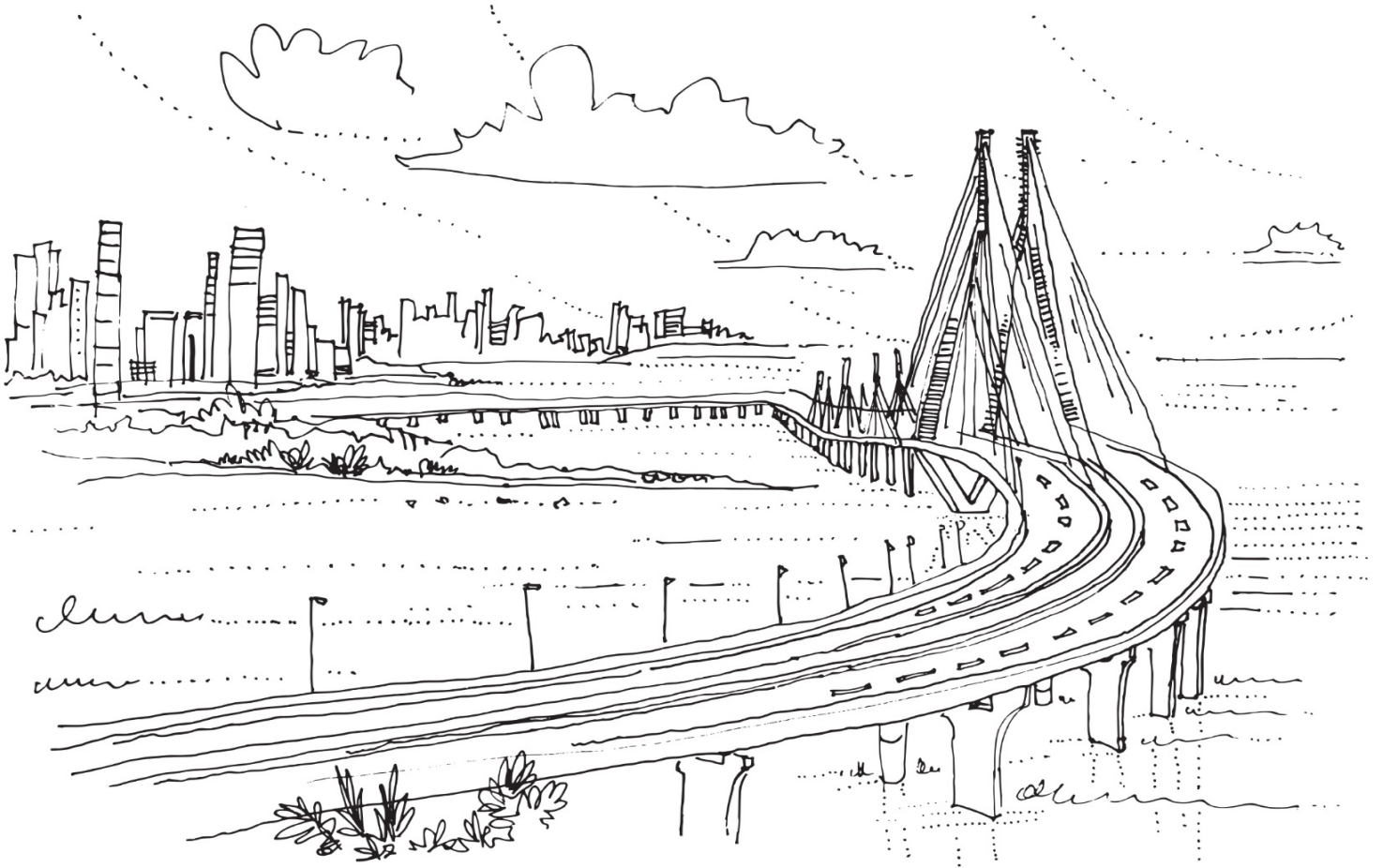




ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS



Infrastructure and Energy Digest

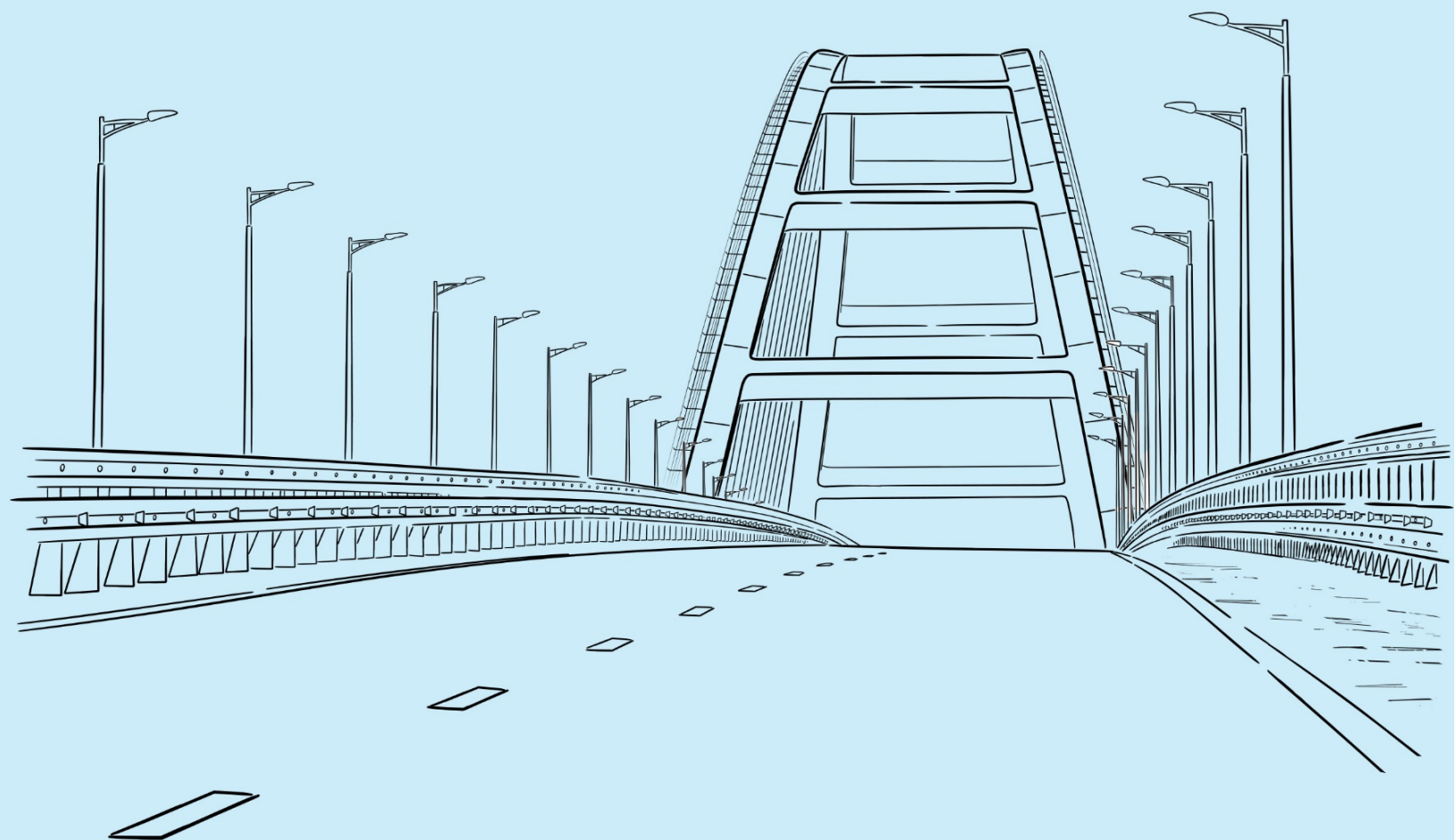
Overview of Legal and Regulatory Developments

July 2021

TABLE OF CONTENTS

| | | | |
|-----------|---|-----------|--|
| 04 | Scheme for Promotion of Flagging of Merchant Ships in India | 06 | Delhi High Court bats for MSMEs as it quashes AAI tender |
| 08 | Madras HC orders interim stay on MoEFCC Office Memo | 09 | NHAI Asset Monetization |
| 11 | SC order on tender process for privatization of Power Distribution Company in the union territories of Dadra and Nagar Haveli and Daman and Diu | 11 | Andhra Pradesh Electricity Regulation Commission allows DISCOMS to adjust the Fuel and Power Purchase Cost Adjustment on quarterly basis |
| 12 | Clarification issued by the Ministry of Power | 13 | Karnataka Electricity Regulatory Commission directs reduced tariff for a delayed solar project |
| 15 | Appellate Tribunal for Electricity directs Tamil Nadu Generation and Distribution Corporation Limited to return bank guarantee of a delayed solar project | 17 | GUVNL withdraws subsidy to solar projects |

INFRASTRUCTURE



Scheme for Promotion of Flagging of Merchant Ships in India

Brief Background

- In order to achieve the objective of Atmanirbhar Bharat, the Union Cabinet approved a scheme to provide INR 1,624 crores over 5 years as subsidy to Indian Shipping companies. This subsidy is by way of global tenders floated by Ministries and Central Public Sector Enterprises (CPSEs) for import of government cargo.
- The subsidy support proposed to be provided to the Indian shipping companies would enable more Government imports to be carried on Indian flag ships and would make it more attractive to flag merchant ships in India as their higher operating costs would be offset to a large extent through the subsidy support. Further, it would lead to an increase in flagging and would link access to Indian cargo to investment in Indian ships.

Provisions of the Scheme:

- The subsidy support rate is as follows:

| <u>Sr. No.</u> | <u>Particulars</u> | <u>Subsidy Support Rate</u> | <u>Reduction of Subsidy Support Rate</u> |
|----------------|---|--|--|
| 1. | Ship flagged in India after February 1, 2021, that is less than 10 years at the time of flagging in India | 15% of the quote offered by the L1 foreign shipping company or the actual difference between the quote offered by the Indian flag vessel exercising ROFR (Right to First Refusal) and the quote offered by the L1 foreign shipping company, whichever is less. | The rate at which the subsidy support is extended would be reduced by 1% every year, till it falls to 10% and 5%, respectively, for the two categories of ships mentioned. |
| 2. | Ship flagged in India after February 1, 2021, that is between 10 to 20 years old at the time of flagging in India | 10% of the quote offered by the L1 foreign shipping company or the actual difference between the quote offered by the Indian flag vessel exercising ROFR and the quote offered by the L1 foreign shipping company, whichever is less. | |
| 3. | Existing Indian flagged ship which is already flagged and less than 10 years old on February 1, 2021 | 10% of the quote offered by the L1 foreign shipping company or the actual difference between the quote offered by the Indian flag vessel exercising ROFR and the quote offered by the L1 foreign shipping company, whichever is less | - |
| 4. | Existing Indian flagged ship which already flagged and between 10 to 20 years old on February 1, 2021 | 5% of the quote offered by the L1 foreign shipping company or the actual difference between the quote offered by the Indian flag vessel exercising ROFR and the quote offered by the L1 foreign shipping company, whichever is less. | - |

- The provisions of the above subsidy support would not be available in a case where an Indian flagged vessel is the L1 bidder.
- The budgetary support would be provided directly to the Ministry/Department concerned.
- The subsidy support would be extended only to those ships which have bagged the award after the implementation of the scheme.
- There would be flexibility in allocation of funds for expenditure from one year to another and within the various Ministries/Departments of the scheme.
- Ships older than 20 years old will not be eligible for any subsidy under the scheme.
- The Ministry must seek allocation of such additional funds from the Department of Expenditure as may be required.
- The scheme would be reviewed after 5 years.

Our view: The Scheme has the potential to generate employment as an increase in Indian fleet will provide direct employment to Indian seafarers as well as indirect employment in development of ancillary industries, such as shipbuilding, ship repair, recruitment, banking, etc. and contribute to the Indian GDP. Further, it will enhance the share of Indian seafarers in global shipping. All in all, the Scheme should promote the growth of the Indian shipping industry.



Delhi High Court bats for MSMEs as it quashes AAI tender

Background:

A two-judge bench of the High Court of Delhi in the case of *Centre for Aviation Policy, Safety and Research (CAPSR) vs. Union of India and Others*¹ quashed a Ground-Handling Services (GHS) tender/RFP issued by the Airports Authority of India (AAI) on the grounds that it had arbitrary conditions which excluded MSME players. The Court held that the tender conditions were onerous, arbitrary and mocked the Government of India's Atmanirbhar policy.

What were the facts of the case?

- AAI is a public sector enterprise established under the Airports Authority of India Act, 1994. It works under the aegis of the Ministry of Civil Aviation, Government of India and is tasked with managing the civil aviation infrastructure in India. It controls and administers 83 airports catering to scheduled and non-scheduled aircrafts.
- The 83 airports under its control have been classified by AAI into four broad categories:
 - Group A – 4 airports located in metropolitan cities;
 - Group B – 14 airports located in the capital cities of some states;
 - Group C – 15 airports located in the larger cities of certain states; and
 - Group D – 49 airports in Group D-1 and 1 airport in Group D-2 which fall in the category of regional and budget airports catering to mainly non-scheduled flights involving smaller aircrafts.
- The National Civil Aviation Policy, 2016 and the Airports Authority of India (Ground Handling Services) Regulations, 2018 (AAI GHS Regs) form the policy bedrock under which the AAI tenders out GHS for airports. On July 28, 2020, AAI issued a tender for engaging agencies to provide GHS for Group D airports. For the purposes of the tender,

AAI had divided the 49 Group D1 airports into four regional clusters as follows:

| | Region |
|------|--|
| i. | Southern Region (10) - Rajahmundry, Tuticorin, Cuddapa, Belgaum, Hubli, Pondicherry, Mysore, Tirupathi, Salem, Kalaburgi (Gulbarga) |
| ii. | Northern Region (20) - Gaggal (Kangra), Gorakhpur, Allahabad, Jaisalmer, Leh, Jodhpur, Kanpur (Chakeri), Khajuraho, Bhuntar, Gwalior, Bikaner, Bhatinda, Agra, Pantnagar, Shimla, Ludhiana, Adampur (Jalandhar), Pathankot, Kishangarh, Hindon |
| iii. | Northeast Region (7)- Silchar, Dibrugarh, Dimapur, Jorhat, Shillong, Lilabari (Lakhmipur), Tezpur |
| iv. | Western Region (12) - Rajkot, Aurangabad, Juhu, Jabalpur, Bhuj, Jamnagar, Porbandar, Kandla, Bhavnagar, Diu, Kolhapur, Jalgaon |

- Thus, a potential bidder could no longer submit a bid for providing GHS for an individual airport. All bids were required to be placed for a specific regional cluster. The RFP also contained certain 'onerous' technical and financial qualifications such as:
 - The requirement of an INR 35 Lakh as earnest money deposit.
 - The requirement of having previous experience in providing GHS to **only** scheduled flights.
 - Having an annual turnover of INR 30 crores (later reduced to 18 crores) in any one of the previous 3 years.
- The CASPR whose members included MSMEs who were providing individual GHS across Group D airports in India challenged the conditions of the RFP and also the cluster-based categorization of airports by the AAI. This was challenged via a writ petition under Article 226 of the Indian Constitution before the High Court of Delhi on the grounds that they were unreasonably restrictive, anti-competitive, oppressive.

¹ W.P.(C) 5722/2020 & CM APPL. 20676/2020 decided on July 14, 2021

What did the High Court hold?

- The High Court of Delhi noted that it was mindful of the limited scope of interference that can be wielded by the Court in matters of public policy. Yet, as the Supreme Court has previously held in *inter alia Internet and Mobile Association of India vs. Reserve Bank of India*², the High Court noted when any law/tender requirements are based on considerations that are wholly unreasonable and have no nexus at all with the object sought to be achieved, the Court is bound interfere.
- The High Court rejected the argument of AAI that the regional clustering was in the interest of efficiency in overall management and administration of the 49 airports. It stated that this clustering does not have any nexus with the object of the National Civil Aviation Policy of 2016 of promoting regional connectivity. The High Court also called for the original record pertaining to the framing of the terms and conditions of the impugned tenders which stated that holding a tender for each of the Group D airports would be a cumbersome affair for AAI. The High Court held that historically the Group D airports were serviced by Ground Handling Agencies as standalone units and in the absence of any basis for the grouping of regional airports; such grouping was declared by the High Court to be based merely on assumptions and thus invalid.
- The High Court noted that it was an admitted fact and a matter of record that until quite recently scheduled airlines were not plying in many of the 49 Group D-1 Category airports. The Court further expressed shock that when neither the National Civil Aviation Policy, 2016 nor the AAI HS Regs differentiated between GHS provided to a scheduled vis-à-vis a non-scheduled airline; the RFP went ahead and did so. Moreover, the High Court noted that this was done in a '*strangely surreptitious manner*' as AAI had not mentioned this stipulation in the primary body of the RFP but was '*hidden*' in the self-certification format provided in Annexure 5C of the RFP that was

required to be furnished by all bidders. Thus, the High Court held that this under-hand tactic was manifestly arbitrary. Further, the High Court stated that AAI could have set forth the necessary technical qualifications so that the existing Ground Handling Agents could upgrade their infrastructure, experience and skills, rather than being completely driven out of business.

- Further, the High Court held that the high requirement of an annual turnover automatically excluded MSMEs. This was in violation of the Government's 2012 MSME policy or the amended 2018 policy issued by the Department of Public Expenditure, Ministry of Heavy Industries and Public Enterprises pursuant to which the Government of India that had made it mandatory for public sector units to procure a minimum of 25% of their supplies from MSMEs. The High Court observed that the requirements floated by the AAI, not only stares in the face of the proclaimed Atmanirbhar policy, but also mocks it. As per the High Court, this would stifle all attempts of smaller entrepreneurs to dream bigger, let alone big. It therefore ordered that the AAI tender be quashed and a fresh tender taking note of the Court's observations be issued by AAI.

Our view: The High Court's decision is an example of where the judiciary has had to step in to place a check on arbitrary action by an authority.

It has been judicially settled that the Government cannot give or withhold largesse in its arbitrary discretion or at its sweet will and will be subject to restraints, inherent in its position in a democratic society.

The power or discretion of the Government must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

² WP(C) No. 528/2018

Madras HC orders interim stay on MoEFCC Office Memo

Background:

A Division Bench of the High Court of Madras in a Public Interest Litigation case of *Fatima vs. Union of India*³ ordered an interim stay of an Office Memorandum (**Office Memo**) dated July 7, 2021 issued by the Ministry of Environment, Forest and Climate Change (**MoEFCC**). The Office Memo contained the Standard Operating Procedure (**SoP**) for identification and handling of violation cases under the 2006 Environment Impact Assessment (**EIA**) Notification.

What were the facts?

- The 2006 EIA notification was issued under the Environment (Protection) Act, 1986 (**EPA**) and put in place a regime under which certain categories of projects require prior Environmental Clearance (**EC**) before commencement.
- Given the rampant violation of the EIA notification, the National Green Tribunal (**NGT**) in the case of *Tanaji B. Gambhire vs. Chief Secretary Government of Maharashtra & Others*⁴ had stated that any project that has commenced without taking the required EC must either be demolished or if it is found that environmental damage can be restored, the project can be permitted on payment of assessed compensation as per the polluter pays principle. The NGT, thus, directed the MoEFCC to lay down a proper SoP for grant of EC in such cases.

What are the contents of the SoP?

- The Office Memo noted that there was a divergence in the ratio of various judgements on the question of ex-post facto EC. The Supreme Court in the case of *Common Cause vs. Union of India*⁵ and *Alembic Pharmaceuticals Ltd vs. Rohit Prajapati & Other*⁶ had stated that while an EC will not come into force earlier than the date of its grant; the principle of

proportionality would require that courts adopt a balanced approach which holds industries to account for having operated without EC in the past without necessarily ordering closure of operations.

- The SoP adopted the following guiding principles:
 - Violators to pay as per the concept of ‘polluter pays’ principle for the violation period – proportionate to the scale of the project and the extent of the commercial transaction.
 - Projects that are not allowable/permisible, for grant of EC, as per extant regulations – To be demolished.
 - Projects that are allowable/permisible, if prior EC had been taken as per extant regulations – To be closed until EC is granted (if no prior EC has been taken) or to revert to permitted production level (in case prior EC has been granted).

What did the High Court of Madras Hold?

- The Office Memo was challenged on the grounds that the MoEFCC did not have the jurisdiction to issue an office order which amended a statutorily issued EIA Notification. Further, it violated Article 21 and Article 48-A of the Indian Constitution. The petitioner also noted that the concept of ex-post facto clearance is alien to environmental jurisprudence and stated that in the case of *Alembic Pharmaceuticals Ltd vs. Rohit Prajapati & Others*, the Supreme Court had upheld a judgement of the National Green Tribunal which had quashed a similar Office Memo of the MoEFCC dated May 14, 2002.
- The High Court noted that the petitioner had demonstrated a *prima facie case* for grant of stay and thus admitted the PIL/writ petition and listed the matter to be heard after 12 weeks.

³ WP(MD) No.11757 of 2021 and WMP(MD) No. 9241 of 2021 dated July 15, 2021

⁴ Appeal No. 34/2020(WZ) dated May 24, 2021

⁵ Writ Petition (Civil) No. 114 of 2014 decided on August 2, 2017

⁶ Civil Appeal No. 1526 of 2016 dated April 1, 2020

Our view: Post-facto environmental clearance dilutes the basis of the EIA Notification and EPA. While the Madras High Court in the case of Puducherry Environment Protection Association vs. Union of India¹ had permitted a one-time relaxation granted by the MoEFCC for post-facto environmental clearance, the institutionalization of such a mechanism via a SoP is likely to be struck down by the Madras High Court.

The High Court of Bombay has in a similar matter stayed an Office Memo issued by the MoEFCC which sought to grant post-facto clearance to projects in CRZ Areas. While the matter is currently pending, the High Court of Bombay, had come down heavily on the misplaced reliance of the MoEFCC on the Alembic Pharmaceuticals Ltd vs. Rohit Prajapati & Others case. While the Supreme Court can exercise its power under Article 142 of the Indian Constitution to regularize environmental violations in certain cases; the MoEFCC's power to do the same via an Office Memo is unlikely to be sustained.

NHAI Asset Monetization

As per news reports, the National Highways Authority of India (NHAI) plans to wait for traffic on the highway stretches to be back in full volume before moving ahead with its asset monetization plans. Curfews and mobility restrictions due to the national lockdown have had a big impact on highway toll collections. Once implemented, the asset monetization program should enable NHAI to repay its debt and develop highways.

ENERGY



SC order on tender process for privatization of Power Distribution Company in the union territories of Dadra and Nagar Haveli and Daman and Diu

Background:

- A tender was floated for 51% equity stake in the power distribution company in the union territories of Dadra and Nagar Haveli and Daman and Diu.
- Torrent Power Limited had emerged as the highest bidder in the tender.
- However, pursuant to an order dated March 4, 2021, the High Court of Bombay had, *inter alia*, suspended the tender process in a public interest litigation case before the High Court of Bombay until further orders in the matter (**Bombay HC Order**).

What did the Supreme Court order?

A civil appeal was filed against the Bombay HC Order before the Supreme Court. Subsequently, the Supreme Court *vide* its order dated July 9, 2021 has granted stay of the operation of the Bombay HC Order and has directed the matter to be listed for hearing before the Supreme Court.

Our view: Considering the recent moves by the Government to privatize the other power distribution companies, the final decision of the Supreme Court is much anticipated. Any investors interested in bidding in such disinvestment processes in the intervening period may take into account the impact of any negative judgment of the Supreme Court.

Andhra Pradesh Electricity Regulation Commission allows DISCOMS to adjust the Fuel and Power Purchase Cost Adjustment on quarterly basis

Background:

- The Eastern Power Distribution Company Limited of A.P. Limited and the Southern Power Distribution Company Limited of A.P. Limited filed petitions requesting the Andhra Pradesh Electricity Regulation Commission (**APERC**) to make suitable amendments to Clause 12.5 of the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) Regulation, 2005 (**Principal Regulations**), concerning the specification of Fuel & Power Purchase Cost Adjustment (**FPPCA**) formula for pass-through of Power Purchase Cost variation every quarter instead of on annual basis.

- Subsequently, the APERC *vide* an order dated June 30, 2021 made suitable amendments to the Principal Regulations.

What are the amendments?

- The distribution licensees are entitled to recover from or refund to the consumers, the FPPCA as approved by the APERC from time to time either *suo motu* or based on the filings made by the Distribution Licensee.
- The DISCOMS are now permitted quarterly FPPCA instead of the erstwhile FPPCA which was on an annual basis.
- As per the amendments, the distribution licensees are required to file an application for FPPCA for that quarter before the APERC, within 2 months from the end of every quarter. The filing is to be

accompanied by purchase details source-wise for the quarter along with the monthly breakups duly certified by the auditor as per the prescribed format.

- A grace period of 1 month has been provided, in the event the distribution licensees fail to make the filing within the 2 month period.
- The FPPCA determined by the APERC would be recovered from or refunded to the consumers by the distribution licensee in 3 equal monthly instalments as specified by the APERC.
- The distribution licensee has been permitted to pass on the variations (true-down or true-up) in fuel costs (variable costs) based only on the actual bills admitted by it from the approved sources (excluding purchases from exchanges) for a quarter on its own subject to a ceiling of 50 paise/unit as per the prescribed formula to all the categories of consumers (except agricultural consumers)
- In respect of agricultural consumers, the distribution licensee may claim upward revision in fuel costs (variable charges) from the Government.
- The amendments have been applicable with effect from the quarter commencing from April 1, 2021.

Our view: The revision of tariff on a quarterly basis is a positive step as it would allow the DISCOMs to adjust the cost regularly, thereby relieving the financial burden of the DISCOMs to some extent.

Clarification issued by the Ministry of Power

Background:

- On March 22, 2021 the Ministry of Power (MoP) issued guidelines to enable DISCOMS to continue or exit from the Power Purchase Agreement (PPA) after completion of the term of the PPA i.e. beyond 25 years or a period specified in the PPA and allow flexibility to the generators to sell power in any mode after State/DISCOM exit from the PPA (**Guidelines**).
- Thereafter, the MoP issued a letter dated July 5, 2021 to provide the required clarity.

Clarification for Clause 2 (VIII) of the Guidelines:

- The MoP has clarified that word 'entire' in the following provision would mean the entire allocated power from the project which has completed 25 years from the date of commissioning of the project. Further, the allocated power cannot be surrendered partly from a project.

"In case of Bulk Power Supply Agreement (BPSA) also, the State/DISCOMS may relinquish entire allocated power from such projects which have been completed 25 years since commissioning of the project. Power supply from other projects shall continue as per the terms of the PPA"

- Further, as per the Guidelines, the first right to avail power from Central Generating Stations developed under Section 62 of the Electricity Act, 2003, even beyond the term of the PPA i.e. on completion of 25 years from the date of commissioning of the plant or a period specified in the PPA would continue to be with the State/DISCOMS with whom the PPA was signed. Accordingly, the State may choose to continue to take power from a project or project(s) as under clause 2 (VIII) even after completion of 25 years from the date of commissioning of the project or exit from a project or project(s) under clause 2 (VIII) after completion of 25 years from the date of commissioning of the project.

Our view: The MoP has paid heed to representations received from concerned organizations and provided the much needed clarity.

RENEWABLE ENERGY

Karnataka Electricity Regulatory Commission directs reduced tariff for a delayed solar project

Background:

In an order pronounced on June 11, 2021, the Karnataka Electricity Regulatory Commission (**KERC**) in the case of *ACME Kudligi Solar Energy Private Limited vs. Bangalore Electricity Supply Company Limited, Karnataka Power Transmission Corporation Limited and Karnataka Renewable Energy Development Limited*⁷, pronounced that ACME Kudligi Solar Energy Private Limited (**ACME**) was liable for a reduced tariff of 80% of the quoted tariff and liquidated damages for a delayed 20 MW solar project in Karnataka.

What are the facts of the case?

- Karnataka Renewable Energy Development Limited (**KREDL**) invited a request for proposal for selection of bidders for undertaking development of a solar PV ground mounted power project of 860 MW in 43 taluks of Karnataka. ACME SHL was the selected bidder for commissioning the 20 MW (AC) solar PV ground mounted power project in Kudligi taluk of Ballari district and for sale of energy at INR 2.94 per unit. Pursuant to the letter of award, ACME SHL incorporated ACME.
 - ACME executed the PPA with Bangalore Electricity Supply Company Limited (**BESCOM**) for sale of energy from the solar power project at a tariff of INR 2.94 per k/wh.
 - ACME was required to achieve the conditions precedent on or before 12 months from May 4, 2018, i.e., by May 3, 2019 and had to achieve the Scheduled Commissioning Date (**SCD**) within 18 months from May 4, 2018, i.e., November 3, 2019
- ACME applied for evacuation scheme approval for evacuating power from the proposed solar power project site to 220/66 kV Kudligi sub-station. Karnataka Power Transmission Corporation Limited (**KPTCL**) issued the requisite approvals and the Regular Evacuation Scheme specified that the evacuation of the proposed 20 MW power will commence only after completion and commissioning of the proposed 220/66 kV Kudligi sub-station.
- Subsequently, ACME issued letters to BESCOM and KPTCL requesting the status up-date of upstream transmission lines from upcoming 220/66 kV Kudligi sub-station. In these letters, ACME also noted the pending works to be attended for commissioning Kudligi sub-station and also requested to intimate definitive timelines of completion and commissioning of 220/66 kV Kudligi Sub-station.
- ACME vide another letter to KPTCL requested it to complete the pending works at Kudligi sub-station, stating that in the absence of completion of Kudligi sub-station, ACME could not commission its solar power project within the timeline.
- Thereafter, ACME issued notice of force majeure due to non-commissioning of Kudligi sub-station to BESCOM. ACME also requested BESCOM for support in implementation of the project in accordance with the relevant provisions of the PPA.

⁷ O.P. No.37/2020

- ACME contended that it was able to achieve the progress of construction work of solar power project, as per the timelines provided under PPA and it would have been able to achieve the commissioning of solar power project by SCD but for the non-availability of adequate infrastructure for evacuation of contracted capacity due to non-commissioning of 220 KV Kudligi sub-station.
- ACME further contended that it was a settled principle that if there is delay on part of the distribution company in providing transmission/evacuation infrastructure to the solar power producer, the solar power producer should not be punished for not commissioning its project by the SCOD. It needs to be classified as a force majeure event, whether it is defined under the definition of 'force majeure' in the PPA or not and consequently extension in SCOD should be given to the solar power producer.
- BESCOM contended that it was ACME's duty to identify a suitable sub-station land and verify evacuation availability which it failed to do. BESCOM further contended that in the event of delay being caused on account of non-availability of evacuation infrastructure, ACME ought to have considered alternative methods of evacuation of power.
- BESCOM also issued a demand notice claiming liquidated damages from ACME.

What was KERC's judgement?

- KERC observed that the definition of 'force majeure' would not cover the event of non-availability of the substation, as a 'force majeure' event. It further observed that ACME would be aware of all the relevant facts before applying for evacuation program approval requesting evacuation of power to Kudligi substation. It also stated that it was the duty of the transmission licensee to develop intrastate transmission lines for smooth flow of energy but did not cast any obligation to complete the transmission system within any specified time to match the commissioning date of the project.
- KERC directed that as a consequence of the delay in commissioning of the solar power project, ACME was liable to pay the liquidated damages as per the PPA without the need of any evidence to prove the loss sustained due to the non-supply of energy as the contract provides for a genuine pre-estimate of damage or loss.
- KERC observed that there was a delay of more than 3 months in the commissioning of the solar project. As per the PPA entered between the parties, as a consequence of delay in commissioning of the solar power project beyond the SCOD, the tariff applicable would be 80% of the tariff quoted by the bidder provided the project is commissioned within 3 months thereafter. ACME was thus liable for a reduced tariff of 80% of the quoted price of INR 2.94 kwh.

Our view: The above case re-iterates the settled position under law that force majeure provisions have to be narrowly construed and relief cannot be granted over and above the construct of the force majeure clause. As regards liquidated damages too, KERC has followed the Supreme Court's previous decisions, where proof of damage has been dispensed with in cases wherein damage or loss is difficult or impossible to prove and the liquidated amount named in the contract has been awarded if it was a genuine pre-estimate of damage or loss.

Appellate Tribunal for Electricity directs Tamil Nadu Generation and Distribution Corporation Limited to return bank guarantee of a delayed solar project

Background:

In an order pronounced on July 5, 2021, the Appellate Tribunal for Electricity (**APTEL**) in the case of *Solitaire BTN Solar Private Limited vs. Tamil Nadu Electricity Regulatory Commission, Tamil Nadu Generation and Distribution Corporation Limited, Tamil Nadu Transmission Corporation Limited and Non-Conventional Energy Sources*⁸, directed the Tamil Nadu Generation and Distribution Corporation Limited (**TANGEDCO**) to not encash the performance bank guarantee or ask Solitaire BTN Solar Private Limited (**Solitaire**) to pay liquidated damages. It also directed TANGEDCO to return the performance bank guarantee of INR 20 crores and an additional bank guarantee of INR 7.6 crores to Solitaire without delay.

What are the facts of the case?

- Tamil Nadu Electricity Regulatory Commission (**TNERC**) TNERC granted approval to TANGEDCO to invite bids to establish, maintain and operate solar power plants of minimum of 1 MW capacity and maximum 500 MW capacity in a single location for a single solar power generator or a company in State of Tamil Nadu for a total capacity of 1500 MW and to supply the generated solar power to TANGEDCO under long term power purchase agreement (**Project**).
 - TANGEDCO issued a Letter of Intent (**LOI**) in favor of Solitaire. The LOI stated that the obligation to provide connectivity to the Project will remain with TANGEDCO and Tamil Nadu Transmission Corporation Limited (**TANTRANSCO**).
 - Solitaire entered into a Power Purchase Agreement (**PPA**) with TANGEDCO for supply of 100 MW of power from the Project. Under the PPA, the Project was required to be set up at Kariapatti Taluk and the power from such Project was required to be injected at nearest substation owned by TANGEDCO/TANTRANSCO. As per the agreed terms of the PPA, Solitaire was made responsible for obtaining transmission connectivity and access to the transmission system owned by TANGEDCO/TANTRANSCO.
 - Solitaire was under obligation to commission the entire capacity of the Project on or before 24 months from the date of signing of the PPA i.e., by September 27, 2019. Solitaire contended that the obligation to achieve the schedule date of commissioning (**SCOD**) as per the stipulated timelines, in the scheme of the PPA, required that the reciprocal obligation of TANGEDCO to provide the evacuation system was undertaken.
 - Solitaire provided the performance bank guarantee of INR 20 crores as per the LOI and an additional bank guarantee of INR 7.6 crores to TANGEDCO.
 - Solitaire contended that TANGEDCO/TANTRANSCO failed to provide any assurance or visibility regarding possibility of evacuation to the extent of 100% of the Project capacity of 100 MW which led to the delay in implementation of the Project.
 - Solitaire contended that the delay in providing transmission system for evacuation

⁸ Appeal No.67 of 2021 & IA No. 150 OF 2021 & IA No. 1703 OF 2020 & IA No. 159 OF 2021 & IA No. 382 OF 2021 & IA No. 434 OF 2021 & IA No. 524 OF 2021 & IA No. 583 OF 2021

of 100% power from the Project was solely attributable to TANGEDCO. It stated that it was a settled principle of law that no one could take advantage of its own wrong. Accordingly, in view of the fact, that the delay prior to outbreak of Covid – 19, caused in achieving SCOD was solely for the reasons attributable to TANGEDCO, TANGEDCO was restricted in law to exercise its option of terminating the PPA as a consequence of the entire capacity not being commissioned within the stipulated timeline. Further, the event of outbreak of Covid -19 in China and India, consequently, impacted the solar module supplier of Solitaire, its logistical partners, EPC and sub-contractors, which qualified to be a force majeure event in terms of Article 16 of the PPA.

- Accordingly, Solitaire issued force majeure notices to TANGEDCO. TANGEDCO failed to respond to such notices.
- TANGEDCO contended that Solitaire failed to commission 100 MW capacity before the commissioning date of September 27, 2019. Therefore, the force majeure clause could not be invoked by Solitaire under the PPA post the SCOD.
- TANGEDCO further contended that Solitaire had only commissioned the solar project partially, i.e., 50 MW capacity, on February 20, 2020, with a delay of 145 days. Therefore, it was entitled to forfeit the performance bank guarantee proportionate to the capacity not commissioned and the capacity commissioned by delaying the project completion by 145 days.

What was APTEL’s judgement?

- APTEL observed that the respondents had failed to fulfill its obligation in terms of the LOI, PPA and the Electricity Act, 2003, to provide adequate transmission system to Solitaire to evacuate the entire output of its 100 MW of the solar PV plant of Solitaire.
- APTEL agreed that the delay caused in the implementation of the Project due to unavailability of the transmission system was for reasons beyond the control of Solitaire. In terms of Article 16 (*Force Majeure*) of the PPA, the delay in granting the connectivity approval by TANGEDCO/TANTRANSCO to Solitaire was defined a force majeure event and Solitaire was entitled for the extension of SCOD in terms of provision of the PPA.
- Accordingly, APTEL allowed Solitaire extension of 10 months’ time on account of force majeure event of unavailability of transmission system and further 5 months extension of time on account of force majeure event of lockdown due to Covid-19 pandemic.
- Thus, APTEL extended the commissioning date from September 27, 2019, to December 27, 2020, and directed TANGEDCO to return the bank guarantee of and the additional bank guarantee without any delay.

Our view: APTEL’s order offers an in-depth analysis of each issue raised by Solitaire in the appeal. The order also clarifies that force majeure relief could only be granted if the same occurred within the timeline provided under the PPA. The order should offer guidance to other developers facing similar issues.

GUVNL withdraws subsidy to solar projects

Vide a public notice dated July 20, 2021, Gujarat Urja Vikas Nigam Limited (GUVNL) has indicated that solar projects to be installed under the 'Policy for Development of Small Scale Distributed Solar Projects, 2019', would not be eligible for any subsidy. As per

media reports, the decision affects around 4000 projects with cumulative power generation capacity of around 2500 MW. This move should further affect the investor sentiment in the solar sector as it is yet another example of regulatory uncertainty.

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