric two wheelers. The impact of such modifications on promoting the use of electric vehicles in India remain to be seen.



ENERGY

Maharashtra Electricity Regulatory Commission directs Maharashtra State Electricity Distribution Company Limited not to Levy additional surcharge for a captive power consumption

In an order pronounced on June 3, 2021, the Maharashtra Electricity Regulatory Commission (**MERC**) in the case of *Exide Industries Limited vs. Maharashtra State Electricity Distribution Company Limited*[1], directed Exide Industries Limited (**Exide**) not to pay any additional surcharge for captive power consumption. It also directed the Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) not to levy any additional surcharge to Exide in the future and also to refund additional surcharge paid by Exide.

What are the facts of the case?

- Exide had three manufacturing facilities at Ahmednagar, Chinchwad, and Taloja in Maharashtra. Exide was consuming power at its manufacturing locations as a captive open access consumption from CSE Solar Sunpark Maharashtra Private Limited. (**CSE Solar**).
- Exide owned equity shares with voting rights to the extent of 27.19% in CSE Solar and qualified as a captive consumer of the generating station of CSE Solar in accordance with the provisions of Rule 3 of the Electricity Rules, 2005 (**Electricity Rules**).
- Exide was the sole captive consumer of the generating station of CSE Solar.
- Exide contended that from July 1, 2020, it had been procuring electricity from the generating station of the CSE Solar, initially under Short Term Open Access (**STOA**) till October 31, 2020, and thereafter under the Medium-Term Open Access (**MTOA**) from November 1, 2020, till the date of petition.
- Exide received invoices for the month of July 2020 for all its three manufacturing facilities from MSEDCL wherein MSEDCL had levied additional surcharge on the captive consumption of electricity by Exide from the generating station of CSE Solar. Immediately upon the receipt of the above invoices, Exide had protested and sought clarification from MSEDCL on the levy of additional surcharge but was only informed that the levy was in accordance with the policy decision taken by MSEDCL.
- Exide further contended that in terms of the provisions of Section 42(4) of the Electricity Act, 2003 (**Electricity Act**), additional surcharge was not payable in respect of the quantum of electricity generated by the captive power plant or a group captive power plant and consumed by a captive user when such generating plant and captive user fulfils the conditions mentioned in Section 2(8) of the Electricity Act and Rule 3 of the Electricity Rules.
- Exide further pointed out that while submitting the open access application, it was incorrectly advised that only those consumers who have their power generating projects set up in their premises with 100% shareholding fell within the definition of a captive power project. Therefore, all other captive users ought to choose the option of a group captive project.
- MSEDCL contended that Exide itself had made the open access applications under the head group captive mechanism. Hence, no wrongdoing could be attributed on MSEDCL with reference to levy of additional surcharge on Exide.

What was the MERC's observation?

- The MERC observed that at the time of grant of open access, MSEDCL had not raised any dispute on Exide's status of being a consumer of the captive power project, citing the existence of the power purchase agreement between Exide and CSE Solar.

[1] Case No. 10 of 2021

- Exide was a single captive user of the power plant of CSE Solar. Although from MSEDCL's point of view, there were three different consumers. As per the Electricity Rules, the nature of power plant (captive power plant or otherwise) is totally dependent upon the users in terms of the equity shareholding held by the users and the percentage of electricity consumed by them on an annual basis. The Electricity Rules recognizes that there can be either a single captive user or multiple captive users such as registered co-operative society or association of persons. It was an admitted fact that Exide (which is a single legal entity) was the sole beneficiary of the power plant and thus in spite of existence of three different consumers at three different locations, *the power plant needs to be treated as the single user captive power plant and not a multi-user captive power plant with a co-operative society or association of persons.*
- The MERC also observed that while the captive status of Exide could be determined only at the end of the year based on actual consumption by Exide vis-à-vis the generation from the power plant, the MERC could not find any reason to deny the claim of Exide that it is a consumer of the individual captive power plant.

What was the MERC's Judgement?

- Exide was a consumer of the individual captive power plant and hence it would not be liable to pay the additional surcharge as per the principles laid down by the MERC in its prior order[2].
- MSEDCL was directed not to levy any additional surcharge on Exide in future. MSEDCL was also directed to refund the additional surcharges paid by Exide in the past. However, no interest would be payable to Exide on such refund as Exide provided incorrect information in its open access application. MSEDCL based on the details provided in the open access application had levied the additional surcharge.

Our view: The MERC has in the past held that an individual captive power plant would not need to pay additional surcharge. The present case re-iterates such a position. However, captive users would need to be cautious in the applications for open access so as to avoid the possibility of such wrongful charges.

[2] Case No. 195 of 2017 dated September 12, 2018

Central Electricity Regulatory Commission directs Tamil Nadu Generation and Distribution Corporation Limited to compensate a generating company for change in law events

Background

In an order pronounced on May 31, 2021, the Central Electricity Regulatory Commission (**CERC**) in the case of *Coastal Energen Private Limited vs. Tamil Nadu Generation and Distribution Corporation Limited and My Home Power Private Limited*[3], directed Tamil Nadu Generation and Distribution Corporation Limited (**TANGEDCO**) to compensate Coastal Energen Private Limited (**CEPL**) for the introduction of Goods and Services Tax (**GST**) on imported coal, and the carrying cost on account of change in law events.

What are the facts of the case?

- CEPL set up a 1200 MW (2X600 MW) power plant (**Generating Station**) in a village called Ottapidarum, in Tamil Nadu.
- CEPL entered into a Power Purchase Agreement (**PPA**) with TANGEDCO for supply of 558 MW for the period of 15 years on December 19, 2013.
- CEPL contended that under Article 10 of the PPA, it was entitled to be compensated on account of occurrence of change in law events thereby resulting in additional recurring/non-recurring expenditure. CEPL further submitted that change in law events occurred after the cut-off date i.e., February 28, 2013, which was 7 (seven) days prior to bid deadline, i.e., March 6, 2013.
- CEPL sought compensation on account of the following change in law events during the operating period which resulted in an additional financial impact on CEPL for supply of power to TANGEDCO:

  (a) Increase in clean energy cess on coal

  (b) Increase in Wharfage charges

  (c) Introduction of integrated Goods and Service Tax (**IGST**)

  (d) Carrying cost
- According to CEPL, in terms of Article 10 of the PPA dated December 19, 2013, change in law events have significant financial impact on the costs and revenue during the operating period for which CEPL was entitled to be compensated and restored, through monthly tariff payment, to the same economic position as if such change in law had not occurred.
- CEPL submitted that the Generating Station had a composite scheme for generation and supply of power to more than one State, thereby satisfying the requirements under Section 79(1)(b) of the Electricity Act. The Generating Station was situated in the State of Tamil Nadu and had a long-term PPA with TANGEDCO. CEPL also entered into Memorandum of Understanding (**MoU**) dated November 28, 2015, with My Home Power Private Limited **MHPPL**), an inter-State trading licensee, for sale of 300 MW for a period of 3 years within the States of Andhra Pradesh and Telangana.
- TANGEDCO contended that CEPL only had one long-term PPA for 558 MW capacity with TANGEDCO and there was no other long-term or medium-term PPA. Thus, as on date, there was no composite scheme as CEPL was not supplying power to more than one State. CEPL had only 1 MoU with MHPPL dated November 28, 2015, for 300 MW for a period of 3 years and was not extended thereafter. Further, in terms of said MoU, CEPL supplied

[3] *Order in Petition No. 351/MP/2018*

power to Telangana Discoms only on short-term basis in respect of the letter of intent issued by Telangana State Power Co-ordination Committee.

- TANGEDCO further contended that CEPL did not have any composite scheme for generation and supply of electricity in more than one State on the date of filing of the present petition. In absence of having a composite scheme, CEPL cannot invoke the power of the commission under Section 79(1)(b) of the Electricity Act.

What was the CERC's judgement?

- The CERC agreed that there was a change in law event and allowed the CEPL claim on increase in clean energy cess on coal, introduction of IGST on imported coal, carrying cost. However, the CERC rejected the claim on increase in wharfage charges as CEPL did not clarify on which services/ items, the Tariff Authority for Major Port Trust had levied the wharfage charges nor submitted any documentary evidence to the effect. Therefore, this claim was rejected due to the absence of requisite information.
- Accordingly, the CERC allowed CEPL to charge the compensation on account of change in law events admitted during the operating period. However, it was clarified that CEPL would be entitled to claim the compensation, in accordance with the order, after the expenditure allowed under change in law during the operating period (including the reliefs allowed for operating period, if any) exceed 1% of the value of Letter of Credit in aggregate. For such purpose, CEPL was required to furnish all the relevant documents supported by an auditor certificate.

Our view: The CERC's order offers an in-depth analysis of components that could be construed as change in law and hence should guide other developers facing similar issues. Further, the CERC also importantly highlighted that the effect of change in law as approved would come into force from the date of commencement of supply of electricity to the procurer or from the date of occurrence of change in law event, whichever is later.

Ministry of Petroleum proposes change in law to include hydrogen in mineral oil

- The Ministry of Petroleum and Natural Gas has vide notice dated June 15, 2021, proposed amendments to the Oilfields (Regulation and Development) Act, 1948 (**Act**) by introducing the Oilfields (Regulation and Development) Bill, 2021 (**Bill**) for stakeholder comments.
- The Bill proposes to *inter alia* amend the definition of 'mineral oil' under the Act to include any naturally occurring hydrocarbon, whether in the form of natural gas or in a liquid, viscous or a solid form including, *inter alia*, gases capable of being used as fuels occurring in association with mineral oils or which can be produced from mineral oils such as hydrogen.
- The aforementioned proposed amendment will effectively enable the production, distribution and regulation of hydrogen gas in conjunction with natural gas and will further facilitate the development and production of alternative/derivative clean energy sources.

Our view: The proposed amendment is a welcome step for the efficient use of hydrogen by enabling its production and exploration in accordance with the Act.

Market Based Economic Dispatch of Power

Background

In order to reduce the cost of power for DISCOMs and consumers, the Ministry of Power (**MoP**) has issued a discussion paper dated June 1, 2020 on market-based economic dispatch (**MBED**) of power (**Discussion Paper**) and has requested the stakeholders to provide their comments on the matter by June 30, 2021.

What does the Discussion Paper envisage?

- As per the Discussion Paper, the MoP is aiming to move towards a "One Nation, One Grid, One frequency, One Price" framework by adoption of a market based economic dispatch, which will lead to discovery of uniform clearing prices in the day-ahead market.
- The idea is to transit to a national merit-order and a country-wide balancing area instead of the siloed self-scheduling and balancing mechanisms currently followed.
- The Discussion paper outlines a phased introduction of MBED with Phase 1 involving only the thermal fleet of NTPC to test the efficacy of the MBED mechanism, identify deficiencies or potential issues that need to be addressed prior to a nation-wide rollout.
- Phase 1 of MBED is proposed to be implemented from April 1, 2022.

What are the salient features of MBED?

Pooling of buy/sell bids

- The sellers and buyers submit their offers and bids on a day ahead basis.
- Offers and bids (quantum and price) are pooled.

Price discovery, scheduling and dispatch

- National merit order stack is prepared.
- Market Clearing Price (**MCP**) is discovered as per common merit order for each time block of upcoming day.

Payments and settlements

- Cleared buyers would pay MCP to the Power exchange which will in turn pay the MCP to the cleared sellers.
- Final settlement would be as per contract for the portion of demand cleared in relation to contracted MW. Gains realized due to sale of un-requisitioned surplus power will be shared with beneficiaries as stipulated by the Commission.
- The buyers would still continue to pay the fixed costs outside the market.

What are the key advantages of the MBED?

- Decrease in overall procurement cost thereby decreasing the cost for DISCOMs and consumers.
- Additional revenue for generators supplying surplus power.
- Increased integration of renewable energy thereby reducing curtailment of renewable energy.
- Uniform price of power throughout the country.

Our view: The MBED policy could be a key reform in the power sector. Apart from reducing the cost considerably, this move could also provide a major boost to the renewable energy sector. By integrating the power from all the states to a central level, the renewable energy sector could benefit a lot, considering the varied geographical and weather conditions of different parts of the country.

Protecting the Great Indian Bustard: The Supreme Court steps in

Background:

- In the case of *M.K. Ranjitsinh & Ors. v. Union of India & Ors* (decided on April 19, 2021) a three-judge bench of the Supreme Court dealt with the question of the collision threat posed by low voltage and high voltage over-ground power-lines to the habitats of birds in the states of Gujarat and Rajasthan.
- The Supreme Court was particularly mindful of the death of six Great Indian Bustards - a critically endangered species. The Wildlife Institute of India (WII) in its Report "Power Line Mitigation, 2018", stated that every year 1 lakh birds die due to collision with over-head power lines in and around Desert National Park, Rajasthan.

Observations of the Supreme Court

- The Supreme Court took cognizance of the fact that there have been tenders issued for the laying of under-ground power lines, thus concluding that the technology for the same exists in India. It ordered that entities responsible for the setting up of power transmission lines must install bird collision prevention equipment on an immediate and urgent basis.
- The Supreme Court also ordered that within one year all power-lines in the designated habitat area of the Great Indian Bustard (the Supreme Court listed out the exact power-lines) must be laid under-ground wherever feasible and the feasibility of which would be determined by a three-member Committee consisting of Supreme Court appointed experts.
- The Supreme Court further stated that the state and union governments have enough resources under the Compensatory Afforestation Fund which could be borne towards rehabilitation of wildlife habitat and could thus cover the conversion of over-ground power lines to underground ones. It also noted that power companies could defray such extra expenditure under the Corporate Social Responsibility head as mandated under Section 135 of the Companies Act, 2013. Moreover, the Supreme Court took note of Section 166 (2) of the Companies Act, 2013 which casts a responsibility on the directors of a company to keep in mind not only the best interests of the employees, the company, the shareholders but also the environment. The Supreme Court held that though 'environment' was not defined under the Companies Act, 2013, it would need to be given the meaning under the Environment Protection Act, 1986.
- The Court also noted that any increase in tariff due to the mitigation measures as required under the order should be passed on to the ultimate consumer subject to approval of the competent regulatory authority and in accordance with the contractual terms.

Impact

The Times of India has reported[4] that in light of this Order, the Gujarat government will incur an expenditure of INR 300 crores and Economic Times reports[5] that solar power developers may incur a cost of USD 3 billion to re-lay the power lines. It remains to be seen whether this Order can constitute a 'change in law,' which can be approved by the appropriate regulatory commission. With reports that the Ministry of New and Renewable Energy set to seek a review of this Order[6]; the final word on this matter remains left to be said.

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[4] https://timesofindia.indiatimes.com/city/ahmedabad/saving-gib-rs-300-crore-extra-to-bury-power-lines/articleshow/82563606.cms

[5] https://economictimes.indiatimes.com/industry/renewables/solar-power-majors-get-3b-shock-from-sc-order/articleshow/82538167.cms?from=mdr

[6] https://www.business-standard.com/article/current-affairs/govt-plans-to-contest-supreme-court-order-on-great-indian-bustard-121062700911_1.html

Our view: In 2017, the Ministry of Environment, Forest and Climate Change vide a notification exempted environmental clearance requirements and Environment Impact Assessment for solar parks and solar projects but stipulated that compliance with the Air (Prevention and Control of Pollution) Act, 1981; Water (Prevention and Control of Pollution) Act, 1974; and Hazardous Waste Management Rules 2016 for disposal of PV Cells would be required.

This Order of the Supreme Court reflects the fact that despite project developers being granted statutory exemptions; they must still ensure that their projects are in compliance with global best practices to preserve and protect the environment. This SC Order is likely to have a bearing on another PIL[7] that is pending before the Rajasthan High Court which challenged the legality of the allotment of land to a developer for setting up a 1500 MW solar park in areas which also come within the habitat of the Great Indian Bustard in village Rasla located in the Jodhpur district.

RENEWABLE ENERGY

Waiver of Inter-State Transmission charges on transmission of electricity generated from solar and wind sources of energy

Background:

- In our previous newsletter, we discussed the order passed by the Ministry of Power (**MoP**) order dated January 21, 2021 (**2021 Order**) wherein it was stated that no Inter-State Transmission System (**ISTS**) charges would be levied on transmission of the electricity generated from power plants meeting certain criteria for a period of 25 years from the date of commissioning of the power plants.
- Thereafter, MoP has issued an order dated June 21, 2021 amending the 2021 order (**Amendment Order**).

Amendment Order

- The MOP has extended the waiver of ISTS charges on transmission of electricity generated from solar and wind sources for projects to be commissioned up to June 30, 2025.
- The waiver of total ISTS charges would also be allowed for Hydro Pumped Storage Plant (**HPSP**) and Battery Energy Storage System (**BESS**) projects to be commissioned up to June 30, 2025, if the following conditions are met:
  - At least 70% of the annual electricity requirement for pumping of water in the HPSP is met by use of electricity generated from solar and/or wind power plant;
  - At least 70% of the annual electricity requirement for charging of the BESS is met by the use of electricity generated from solar and/or wind power plant.
- The ISTS charges for power generated/ supplied from such HPSP and BESS will be levied gradually: 25% of the STOA charges for initial 5 years of operation, then charges can be gradually increased in steps of 25% after every 3rd year to reach to 100% of STOA charges from 12th year onwards. This may be aligned with the gradual reduction in tariff and payment debt.

[7] D.B.C.Writ Petition No.825/19

- Waiver of Transmission charges will be allowed for trading of electricity generated/ supplied from solar, wind, PSP and BESS in Green Term Ahead Market and Green Day Ahead Market for 2 years i.e. till June 30, 2023. This arrangement will be reviewed on annual basis depending upon the future development in the power market.
- The MOP has also clarified that the waiver is allowed only for ISTS charges and not losses.
- Further, where the ISTS is used for the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such Inter-State Transmission of electricity, the ISTS would be included for sharing of ISTS charges. Any waiver of ISTS charges that applies to ISTS will also be applicable to such parts of the Intra-State Transmission. The transmission charges of such ISTS will be reimbursed by the CTU as is being done for ISTS system. The concerned Regional Power Committee have been empowered to identify such lines.

Our view: Such an extension is a welcome move in the current scenario of the subsisting pandemic.

Shankra Ram vs State of Rajasthan: Importance of land due diligence in solar projects

Background:

- The case of *Shankra Ram vs State of Rajasthan* is a clutch of 3 writ petitions heard by a two judge Jodhpur bench of the Rajasthan High Court via an intra-court appeal challenging the decision of a single judge bench. It partially allowed the appeal and directed the state government to ensure that certain parcels of land in villages falling under the Jodhpur and Jaisalmer districts that were allotted to the solar power companies which transgressed the property held by the villagers, the village common land and public utilities should be cancelled.
- The case involved the Rajasthan Renewable Energy Corporation (a state government undertaking) which had entered into joint venture agreements with the Essel Group and Adani Group to set up the following companies: Essel Saurya Urja Company of Rajasthan Limited (**ESUCRL**) for a 450 MW solar park in Jodhpur district and Adani Renewable Energy Park Rajasthan Limited (**AREPRL**) for developing a1500 MW solar park in Jaisalmer district.

Arguments of the petitioners

- The petitioners (appellants) claimed that they were in ‘cultivator possession’ of the lands that were allotted by the District Collector of Jodhpur and Jaisalmer on March 23, 2018 to the solar power companies for the setting up of solar parks. It was on these lands that they had constructed a *dhani* (settlement) and were residing since the past 40-45 years. They stated that their *khatedari* land (a type of tenancy) and the land reserved for public utilities i.e. temple, cremation ground, school etc. was surrounded by the land allotted in favour of the solar companies and thus, they stood deprived of its beneficial use.
- On March 8, 2006, the Sub-divisional officer (**SDO**), Pokaran (Jaisalmer district) had issued an advertisement inviting applications for allotment of the agriculture land to landless peasants based on the social welfare policy of the state under Rule 7 of the Rajasthan Land Revenue (Allotment of Land for Agricultural Purposes) Rules, 1970. The petitioners had applied for the same on the basis that they had been living on such land for 40-45 years, however, they had not received any response from the State Government. The same

land was later allotted to the solar power companies on January 1, 2018. The petitioners claimed this grant of land was mala fide as their prior claims had not been disposed of and they should thus not be dispossessed from their lands.

- The petitioners also adduced evidence that the grant of land to the solar companies in certain villages included the village common land such as *charagah* (pasture land), *oran* land (sacred groves), ponds, the village school, burial grounds, etc. and also blocked the right of way that the villagers enjoyed and that the allotment of these lands is prohibited under law. They submitted that out of 6115.06 *bighas* (unit of measurement) land allotted to one of the companies, the possession of only 4662.13 *bighas* land has been handed over, which clearly indicated that before making the allotment of the land no survey/site inspection was undertaken.
- They also claimed that the grant of land by the District Collector to the solar companies was mala fide, based on non-application of mind and against the principles of natural justice as a survey for the same was not undertaken before granting it to the companies.

Arguments of the Respondents

- The respondent state as well as the solar companies argued that on August 16, 2009 the Rajasthan State Cabinet had passed a resolution cancelling the allotment of the land in question to landless tenants and the same had been forwarded by the District Collector to the SDO. Moreover, the state argued that the age of some of the petitioners was less than 35 years and thus they could not claim to be in possession of the land for 40-45 years.
- The state also argued that the land was allotted to the respondent companies after following due procedure under the Rajasthan Land Revenue (Allotment of Land for Setting up of Power Plant based on Renewable Energy Sources) Rules, 2007 and Section 90B and Section 100 of Rajasthan Land Revenue Act, 1956.
- With regard to the allotment of the village common land the respondents argued that the solar companies have not been given possession of the said land. The respondent solar companies also stated that in setting up the solar park, no public utility/facility would be adversely affected.

The Observations of the High Court

- The High Court rejected most of the contentions put forward by the petitioners. The High Court held that the Cabinet Resolution of 2009 was sufficient to show that the claim of the petitioners had been rejected by the government. This rejection could have been challenged by the petitioners on the available grounds under the appropriate remedy under law and not by way of a writ petition.
- Further, the High Court noted that the 2009 Cabinet Resolution which proposed to reject the application for land allotment was a conscious decision. It had noted that given the sparse rainfall in the land the potential for agricultural production was negligible and thus it would be appropriate to reserve the land for 'production of oil, natural gas, solar energy, wind Energy, etc.'
- With regard to the allotment of village common lands to the solar companies, the High Court noted that while the state government had not handed over the public utility and reserved category land to AREPRL, it had not categorically cancelled the same.
- The High Court noted that when allotment of land to AREPRL in the village Dawara was done (first allotment) a proper process was followed and a survey undertaken. On the other hand, while allotting land to AREPRL in the village Nedan (second allotment) no proper survey was conducted. Also, the entries in the revenue record were not appropriately considered so as to ascertain as to whether the land sought to be allotted, was actually available for allotment or not. This meant that lands of public utilities, the approach road, the land falling within the flow of the river and the land required to be left open so as to protect the rights of the inhabitants and the

khatedar tenants was also allotted to AREPRL which was prohibited under Section 16 of the Rajasthan Tenancy Act, 1955.

- The High Court referred to the cases of *Jagpal Singh & Ors. vs. State of Punjab & Ors* and *Jitendra Singh v MoEFCC* which had emphasized the protection of village commons under Article 21 of the Indian Constitution.
- Thus, the High Court ordered the cancellation of all land allotments to the solar companies that encroached upon the public utilities of the village.
- It ordered the state government to under-take a fresh survey for three villages to ensure that the rights of peaceful existence of the *khatedar* petitioners is not disturbed.
- The High Court also directed that its order be placed before the bench hearing the Public Interest Litigation Challenge to the allotment of land to the solar power companies near the Great Indian Bustard Arc Area.

Our view: This judgement shows the importance of undertaking due diligence exercises in cases involving large parcels of land in India, even where there may be a grant from the government. The impact of solar projects on community common land used by local pastoralists and the issues that may arise on such account ought to be a concern that investors in such projects should keep in mind.

MERC Order on adoption of correct monthly open access billing methodology

Background:

- Mahindra Sanyo Special Steel Private Limited (**Petitioner**) filed a case under the Electricity Act read along with the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2016 (**DOA 2016 Regulations**) for non-compliance by the Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) of Maharashtra Electricity Regulatory Commission's (**MERC**) order dated August 11, 2017 (**2017 Order**) regarding the adoption of correct monthly open access billing methodology for adjustment of Renewable Energy (**RE**) and captive power under open access and seeking revisions of such incorrect billings.

What are the facts of the case?

- The Petitioner was a consumer of MSEDCL. The Petitioner consumed conventional power from the Group Captive Power Plant of Sai Wardha Power Generation Limited (**SWPGL**) and was also sourcing its power from multiple sources through open access from conventional / non-conventional (wind and solar) for meeting its RPO.
- The open access bills received by the Petitioner for certain months gave adjustment to power from renewable power first and then captive power plant (**CPP**) conventional power.
- MSEDCL did not upload any approved procedure that was required as under Regulation 4.1 of the DOA 2016 Regulations in the specified time and uploaded the same more than a year after the lapse of such. The procedure adopted by MSEDCL was not in consonance with the DOA 2016 Regulations, pursuant to which the correct credit adjustment was not been followed by MSEDCL.
- Due to the incorrect open access billings, the Petitioner incurred losses on a monthly basis aggregating to an approximate amount of INR 3.2 lakhs.
- Earlier, the MERC in a similar case had passed the 2017 Order directing MSEDCL to adopt correct billing methodology and issue correct and issue revised bills to all open access consumers. Thereafter, MERC passed an order dated October 23, 2018 in the matter

of another captive user of wherein the MERC directed MSEDCL to correct billing methodology of open access consumers.

- In view of the aforesaid, the Petitioner approached the MERC.

What were the contentions?

- Non- compliance of the 2017 Order and issue of limitation period.
- Revision of open access bills for the disputed period.
- Adoption of correct practice of set-off open access power i.e. first conventional open access power and then RE power.

What was the MERC's Order?

- The MERC noted that it its 2017 Order it had provided the billing methodology for the adjustment of conventional CPP open access power first and then RE Power and directed MSEDCL to comply with the directives of the MERC. However, MSEDCL did not revise the bills of the Petitioner and corrected the bills only after filing of the present petition. The MERC was of the opinion that there was an element of omission/negligence on part of MSEDCL and in future, MSEDCL needs to ensure compliance of the directions issued by MERC within the stipulated timeframe. Failing this, MERC will be constrained to take appropriate action against the concerned officers of MSEDCL in accordance with the relevant provisions of the Electricity Act, 2003.
- The MERC noted that for the issue of adjustment of CPP conventional open access power first and then RE power as per MERC's 2017 Order, at the request of the parties, both the parties had mutually resolved the issues of adjustment of credit amounts.
- The MERC noted that Mahindra CIE Automotive Limited, another captive user of SWGPL has raised an issue, in its appeal before Appellate Tribunal for Electricity (**Appeal**), relating to adjustment of conventional IPP Power first and then RE Power. Further, the MERC noted that the Appeal was sub-judice before the Appellate Tribunal for Electricity. In view of the facts of the case and the that the Appeal was still pending, MERC was of the opinion that balance of convenience required the Petitioner to wait till the Appellate Tribunal for Electricity decided the Appeal.
- The MERC directed MSEDCL to provide the credit adjustment for specific months, in the next billing cycle and also observed that the Petitioner had the liberty to approach the MERC afresh, if it so desires depending on the outcome of the Appeal.

Our view: The Order is in line with the MERC's earlier orders which require that conventional CPP power should be adjusted before RE power, since the DOA 2016 Regulations only permit banking of RE power.

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