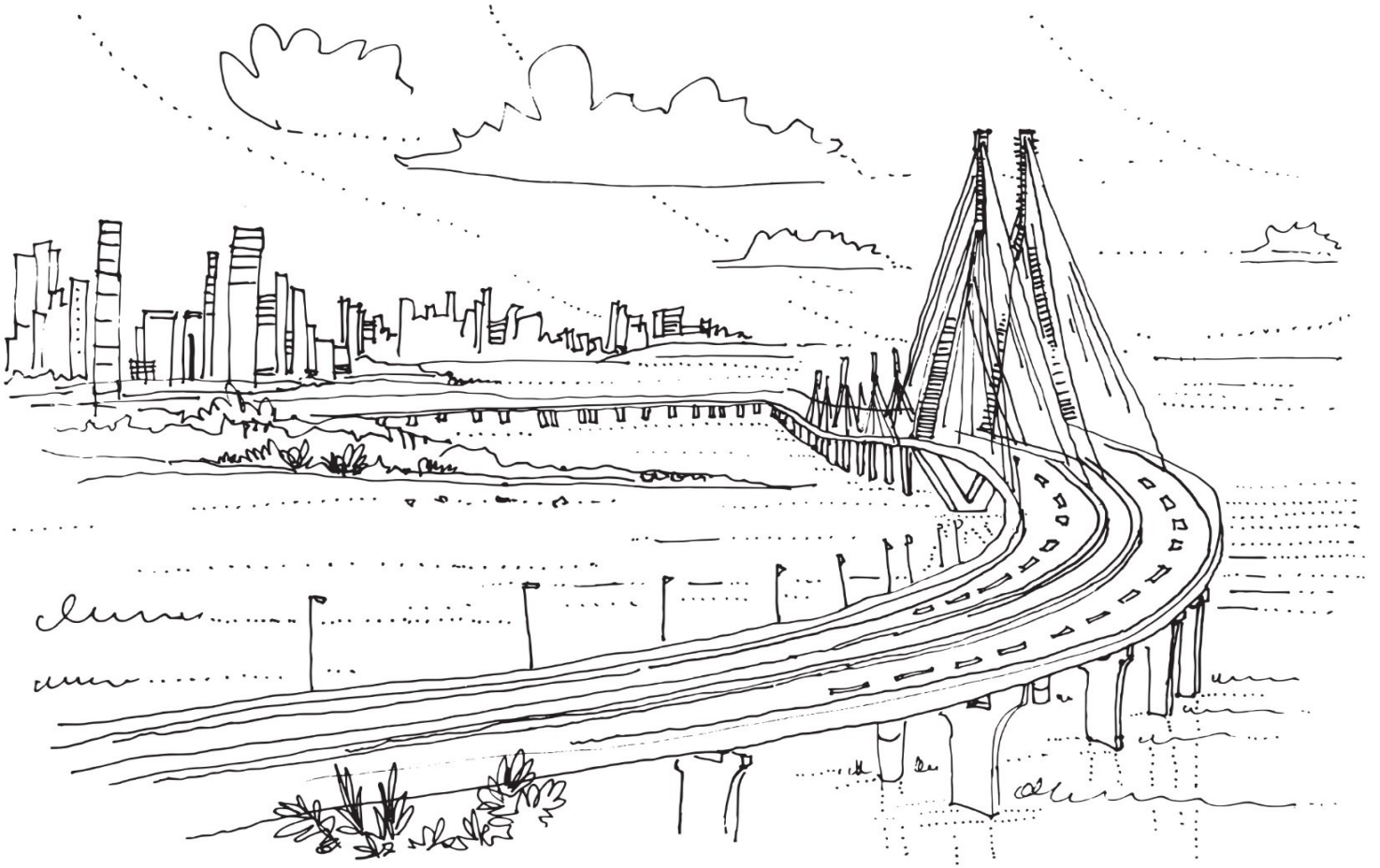




ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS



Infrastructure Newsletter

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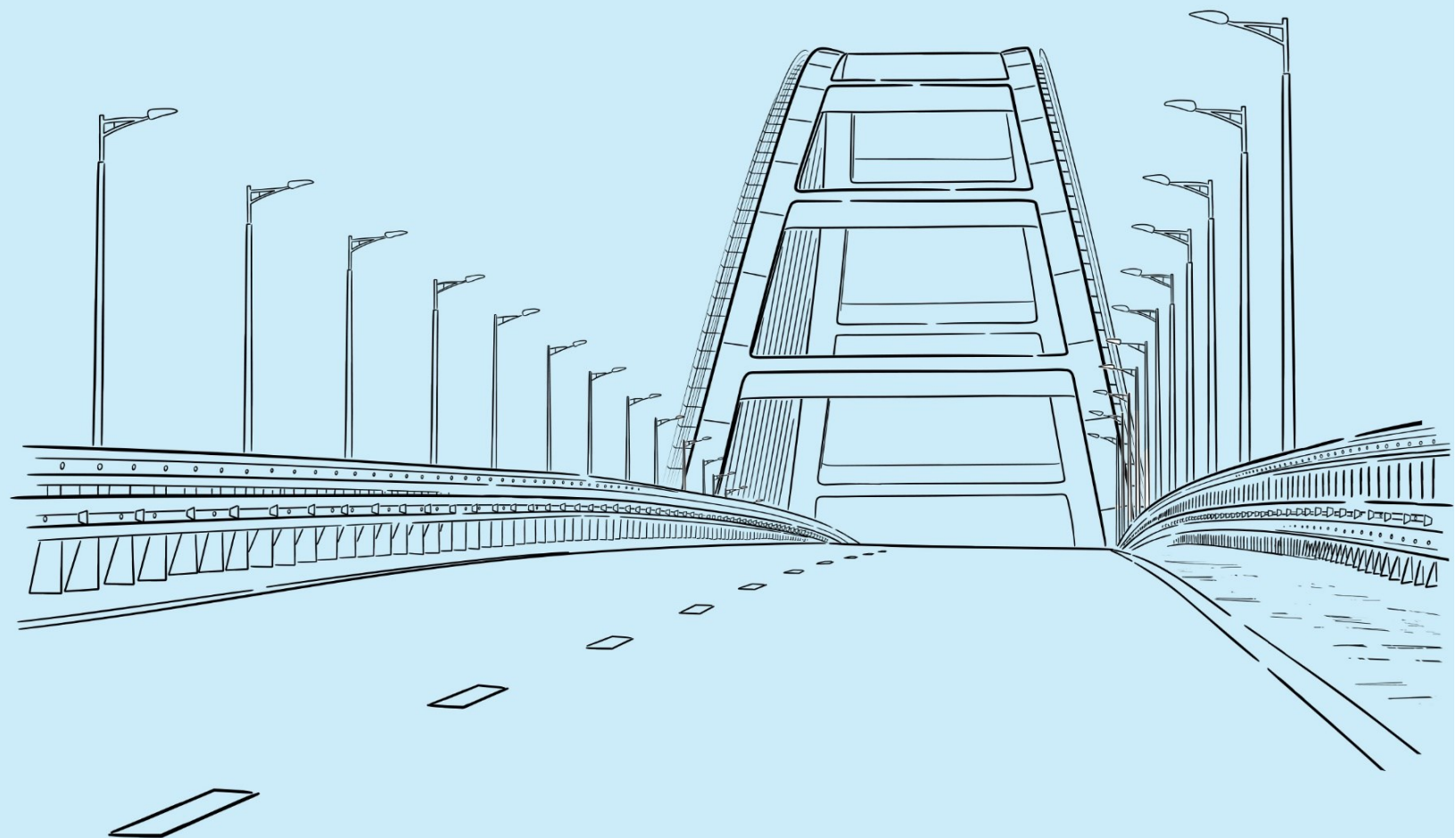
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INFRASTRUCTURE



Disqualification of Adani Ports in JNPA Tender

Background

The High Court of Bombay (**Bombay HC**) *vide* its judgment dated June 27, 2022, in the case of *Adani Ports and Special Economic Zone Limited vs. the Board of Trustees of Jawaharlal Nehru Port Authority and Others*¹, dismissed the petition of Adani Ports and Special Economic Zone Limited (**Adani Ports**) challenging its disqualification in the tender for upgradation of the container terminal in Navi Mumbai by the Board of Trustees of Jawaharlal Nehru Port Authority (**JNPA**).

Facts of the case

- JNPA had issued a request for qualification (**RFQ**) for upgradation, operation, maintenance, and transfer of Jawaharlal Nehru Port Container Terminal through Public Private Partnership on August 23, 2021.
- The bid process consisted of two steps – (i) identification of the qualified bidder; and (ii) commencement with the participation in the bidding process by the qualified bidders comprising ‘Request for Proposals’ (**RFP**).
- Post the RFQ, as addendum, certain legal declarations were requested by JNPA. Adani Ports submitted the required declarations.
- Subsequently, JNPA confirmed the qualification of Adani Ports in response to their RFQ and requested the submission of RFP.
- JNPA proposed to disqualify Adani Ports from the tender process as it contended that the following disclosures were found to be missing from Adani Ports’ declarations and the disclosures violated Clause 2.2.8 of the RFQ²
 - Adani Ports’ subsidiary and an associate as per the terms of the RFQ, Adani Vizag Coal

Pvt. Ltd (**AVCTPL**) had executed a concession agreement with Vishakhapatnam Port Trust (**VPT**).

- During the pandemic, AVCTPL proposed to terminate the concession agreement invoking force majeure, which was rejected by VPT, following which AVCTPL terminated the agreement. The termination was disputed by VPT and referred to arbitration.
 - Subsequently, VPT terminated the concession agreement citing failure of AVCTPL to maintain minimum guaranteed cargo.
- JNPA sought a response from Adani Ports explaining why it shouldn’t be disqualified from JNPA’s tender, as it had violated clause 2.2.8 of the RFQ. JNPA being dissatisfied by the response submitted by Adani Ports, communicated to Adani Ports that it was disqualified from participating further in the tender process.
 - Subsequently, Adani Ports challenged the disqualification before the Bombay HC.

Bombay HC’s Decision

- The Bombay HC extensively discussed the scope of interference required in tender cases. It stated that unless the tendering authority is found to be malicious and in misuse of its statutory powers, interference by courts is not warranted. The terms and conditions of a tender are not to be read and interpreted in the same manner a statute is read and interpreted.
- While interpreting Clause 2.2.8, the Bombay HC rejected Adani Ports’ request to harmoniously construct the provisions of the first and the third limb of the clause, as it would amount to a rewriting of the tender terms and conditions.

¹ Writ Petition (L) No. 14657 of 2022

² Clause 2.2.8 of the RFQ provided as follows:

“An applicant including any consortium member or associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or

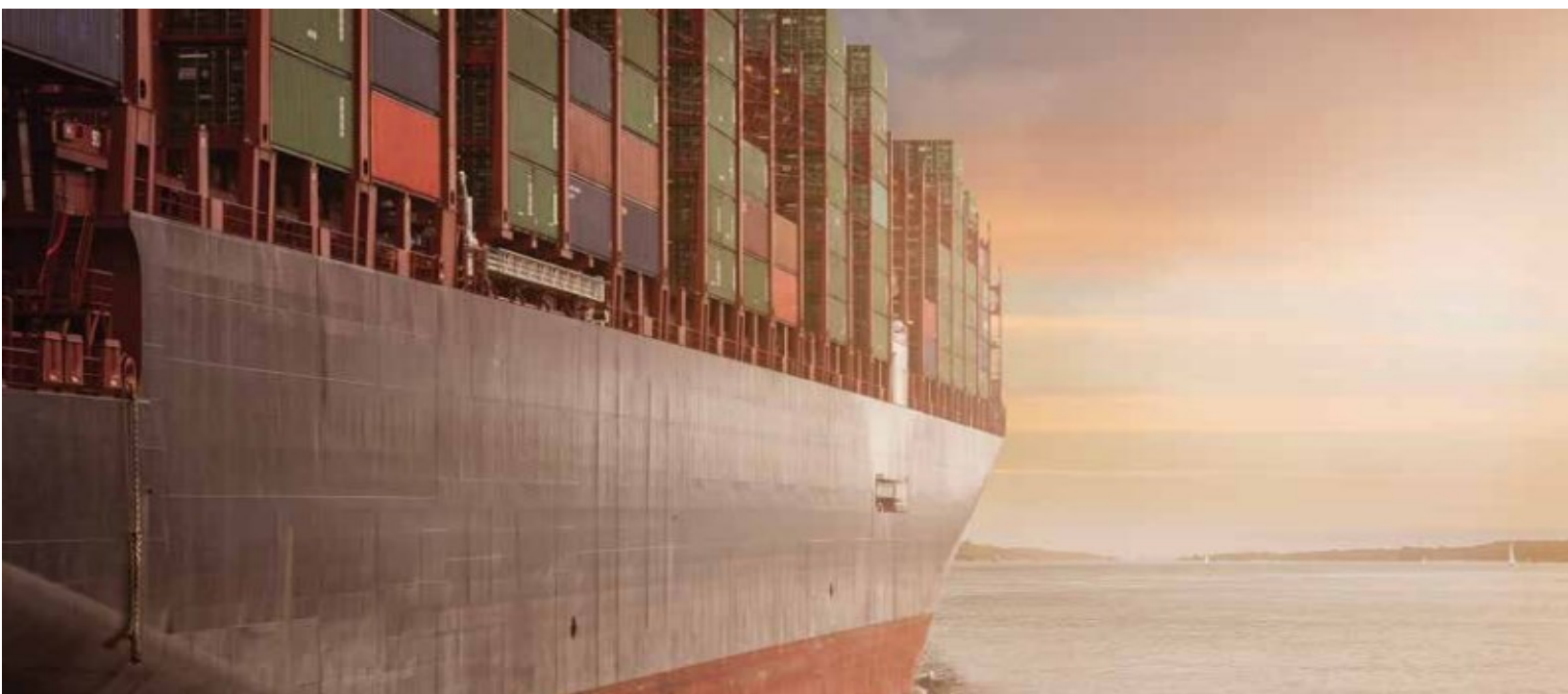
judicial authority or a judicial pronouncement or arbitration award against the applicant, consortium member or associate, as the case may be, nor has been expelled from any project or contract by an public entity nor have had any contract terminated (sic, by) any public entity for breach by such applicant, consortium member or associate.”

- The Bombay HC rejected the contention that Clause 2.2.8 was not a compulsory pre-qualification condition and merely a general and consequently waivable in nature.
- The Bombay HC referred to Adani Ports' letter, in which it certified that neither it nor its associates have, in the past 3 years, terminated a contract due to breach of the contract terms. In addition to this, Adani Ports also submitted an undertaking that stated that neither Adani Ports nor its associates have had any contract terminated by any public entity for breach by such entity. The Bombay HC observed that if the declaration was supposed to be found as false, JNPA was entitled to reject the bid at any stage.
- The contention of Adani Ports that JNPA had earlier qualified them for RFP, and consequently by the declaration had waived off their right to disqualify was rejected by the Bombay HC. This was in light of Clause 2.7.3 of the RFQ which reserved the right of JNPA to disqualify any bidder on account of any pre-qualification condition not being met by it or having made a material misrepresentation or the bidder having given

materially incorrect or false information, even after the execution of the concession agreement. As a result of an express provision in the tender, the argument that post acquiring the qualification and payment of remittance amount, Adani Ports got indefeasible right of participation, stood futile.

- The Bombay HC refused to acknowledge any illegality in the conduct of JNPA and instead highlighted its generosity for allowing the petitioner an opportunity for full and fair disclosure on disputes between AVCTPL and VPT.
- In light of the foregoing the Bombay HC dismissed Adani Ports petition.

Our view: The judgement of the Bombay HC reiterates the settled position that the courts generally do not interfere in matters of tender. Courts only interfere where the action of the tendering authority is found to be malicious and in misuse of its statutory powers. The rationale for such caution is that any undue interference might derail the services meant for the larger public good. Adani Ports has appealed the aforesaid decision before the Supreme Court. Further to such appeal, the Supreme Court has sought the response of the JNPA in this regard. It would be interesting to see the Supreme Court's views in this case.



ENERGY



Ministry of Coal makes an important addition to its Single Window Clearance System

Background

- On June 14, 2022, the Ministry of Coal added an IT enabled Project Information and Management Module (PIMM) to the Single Window Clearance System (SWCS).
- To operate a coal mine in India various clearances are required such as: approval of the Mining Plan and Mine Closure Plan, grant of mining lease, environment and forest clearances, wildlife clearance, safety clearances and rehabilitation of project affected families.
- The SWCS, launched on January 11, 2021 is a unified platform that enables project proponents to obtain various clearances spread across different state and central ministries for the operationalization of coal mines.

Salient features of SWCS

- Previously, a project proponent had to contact several administrative ministries and government agencies independently to request the necessary permissions, which delayed the operationalization of coal mines.
- Through SWCS, the project proponent can now use a single registration interface to apply for the necessary approvals.
- SWCS is proposed to chart applications and their corresponding process flows for the purpose of granting all the legal permissions necessary (encompassing Central Ministries as well as State

Government departments/agencies) for starting a coal mine,

- SWCS platform has been created to make conducting business easier, and it includes a module that is already operating for timely approval of mining plans and mine closure plans.
- SWCS is integrated with Parivesh Portal, digital acceptance of objection under Section 8 (1) of Coal Bearing Areas (Acquisition & Development) Act, 1957, Consent Management System of Telangana & West Bengal.

Addition of PIMM to the SWCS

- The addition of PIMM to the SWCS is anticipated to encourage project proponents and authorize Ministry of Coal and State officials to supervise coal mines and grant clearance (subject to compliances) in a time-bound manner.
- PIMM can offer the digital resolution for each coal block and also facilitate the virtual connection between the Ministry of Coal and the mine allocatee.
- Other features of PIMM include management of Bank Guarantee, upfront payment, major clearances, show cause notices and court cases.

Our view: On December 16, 2019, the Ministry of Coal had released the 'Guidelines for preparation of Mining plan for the coal and lignite blocks,' (Guidelines). The addition of the PIMM to the SWCS can ensure better implementation of the Guidelines and cut down delays in the operationalization of coal mines.

Late Payment Surcharge Rules notified by Ministry of Power

Background:

- On June 3, 2022 (**Notification Date**), the Ministry of Power (**MoP**) notified the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022 (**Rules**). The Rules are applicable in relation to the outstanding dues of generating businesses, interstate transmission license holders, and electricity trading license holders.
- Previously on February 22, 2021, the MoP had notified the Electricity (Late Payment Surcharge) Rules, 2021, which have now been superseded by the Rules.

Salient features of the Rules:

- The Rules provide that the total outstanding dues³ owed by distribution licensees, that existed prior to the Notification Date, will be rescheduled and the due dates for payments would be re-determined in the manner specified under the Rules.
- The Rules also state that distribution licensees are required to, within 30 (thirty) days of the Notification Date, communicate the total dues that are outstanding to the generating company, the transmission licensee or the electricity trading licensee. The communication must also stipulate the number of instalments in which the total dues would be paid.
- The Rules impose a Late Payment Surcharge⁴ on payments outstanding beyond the due date.⁵
- The Rules further state that in case the payment is done in monthly instalments as per Rule 5 of the

Rules, then the Late Payment Surcharge will not be applicable. However, if there is delay on the payment of even one monthly instalment, then Late Payment Surcharge would have to be paid on the entire outstanding amount.

- The Rules specify that all the payments made by the parties involved would be utilized in the following priority:
 - Adjustment towards Late Payment Surcharge;
 - Payment of monthly charges, commencing from the bill which has been overdue for the longest period of time.
- These Rules also obligate the Distribution Licensee(s) as well as any other user of the transmission system to maintain an adequate payment security mechanism, failing which their power supply would become regulated.
- In case of non-payment of outstanding dues on the default date, the generating companies would be eligible to sell 25% of the contracted power through power exchanges. If the non-payment goes on for another 30 days, then the percentage of the contracted power that can be sold goes up as high as 100%.
- The profit from the sale of such contracted power in case of non-payment of dues or non-maintenance of payment security mechanism would be adjusted in the following manner:
 - Recovery of fixed charges;
 - Liquidation of overdue amount;

³ Outstanding dues is defined as the dues of a generating company, electricity trading licensee, or a transmission licensee, not stayed by a competent court or Tribunal or dispute resolution agency as designated in the Power Purchase Agreement, which remains unpaid by the beneficiary beyond the due date and includes the amount of installment not paid after the re-determined due date under the Rules.

⁴ The charges payable by a distribution licensee to a generating company or electricity trading licensee for power procured from it, or by a user of a transmission system to a transmission licensee on

account of delay in payment of monthly charges beyond the due date.

⁵ The date by which the bill for the charges for power supplied by the generating company or electricity trading licensee or for the transmission service provided by a transmission licensee are to be paid, in accordance with the agreement, as the case may be, and if not specified in the agreement, 45 days from the date of presentation of the bill by such generating company, electricity trading licensee or transmission licensee.

- The balance would be shared in the ratio of 50:50 between the distribution licensee and the generating company.
- If the situation of non-payment arises, the power supply would be regulated in the following manner:
 - Entire regulation of short-term access, for sale and purchase of electricity, including in the power exchange.
 - If the above-mentioned situation continues for 1 (one) month, long and medium-term access will be regulated by 10%.
 - Progressively for each month of default, the reduction or withdrawal of long-and-medium term open access will be increased by 10%.
- The Rules prescribe a penalty for generating companies when they fail to provide the contracted power as per their agreement with a distribution licensee or when they sell the contracted power without consent.
 - If the bids or proposals have not been placed, the generating company would be free to sell the un-requisitioned power on the power exchange.
 - The Rules specify that the distribution licensee(s) will continue to be responsible for paying the fixed fees associated with the un-requisitioned power. Moreover, if the distribution licensee(s) does not procure electricity from a must-run power plant, compensation would be payable by the licensee to the generating company owning the must-run power plant at the rate specified in the agreement for purchase of power. If no compensation rate is specified in the agreement, then compensation will be payable in accordance with the Electricity (Promotion of Generation of Electricity from Must-Run Power Plant) Rules, 2021.

Our view: The power sector has been beset with the problem of the ballooning debt of distribution licensees. Permitting distribution licensees to manage their debt through equated monthly installments will help alleviate the financial stress in the sector and avoid any near-term defaults.

Kerala State Electricity Regulatory Commission rejects plea to amend the KSERC (Renewable Energy and Net Metering) Regulations, 2020

Background:

In an order pronounced on July 16, 2022⁶, the Kerala State Electricity Regulatory Commission (**KSERC**) rejected the petition filed by the Kerala State Electricity Board Limited (**Petitioner**) which sought to amend the Kerala State Electricity Regulatory Commission (Renewable Energy and Net Metering) Regulations, 2020 (**KSERC Regulations**). The Petitioner sought to amend the KSERC Regulations by introducing the gross metering scheme and net billing scheme as intended by the Electricity (Rights of Consumers) Amendment Rules, 2021 (**Electricity Rules**).

Additionally, KSERC also rejected the Petitioner's plea to approve INR 2.44/unit as the Average Pooled Power Purchase Cost (**APPC**) for settling the excess energy banked for the settlement period starting October 1, 2021, to September 30, 2022 (**Settlement Period**).

Facts of the Case:

- In June 2021, the MoP vide an amendment to the Electricity Rules, permitted net metering to the prosumer for loads up to 500 kW or up to the sanctioned load, whichever is lower. Under the Electricity Rules, the arrangements for 'net-metering', 'gross metering', 'net-billing or net

⁶ OP No. 34/2022

feed-in' would observe the regulations made by the State Commission from time to time. The Petitioner sought that the aforesaid amendment methodology was creating a heavy financial burden on DISCOMs. Additionally, the Petitioner observed that a substantial capacity addition through multiple renewable energy programs will reduce energy sales in the coming years. The Petitioner also submitted that many states have adopted the said Electricity Rules but have taken a different methodology for settling the excess energy injection by prosumers and captive consumers.

- The Petitioner further contended that the APPC approved by KSERC for the financial year 2021-22 was INR 3.22/unit, a rate significantly higher than the prevailing solar tariff. Owing to the higher tariff, many states modified their settlement rates to be in consonance with the prevailing solar tariff. It was further submitted that the lowest rate of tariff for procurement of solar energy in the recent contracts entered into by the Petitioner was INR 2.44/unit.
- The Petitioner also contended that the banking facility was also causing huge loss to the Petitioner. The Petitioner had to surrender contracted power during normal hours. The demand during peak hours varies from that of the normal hours by 400MW to 800MW. The DISCOMs were forced to provide costlier peak power to prosumers at zero cost, which resulted in a huge financial liability for the DISCOMs.
- The Petitioner also submitted that the MOP introduced gross metering and net billing schemes considering the rapidly declining solar tariff and the revenue loss to the DISCOMs.

What was KSERC's Judgement?

- KSERC observed that the MOP issued the Electricity Rules as an incentive to prosumers in states where at present there was an absence of

provisions for net billing. KSERC also noted that rules notified by the MOP are not binding on the State Commission but are meant to serve as a guidance tool for the same while notifying their respective regulations.

- KSERC observed that the Petitioner is yet to attain the reduced renewable purchase obligation (**RPO**) targets as specified by KSERC for the Petitioner. In the circumstances, introduction of 'net-billing or net-feeding' and 'gross metering' would be counter-productive and detrimental to the interests of the prosumers/consumers who may intend to invest in renewable energy systems in the State. In view thereof, KSERC stated that the Petitioner could file a petition for introduction of said new billing methods after achieving its RPO targets. KSERC after due verification, can then consider the petition on its merits and take an appropriate decision on introducing gross-metering and net-billing or net feed-in as the case may be, after public consultation including public hearing.
- As regards the pleading pertaining to approval of INR 2.44/unit as APPC for settlement of excess energy banked for the Settlement Period, KSERC observed that it cannot deviate from the provisions of the KSERC Regulations. The KSERC Regulations provide that the excess energy injected into the State grid by the prosumers shall, after the Settlement Period, be paid at the APPC of the concerned previous year, unless the same is amended after following the due process. It was further observed that the rate of INR 2.44/unit as specified by the Petitioner was the rate obtained by it in one of the Solar Energy Corporation of India's (**SECI**) tenders. It was placed on record by KSERC that the price

Our view: KSERC's order considers the concerns of the prosumers and other stakeholders who have invested in renewable energy systems. Further, it is encouraging to see State commissions subject reliefs to fulfillment of RPO targets. Enforceability of RPO targets has always been a concern but is also the need of the hour in order to help India achieve its Renewable Energy (RE) goals.

Ministry of Power notifies Green Energy Open Access Rules

Background

- On June 6, 2022, the MoP notified the Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022 (**Open Access Rules**). Previously on August 16, 2021, the MoP had released the Draft Electricity (Promoting renewable energy through Green Energy Open Access) Rules, 2021 (**Draft Rules**) for public comments⁷.
- The notified Open Access Rules are aimed at ensuring access to affordable, reliable, sustainable and green energy. Their actual implementation will depend on the Central Electricity Regulatory Commission (**CERC**) and the state Electricity Regulatory Commissions (**SERCs**) framing new or amending existing open access regulations.

Salient features

- Applicability:** The Open Access Rules defines an entity as a consumer who has contracted demand or sanctioned load of 100 kW or more except for captive consumers. At present the fifth proviso to Section 42(2) of the Electricity Act requires SERCs to frame regulations to provide open access to all consumers who require more than 1 MW of power to be made available at all times.
- Focus on green hydrogen:** The Open Access Rules define green energy as the electrical energy from renewable sources of energy including hydro and storage (if the storage uses renewable energy) or any other technology as may be notified by the Government of India. It also includes any mechanism that utilizes green energy to replace fossil fuels including production of green hydrogen or green ammonia.

Further, the Open Access Rules also state that obligated entities can meet their RPOs by purchasing green hydrogen or green ammonia. The quantum of such green hydrogen or green ammonia would be computed by considering the equivalence to the green hydrogen or green ammonia produced from 1 MWh of electricity from renewable sources or its multiples and norms in this regard shall be notified by the CERC.

The Open Access Rules also state that green cross subsidy surcharge and additional surcharge would not be applicable if green energy is utilized for production of green hydrogen and green ammonia.

- Focus on DISCOMs:** The Open Access Rules state that any entity may elect to purchase green energy by placing a requisition with their DISCOM. The DISCOM is required to procure such quantity of green energy and supply it to the consumer. The tariff for green energy will be determined by the SERC or the CERC, as the case may be. The rules state that requisition for green energy from a distribution licensee should be for a minimum period of 1 year and the quantum of green energy should be pre-specified for at least 1 year.

The Open Access Rules also state that a minimum number of 12-time blocks may be imposed by the SERC or the CERC for which the consumer cannot change the quantum of power consumed through open access.

The Open Access Rules further state that additional surcharge would not be applicable for green energy open access consumers, if fixed charges are being paid by such a consumer to the DISCOM.

Our view: The Open Access Rules signify the Government's intent in enabling stakeholders to work towards achieving India's renewable energy targets. The Central Electricity Regulatory Commission (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022 which were notified on June 7, 2022 must be read in conjunction with the Open Access Rules as they designate appropriate nodal agencies for handling open access applications.

⁷ ELP had analyzed the Draft Rules in our October 2021 Infrastructure and Energy Digest (Page 11 at <https://elplaw.in/wp-content/uploads/2021/11/Infrastructure-and-Energy-Digest-October-2021-1.pdf>).

CERC notifies General Network Access Rules

Introduction

On June 7, 2022, the CERC notified the Central Electricity Regulatory Commission (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022 (**GNA Regulations**). Previously on December 16, 2021, the CERC had released the Draft General Network Access Regulations.

The Explanatory Memorandum to the GNA Regulations notes that the GNA Regulations will enable the sellers to compete purely based on energy charges and efficiency, which will ultimately benefit the buyers. At the same time, the buyers would have scheduling flexibility based on merit order within their GNA under the proposed mechanism. This will eventually lead to optimization of the system cost.

Salient features

▪ Connectivity

- The eligible entities who may seek connectivity to Inter-state Transmission System (**ISTS**) have been delineated as follows:
 - Generating station(s), including Renewable Energy Generating Station (**REGS**), with or without Energy Storage System (**ESS**), with an installed capacity of 50 MW and above individually or with an aggregate installed capacity of 50 MW and above through a Lead Generator or a Lead ESS.
 - Captive generating plant with capacity for injection to ISTS of 50 MW and above.
 - Standalone ESS with an installed capacity of 50 MW and above individually or with an aggregate installed capacity of 50 MW and above through a Lead ESS or Lead Generator.
 - Renewable Power Park Developer.
 - REGS or standalone ESS with an installed capacity of 5 MW and above applying for grant of Connectivity to ISTS through the electrical system of a generating station already having Connectivity to ISTS.

- A One-time GNA charge @ INR 1 lakh/MW is required to be furnished by entities that shall get Connectivity to ISTS.
- REGS are now allowed to split their connectivity in parts having minimum capacity of 50 MW of each part and transfer the same after their Commercial Operation Date (**COD**).
- The GNA Regulations provide that a generating station, already connected to or intending to connect to intra-State transmission system would be eligible as an applicant for connectivity to the ISTS. This is intended to avoid any redundant transmission systems.
- The GNA Regulations state that the scheduling of power and payment of transmission charges would be governed as per provisions of the Grid Code and the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020.

▪ GNA

- Each State would have a GNA to ISTS. On the date of coming into effect of the GNA Regulations, it would be based on drawal of power from ISTS during the last 3 years.
- States would be able to schedule power under various contracts based on their assessment of merit order on day ahead basis within their GNA. This flexibility will help them optimize their overall procurement cost.
- The entities eligible for GNA are as follows:
 - State Transmission Utility on behalf of intra-State entities including
 - distribution licensees;
 - A drawee entity connected to intra-State transmission system;
 - A distribution licensee or a Bulk consumer, seeking to connect to ISTS, directly, with a load of 50 MW and above;
 - Trading licensees engaged in cross border trade of electricity in terms of the Cross Border Regulations;

- Transmission licensee connected to ISTS for drawal of auxiliary power.
- **T-GNA**
 - T-GNA may be granted to a buyer or an entity on behalf of the buyer for one time block and up to 11 months.
 - T-GNA would be granted over the surplus capacity on the existing ISTS.
 - T-GNA would be applied and processed through a single window electronic platform viz. National Open Access Registry (NOAR).
 - T-GNA may be applied under two categories viz. bilateral and collective transactions. Bilateral transaction is sub-categorized into Advance application and Exigency application.

- **National Open Access Registry (NOAR)**
As per the GNA Regulations the information related to approvals or rejections of applications of T-GNA, revisions or curtailment of schedules, payment schedules and such other matters, would be made available through NOAR to the respective market participants including providing alerts through email or SMS or such other electronic mode of communication.

Our view: The GNA Regulations can result in a significant shift towards the operation of a competitive power market. On account of the GNA Regulations, REGS would now be able to focus on generation and consumers only on consumption. This is because the requirement of point-to-point access becomes obsolete with the commencement of GNA, and the generator would be able to inject energy from any point on the ISTS. Similarly, bulk consumers would also be able to withdraw the energy for their use from anywhere on the ISTS. This will certainly be a step forward in making reliable clean energy accessible to bulk consumers thereby improving their cost competitiveness.



CERC issues Renewable Energy Certificates Regulations

Introduction

- Section 86(1)(e) of the Electricity Act stimulated the development of renewable energy-based power generation in India by granting SERCs the responsibility to promote the procurement of renewable energy. SERCs frame regulations that specify the percentage of renewable energy that obligated entities are required to procure.⁸ These obligations are referred to as RPOs. The obligated entities usually are distribution licensees, users owning a captive power plant and open access consumers located in the relevant state.
- In 2010, the CERC issued the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (**2010 Regulations**). The CERC for the first time recognized Renewable Energy Certificates (**RECs**) as tradeable market-based instruments which obligated entities procure to meet their RPO targets.
- As the power sector in India has witnessed significant changes since the introduction of the REC mechanism in 2010, the CERC felt the need for a revised REC framework which addresses the declining investment in REC projects and is aligned with the market realities. Hence, on May 9, 2022, the CERC issued the Central Electricity Regulatory Commission (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022 (**REC Regulations**).

Salient features of the REC Regulations

- *Eligibility Criteria*
 - Under the REC Regulations, the eligibility criteria for issuance of RECs has been simplified further for renewable energy generators.
 - Any RE Generator, whose tariff is not being determined under Section 62 or 63 of the Electricity Act or who has not sold power in power exchange for RPO compliance would be eligible for a REC.
 - Captive generating station (CGS) based on renewable energy sources would also be eligible under the REC Regulations. However, RECs issued to such an entity up to its own consumption would not be allowed for sale but can be used to fulfil its own RPO. Any REC issued to such entity above its self-consumption would be available for sale. However, such eligible entity should not have availed benefits of transmission charge waiver or wheeling charge waiver.
 - The distribution companies would be eligible for RECs to the extent of excess renewable energy procurement above their RPO as specified by their respective State Commission.
- *Trading of RECs*
 - In addition to the existing system of transactions of RECs through the power exchange, the REC Regulations allow trading of RECs also through electricity traders at a mutually agreed price.
- *No floor and Forbearance Price for Certificates*
 - As per the REC Regulations, the price for a REC would be as discovered in the power exchange or as mutually agreed between eligible entities and electricity traders. The CERC would intervene only under certain circumstances such as sudden

⁸ For instance the Maharashtra Electricity Regulatory Commission has framed the MERC (Renewable Purchase Obligation, its Compliance and

Implementation of Renewable Energy Certificate Framework) Regulations, 2019.

volatility in the prices of certificates or sudden high or low transactions volume.

- *Concept of multiplier*

- Under the REC Regulations, the categorization of RECs as solar and non-solar has been dispensed with; instead, the concept of multiplier has been introduced for new Projects based on the principle of tariff range for various RE technologies.

- *Accreditation*

- The 2010 REC Regulations envisaged accreditation of renewable projects at the state level considering the then prevailing market conditions of renewable generating stations connected to intra-state system.

- With the maturity of the renewable energy market many renewable energy projects have been connected directly to the inter-state transmission system. Hence, the REC Regulations now make provision for accreditation of such renewable energy generating stations.

- Thus, under REC Regulations, the accreditation of eligible entities connected to inter-State transmission system will be granted by the RLDC of the region in which such eligible entities are located.

- *Change in name or change in legal status*

- In order to ease the process of change in name or change in legal status of the eligible entities, the concerned agencies (Regional Load Dispatch Centre for Accreditation and the Central Load Dispatch Centre for Registration) have been mandated to update their records within 30 days of information of such change by the concerned.

Our view: The CERC REC Regulations can galvanize investment in renewable energy technologies. A well-functioning REC market will enable obligated entities to opt for market-based procurement of renewable energy in addition to procurement under Section 62 or 63 of the Electricity Act. However, it throws open a question of whether RECs can be traded privately without electricity traders, which may have an impact on the development of virtual PPAs in India.

Renewable Purchase Obligation and Energy Storage Obligation Trajectory

Background:

- The Tariff Policy, 2016 (**Tariff Policy**) provides that the long-term growth trajectory of RPOs would be prescribed by the MoP in consultation with the Ministry of New and Renewable Energy (**MNRE**).
- On March 8, 2019, the Government of India had recognized Large Hydro Power Projects (**LHPs**) including Pumped Storage Projects (**PSPs**) with a capacity of over 25 MW as being RE. Further, energy from LHPs commissioned after March 8, 2019, was to be considered as part of RPO through a separate obligation i.e. Hydro Power Purchase Obligation (**HPO**).
- Vide order dated January 29, 2021, and clarification dated April 1, 2021, the MoP and MNRE notified the HPO trajectory for the period 2021-22 to 2029-30. Further, the revised trajectory of RPOs for solar and other non-solar power was also notified for the period 2019-20 to 2021-22.
- Based on the recommendations of the joint committee under the co-chairmanship of Secretary of MoP and Secretary of MNRE, MoP specified the RPO trajectory beyond 2021-22. The MoP issued an order dated July 22, 2022, regarding RPO and Energy Storage Obligation trajectory till 2029-30.⁹
- Other RPOs may be met by energy produced from any RE power project, other than wind and hydro power.
- From 2022-23, the energy from all Hydro Power Projects (**HPPs**) would be considered as part of RPO. The HPO trajectory as notified earlier would continue to prevail for LHPs commissioned after March 8, 2019. All other HPPs would be a part of RPO under the category of 'Other RPO'.
- RPO will be calculated in energy terms as a percentage of total consumption of electricity.
- HPO obligations may be met from the power procured from eligible LHPs (including PSPs) commissioned on and after March 8, 2019, to March 31, 2030.
- HPO obligation of the State/ DISCOM may be met out of the free power being provided to the state from LHPs commissioned after March 8, 2019.
- Free power will be eligible for HPO benefit. If the free power is insufficient to meet the HPO obligations, then the State would have to buy additional hydro power to meet its HPO obligations or may have to buy the corresponding amount of RE certificate to Hydro Power.
- The REC mechanism corresponding to Hydro Power to be developed by CERC to facilitate the compliance of HPO obligation would have a capping price of INR 5.50 per unit of electrical energy from March 8, 2019 to March 31, 2021, with an annual escalation of 5% thereafter for the purposes of ensuring HPO compliance.
- Hydro power imported from outside India would not be considered for meeting HPO.

Recommended trajectory for RPO beyond 2021-22

- Wind RPO will be met by energy produced from Wind Power Projects commissioned after March 31, 2022.
- HPO will be met by energy produced from LHPs (including PSPs), commissioned after March 8, 2019.

⁹[https://powermin.gov.in/sites/default/files/webform/notices/Renewable Purchase Obligation and Energy Storage Obligation Trajectory till 2029_30.pdf](https://powermin.gov.in/sites/default/files/webform/notices/Renewable_Purchase_Obligation_and_Energy_Storage_Obligation_Trajectory_till_2029_30.pdf)

- Any shortfall in achieving of 'Other RPO' category in a particular year can be met with either the excess energy consumed with WPPs, commissioned after March 31, 2022, beyond 'Wind RPO' for that year or with excess energy consumed from eligible LHPs commissioned after March 8, 2019, beyond HPO for that year or partly from both. Further, any shortfall in achievement of 'Wind RPO' in a particular year can be met with excess energy consumed from Hydro Power Plants which is in excess of 'HPO' for that year and vice versa.
- Energy storage obligation must be calculated in energy terms as a percentage of total consumption of electricity and will be treated as fulfilled only when at least 85% of the total energy stored in the Energy Storage System (ESS) on an annual basis, is procured from RE sources.
- The Energy storage obligation will be reviewed periodically.

Our view: This order is in line with India's clean energy commitments. However, implementation of RPOs may present a challenge as power distribution utilities are struggling financially and SERCs have not been strictly enforcing RPO compliance. Further, wind RPO will boost wind installations and will bring down the cost of power generated from wind projects.

Captive Power Plant by an Association of Corporate Bodies

Background

The Supreme Court vide its judgement dated May 12, 2022, in the case of *Chhattisgarh State Power Distribution Company Limited vs. Chhattisgarh State Electricity Regulatory Commission and Another*¹⁰ has held that an association of corporate bodies can establish a captive power plant, provided that the said plant is established primarily for their own use.

Facts of the case

- Shri Bajrang Power and Ispat Limited (SBPIL) had established a captive generation plant. Shri Bajrang Metallics and Power Limited (SBMPL) was the sister concern of SBPIL.
- SBPIL submitted a petition to the Chhattisgarh State Electricity Regulatory Commission (CSERC) for providing open access and wheeling of power through the transmission system of Chhattisgarh State Power Distribution Company Limited (CSPDCL) for captive use by SBMPL.

- CSPDCL resisted the petition on the grounds that the consumption of power by SBPIL and SBMPL was not proportionate to the ownership of the power plant.
- The CSERC rejected the contention of SCPDCL and held that the supply of electricity from SBPIL to SBMPL qualified to be treated as 'own consumption' within the ambit of Section 9 read with Section 2(8) of the Electricity Act, 2003 (**Electricity Act**) and Rule 3 of the Electricity Rules, 2005 (**Rules**).
- SCPDCL appealed against the order of the CSERC before the Appellate Tribunal for Electricity and subsequently before the Supreme Court.

What did the Supreme Court observe?

- The Supreme Court analyzed the definition of 'captive generating plant' and 'person' under Section 2 of the Electricity Act and the requirements of captive generation under Section 9 of the Electricity Act read with Rule 3 of the Rules.

¹⁰ CIVIL APPEAL NOS. 2578-2579 OF 2008

- The Supreme Court observed that a combined reading of Section 9 and Section 2(8) of the Electricity Act would reveal that a person is entitled to construct, maintain or operate a captive generating plant, which should be primarily for his own use. The captive generating plant also includes a power plant set up by any cooperative society or association of persons for generating electricity. The requirement is that it should be primarily for the use of the members of such co-operative society or association.
- The definition of “person” was wide enough to include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.
- The Supreme Court further observed that even an association of corporate bodies could establish a captive power plant. The only requirement would be that the plant should be established primarily for their own use.
- The Supreme Court also referred to the relevant provisions of the National Electricity Policy, 2005 and observed that the policy had a statutory flavour and a liberal provision has been made in Section 9 of the Electricity Act so as to promote establishment of captive power plants. Accordingly, the Supreme Court dismissed the appeal.

Our view: The Supreme Court’s judgement provides clarity on the concept of association of companies. The judgement would benefit small and medium scale enterprises to operate and manage captive power plants with their group companies as an association of companies. While the Supreme Court gave a beneficial interpretation to the relevant provisions for captive generating plants, it did not delve into the requirement of the captive users to consume electricity in proportion to their shares in ownership of the power plant.

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