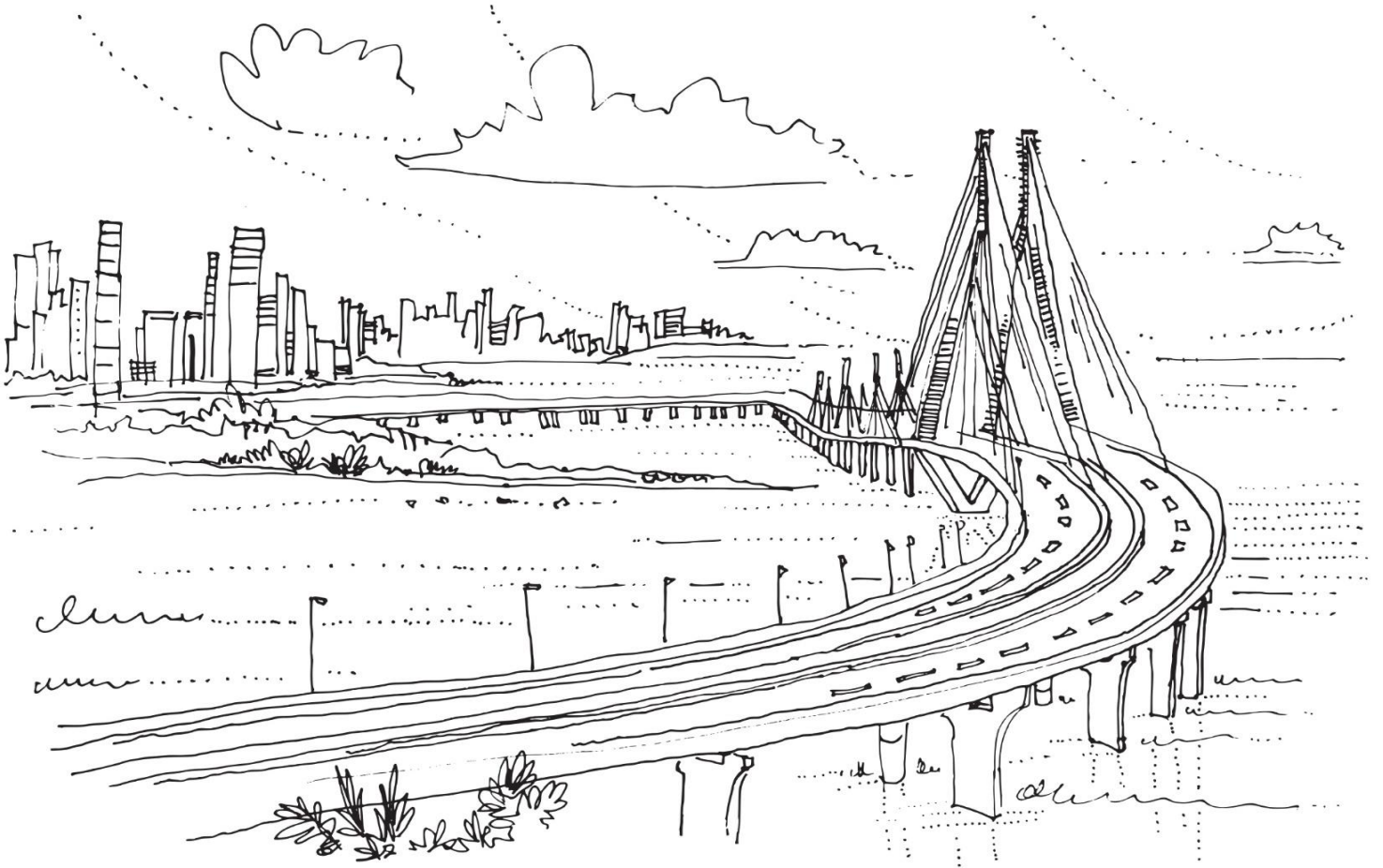




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Infrastructure and Energy Digest

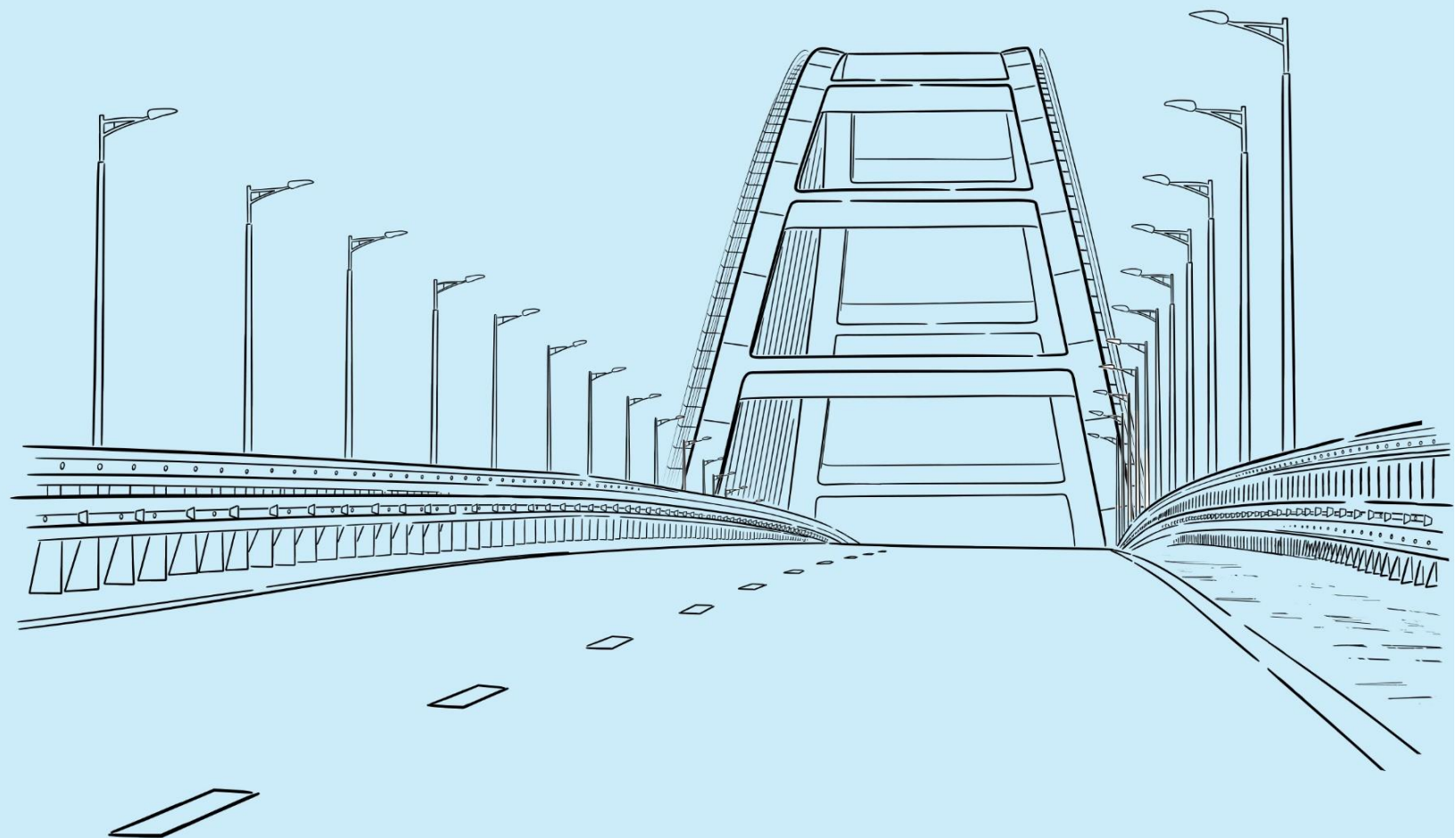
Overview of Legal and Regulatory Developments

October 2021

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INFRASTRUCTURE



Cabinet approves PM Gati Shakti National Master Plan

Background:

On October 21, 2021, the Cabinet Committee on Economic Affairs (CCEA) approved the “PM Gati Shakti National Master Plan” (Gati Shakti NMP). This will lay down the institutional framework for rolling out, implementation, monitoring and providing a support mechanism for multi-modal connectivity. The Gati Shakti NMP would essentially be a digital platform to bring several ministries including Railways and Roadways together for integrated planning and coordinated implementation of infrastructure connectivity projects. It aims to facilitate the last mile connectivity of infrastructure and also reduce travel time for people.

Salient Features:

- The Gati Shakti NMP will be monitored by a three-tier system. The implementation framework would include Empowered Group of Secretaries (EGOS), Network Planning Group (NPG) and Technical Support Unit (TSU) with required technical competencies.
- The EGOS would be headed by the Cabinet Secretary and will consist of secretaries of 18 ministries as members and Head of Logistics Division as member convenor. The EGOS has been mandated to review and monitor implementation of the Gati Shakti NMP to ensure logistics efficiency. It is empowered to prescribe the framework and norms for undertaking any subsequent amendments to the Gati Shakti NMP. The EGOS is required to set out the procedure and definitive framework for synchronization of various activities and ensure that various initiatives of infrastructure development are part of the common integrated digital platform. The EGOS will examine the interventions required to meet the demand side, in efficiently transporting bulk goods on the requirement of various ministries such as steel, coal and fertilizers.
- The CCEA has also approved the formation, composition and terms of reference for the NPG. The NPG will consist of heads of the network planning wing of respective infrastructure ministries and will assist the EGOS.
- The formation of the TSU will ensure that there is no duplication of works for holistic development of any region as well as reduce logistics costs through micro-plan detailing by providing the required competencies. The TSU will comprise domain experts from various infrastructure sectors such as Aviation, Maritime, Public Transport, Rail, Roads and Highways and Ports and subject matter experts such as Urban & Transport Planning, Structures (roads, bridges & buildings), Power, Pipeline, GIS, ICT, Finance/Market PPP, logistics and Data Analytics.
- The Gati Shakti NMP is intended to break departmental silos and bring in more holistic and integrated planning and execution of projects with a view to address the issues of multi modal connectivity and last mile connectivity. This will help in bringing down the logistics cost and also translate into enormous economic gains to consumers, farmers, youth as well as those engaged in businesses.
- The Gati Shakti NMP is to be based on 6 pillars:
 - Comprehensiveness: It will include all the existing and planned initiatives of various Ministries and Departments with one centralized portal.
 - Prioritization: Different departments of the Government will be able to prioritize their projects through cross-sectoral interactions.
 - Optimization: It will assist different ministries in planning for projects after identification of critical gaps. For the transportation of the goods from one place to another, the plan will help in selecting

- the most optimum route in terms of time and cost.
- **Synchronization:** It will help in synchronizing the activities of each department, as well as of different layers of governance, in a holistic manner by ensuring coordination of work between them.
 - **Analytical:** The plan will provide the entire data at one place with GIS based spatial planning and analytical tools having 200+ layers, enabling better visibility to the executing agency.
 - **Dynamic:** All Ministries and Departments will now be able to visualize, review and monitor the progress of cross-sectoral projects, through the GIS platform, as the satellite imagery will give on-ground progress periodically and progress of the projects will be updated on a regular basis on the portal.

Our view: The Gati Shakti NMP signals a paradigm shift in the Government approach to development planning. If implemented effectively, the Gati Shakti NMP would be a game-changer in inter-ministerial and inter-departmental cooperation in infrastructure planning and ensure maximum utilization of resources and capacities. This effort by the GOI will indeed enhance efficiency and reduce wastage. One hopes that this will be a win-win for all the stakeholders and assist in the overall economic growth of India.



ENERGY



Resolution of CERC-SEBI jurisdiction dispute gets Supreme Court approval

Background:

The Supreme Court in an order passed on October 6, 2021, in the case of *Power Exchange of India v. Securities and Exchange Board of India*¹, permitted the Central Electricity Regulatory Commission (CERC) and the Securities and Exchange Board of India (SEBI) to proceed in accordance with law to resolve a decade long jurisdiction dispute. The dispute was on which regulatory body should regulate trading in electricity forward contracts², electricity future contracts³ and electricity derivative contracts.

Factual Matrix:

- The CERC and the SEBI had filed a Special Leave Petition against a decision of the High Court of Bombay in the case of *Multi Commodity Exchange of India and Others vs. CERC and Others*⁴. In this case, the High Court of Bombay had rendered inoperative certain provisions of the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 which had given the power to the CERC to regulate electricity forward, futures and derivative contracts. The High Court held these provisions to be inoperative on account of an overlap of regulatory jurisdiction with the Forward Markets Commission (FMC).
- With the merger of the FMC with SEBI in 2015, the question of regulatory overlap arose between the CERC and the SEBI. During the pendency of the appeal from the High Court of Bombay's decision, the Ministry of Power (MoP) set up a *Committee on Efficient Regulation of Electricity Derivatives (Committee)*. The Committee had representatives from the Department of Economic Affairs, Central Electricity Authority, CERC, Power System Operation Corporation Limited (POSOCO), SEBI, Indian Energy Exchange, Power Exchange of India Limited and the Multi Commodity Exchange.
- The Committee submitted its report in October 2019. The Committee recommended that electricity contracts which require the physical delivery of electricity should be regulated by the CERC and electricity derivatives should be regulated by the SEBI. The Supreme Court asked the parties to abide by the settlement reached between the CERC and SEBI in accordance with the recommendations of the Committee.

Our view: The Central Electricity Regulatory Commission (Power Market) Regulations, 2021 (which came into effect from August 15, 2021) regulate ready delivery term ahead contracts. Electricity derivatives will no doubt lower electricity prices, the flip side however is that it will increase volatility. As derivative trading is bound to affect the trading of electricity spot prices, the extent of regulatory co-ordination required between the CERC and SEBI remains to be seen. For RE generators, where there is a challenge of variability of supply market-based mechanisms such as forward physical - future physical and future contracts can help market participants hedge the price risk. Further, electricity derivatives can be used by distribution companies (DISCOMs), large commercial and industrial consumers and generators for effective price risk management. This can be combined for several months to form a close match with the long-term load or generation profile. DISCOMS and other large consumers would also be able to plan their short-term power procurement more efficiently.

¹ Civil Appeal Numbers 5290-5291 of 2011.

² A contract where electricity is delivered at a future date at a price agreed to in the present. They are also referred to as term ahead contracts.

³ Futures contracts are traded on a commodity exchange where the delivery date, location, quality, and quantity are standardized.

⁴ Writ Petition Number 1197 OF 2010 with Notice of Motion Number 100 of 2010 (*decided on February 2, 2011*).

MoP notifies Must-Run Rules

Background:

On October 22, 2021, the Ministry of Power (MoP) notified the Electricity (Promotion of Generation of Electricity from Must-Run Power Plant) Rules, 2021 (**MRPP Rules**).

India has made an international commitment to set up 175 GW of Renewable Energy capacity by 2022 and 450 GW by 2030. The MoP aims that the MRPP Rules will help in achieving those targets.

Salient Features:

- A wind, solar, wind-solar hybrid or hydro power plant (in case of excess water leading to spillage) or a power plant from any other source, as may be notified by the appropriate Government, which has entered into an agreement to sell electricity to any person, would be treated as a 'must-run power plant'.
- Must-run power plants would not be subjected to curtailment or regulation of generation or supply of electricity on account of merit order dispatch or any other commercial consideration. The electricity generated may be curtailed or regulated only in the event of any technical constraint in the electricity grid or for reasons of grid security and is required to be as per the provisions of the Indian Electricity Grid Code.
- In the event of a curtailment of supply from a must-run power plants, the procurer must compensate the plant at the rates specified in the power purchase agreement (**PPA**).
- If the curtailment is due to technical constraint or grid security, and procurer gives notice in advance - prior to the start of the day ahead market or real time market – then the must-run power plant is required to sell the unscheduled electricity in the power exchange. The amount realized, after deducting the actual expenses paid for the sale in the exchange, if any, would be adjusted against the compensation payable by the procurer as per the PPA.
- Any deficit in realization of amount, with respect to compensation is to be paid by the procurer on monthly basis. Any excess realization of amount during a month, if any, is to be carried forward and adjusted in the next month or months. The final adjustment is required to be paid within 1 month of the close of the financial year, by the must-run power plant to the procurer.
- The MRPP Rules also indicate that the intermediary procurer (*an intermediary company, nominated by the Central or State Government, between the distribution licensees and the generating company, required either to aggregate the purchase of electricity from different generators and sell it to the distribution licensee, or to enhance the credit profile*) may procure electricity through bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003 (**EA**). The intermediary procurer would be deemed to be a trader for the purposes of the Act, buying electricity from the must-run power plant and selling the same to one or more distribution licensees.
- If multiple generating companies, as successful bidders, are selected at different rates in order to meet the full quantum of electricity specified in the bid, the weighted average of all the selected bids will be considered as the resultant bid rate. The power may be offered by the intermediary procurer or trading licensee for sale at the resultant bid rate to the procurer.
- The manner of a resultant bid rate as specified above would also be applicable to agreements entered into between the intermediary procurer and distribution licensees, prior to commencement of the MRPP Rules, for sale of electricity based on sources of renewable energy from suppliers selected in a bidding process.
- On an application made by the intermediary procurer or distribution licensee, the appropriate

Commission can adopt the weighted average tariff after hearing the parties concerned. It is also required to adjust the rate of tariff on annual basis based on the actuals.

- The intermediary procurer may retain only the trading margin as specified in the agreements or the regulations or as may be determined by the appropriate Commission.

Our view:

With climate change being the present focus of attention across the world, the MRPP Rules should provide a much-needed impetus for green and clean power and help secure a healthy environment for the future generations. By offering a safeguard against power curtailment which has been a major pain point for the renewable energy sector in India, the MRPP Rules should aid in meeting India's commitment towards climate change.

Earlier in August this year, the Appellate Tribunal for Electricity (APTEL) in the case of *National Solar Energy Federation of India vs. Tamil Nadu Electricity Regulatory Commission and Other* (Appeal No. 197 of 2019 & IA No. 1706 of 2019) directed Tamil Nadu's state-owned distribution company to pay the dues of renewable power companies after curtailing power generation. The MRPP Rules should help deter frequent curtailment of renewable power and help reinstate investor confidence in the renewable energy sector.

Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021

Background:

Alongside the MRPP Rules, the MoP also notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (CIL Rules) on October 22, 2021. The investment in the power sector largely depends upon the timely payments. Hence, timely recovery of the costs due to change in law is very important. The CIL Rules are an attempt by the MoP to help in creating an investment friendly environment in the country.

Salient Features:

- The CIL Rules have defined 'change in law' to mean any enactment or amendment or repeal of any law, made after the determination of tariff under section 62 or section 63 of the EA leading to corresponding changes in the cost requiring change in tariff, unless otherwise defined in the agreement.
- 'Change in law' would include:
 - A change in interpretation of any law by a competent court; or
 - A change in any domestic tax, including duty, levy, cess, charge or surcharge by the Central Government, State Government or Union territory administration leading to corresponding changes in the cost; or
- A change in any condition of an approval or license obtained or to be obtained for purchase, supply or transmission of electricity, unless specifically excluded in the agreement for the purchase, supply or transmission of electricity, which results in any change in the cost.
- However, the following have been excluded from the purview of 'change in law':
 - Any change in any withholding tax on income or dividends distributed to the shareholders of the generating company or transmission licensee; or
 - Change in respect of deviation settlement charges or frequency intervals by an appropriate Commission.
- Upon a change in law, the monthly tariff or charges will be adjusted and recovered as per the CIL Rules to compensate and to restore the affected party to the same economic position as if such change in law had not occurred. In order to claim such relief, the affected party is required to give 3 weeks prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party.

- The affected party is also required to furnish to the other party, the computation of impact in tariff or charges to be adjusted and recovered, within 30 days of the occurrence of the change in law or on the expiry of 3 weeks from the date of the notice, whichever is later, and the recovery of the proposed impact in tariff or charges is to start from the next billing cycle of the tariff.
 - In case of generation project, within a period of 180 months; or
 - In case of recurring impact, until the impact persists.
- The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and will be recovered in the monthly bill as the part of tariff.
- The amount of the impact of change in law to be adjusted and recovered, will be calculated:
 - Where the agreement lays down any formula, in accordance with such formula; or
 - Where the agreement does not lay down any formula, in accordance with the formula given in the schedule to the CIL Rules.
- The recovery of the impacted amount, in case of the fixed amount will be:
 - Within 30 days - of coming into effect of the recovery of impact of change in law- the generating company or transmission licensee is required to furnish all relevant documents along with the details of calculation to the appropriate Commission for adjustment of the amount of the impact in the monthly tariff or charges. The appropriate Commission must verify the calculation and adjust the amount of the impact in the monthly tariff or charges within 60 days from the date of receipt of the relevant documents.
 - After the adjustment of the amount of the impact in the monthly tariff or charges, the generating company or transmission licensee, is bound to adjust the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount.

Our view: Currently, the pass through of cost due to change in laws takes time, which significantly affects power developers and adds to their financial woes thereby impacting the viability of the sector. Often, disputes arise between power procurers and generators in relation to the applicability and impact of CIL reliefs. As the CIL Rules come at a time when the sector is witnessing increasing costs and higher tariffs, we hope that they will go a long way in ensuring sustainability of the power sector. It would be interesting to see whether the CIL Rules themselves are treated as a 'change in law' event under existing PPAs.



Green energy open access in India: Still a long way to go

Background:

On August 16, 2021, the Ministry of Power released the Draft Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2021 (**GEOA Rules**). The GEOA Rules were open for public feedback until September 15, 2021.

Open access to the electricity grid for consumers, DISCOMS and generating companies was one of the cornerstones of the EA. The operational reality of open access in India however paints a picture that is far from rosy.

Salient Features:

- The GEOA Rules reduce the eligibility criteria for an open access applicant from 1 Megawatt (1,000 kilowatt), as provided in the fifth proviso to Section 42(2) of the EA to 100 kilowatt.
- To overcome the operational delays that currently beset applicants who want to obtain open access, the GEOA Rules provide that an applicant for **green energy open access** will have their applications disposed within 15 days.
- DISCOMS are wary of providing consent to open access applicants on account of the high variation

in demand that may result due to consumers switching on and off from open access. To overcome this challenge, the GEOA Rules provide that a minimum number of time blocks, for which the consumer will not change the quantum of power consumed, may be imposed.

- To streamline the application process for green energy open access, the GEOA Rules also provide for the setting up of a Central Nodal Agency which will operate a portal on which applications for green energy open access will be processed.
- With the aim of encouraging a wider pool of green energy consumers, the GEOA Rules state that no additional surcharge will be applicable to them.
- To promote nascent technologies such as green hydrogen and waste to energy plants, the GEOA Rules enable obligated entities to meet their Renewable Purchase Obligations (**RPO**) via purchase of green hydrogen. The Rules also provide that cross-subsidy surcharge and additional surcharge would not be applicable to energy produced from waste to energy plants.

Our view: The Rules are unlikely to be operationalized anytime soon as they run contrary to many sections of the EA. Moreover, as the scheme of the EA currently stands, it is the CERC/ respective state electricity regulatory commissions and not the MoP who have the regulatory authority to make open access regulations. While the Rules do appear well intentioned, amending the EA seems to be the only constitutional way forward.

JSW Steel's fossil-fuel based cogeneration projects exempted from RPO Compliance

Background:

In its order dated August 2, 2021, the APTEL in the case of *JSW Steel Limited vs. Maharashtra Electricity Regulatory Commission and Another*⁵, held that JSW Steel Limited (**JSWSL**) was exempted from RPO compliance targets in relation to its Dolvi unit, for the period between the financial year (**FY**) 2010-11 to FY 2015-16, as well as for subsequent years, as long as the power from cogeneration was in excess of presumptive RPO targets.

Factual Matrix:

- JSWSL established 2 Captive Power Plants (**CPP**) in Dolvi namely, a gas expansion turbine of 14 MW capacity and a waste-gas based cogeneration plant of 53.5 MW capacity. The plant was a cogeneration CPP as per Electricity Act, 2003 (**EA**).
 - JSWSL had filed a petition before Maharashtra Electricity Regulatory Commission (**MERC**) in September 2013, seeking a declaration that the electricity produced and consumed from its cogeneration CPP at Dolvi would meet/offset the RPO target of JSWSL and its group companies in respect of its units in Maharashtra. This would be done under the Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2010 (**MERC RPO Regulations, 2010**).
 - On April 12, 2018, MERC held that JSWSL was exempted from RPO only to the extent that it was consuming power from its fossil fuel-based cogeneration CPP and that RPO targets specified under the MERC RPO Regulations, 2010 are applicable to 'Obligated Entities' which the Maharashtra Energy Development Agency ("**MEDA**") classified JSWSL as. In a subsequent order on May 4, 2018, it was held by MERC that based on the data submitted by MEDA, there was a shortfall against the cumulative RPO target to the extent of open access consumption, and JSWSL was directed to fulfill its RPO target for the period between FY 2010-11 to FY 2013-14 by the end of FY 2018-19.
- MERC in an order dated August 29, 2020, further rejected JSWSL's plea seeking exemption from the applicable RPO regulations for FY 2010-11 to FY 2013-14 and subsequent years requiring JSWSL to comply with the Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 (**MERC RPO Regulations 2016**) and Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2019 (**MERC RPO Regulations 2019**).
- JSWSL filed an appeal with APTEL, to set aside the order dated August 29, 2020, and grant an exemption from RPO compliance. It also sought declaration that its Dolvi unit be entitled to set-off its presumptive RPO targets as being open access consumption against the electricity generated and consumed from its cogeneration plants.
- JSWSL contended that as per the EA, State Commissions had been given a mandate to promote cogeneration and renewable energy. It was due to this mandate that MERC had framed MERC RPO Regulations, 2010 which had exempted cogeneration plants from the RPO targets. Further, JSWSL contended that contrary to the mandate provided in Section 86(1)(e) of the EA, MERC chose to delete the proviso to Regulation 11.3 in the MERC RPO Regulations of 2016 (*which replaced the MERC RPO Regulations of 2010*).
- JSWSL also relied on previous decisions of APTEL wherein it was held that no consumer owning and operating a cogeneration based CPP was liable to be fastened with the RPO obligations so long as the electricity generated from its cogeneration plant was more than the presumptive RPO target for the relevant years.

⁵ Appeal No. 176 of 2020 and IA No. 1298 of 2020

- JSWSL further contends that interpretation put forth by MERC on the definition of ‘obligated entity’ was incorrect since the definition does not cover within its ambit captive cogeneration plants, it only covered the conventional captive power plants.
 - MERC contended that with respect to MERC RPO Regulations, 2010, MEDA had submitted that JSW’s cogeneration plant was a fossil fuel-based plant and was not a recognized source of renewable energy in terms of the list of approved Renewable Energy sources by the Ministry of New and Renewable Energy (MNRE), therefore it cannot be considered for fulfilment of RPO obligation.
- APTEL’s Judgement:**
- APTEL observed that Section 86(1)(e) of the EA provides for ‘cogeneration’ as well as ‘generation of electricity from renewable sources of energy’. APTEL had in previous decisions held that irrespective of the fuel used in a cogeneration plant, the cogeneration plant has to be treated as a separate category of generation of power from that of renewable energy source category. The plant cannot be fastened with RPO compliance as long as the cogeneration was more than the RPO target. APTEL observed that one cannot ignore the fact that investment made in a cogeneration plant was akin to investment made in renewable energy projects.
 - APTEL ascertained from the impugned order that MERC has misplaced the definition of ‘obligated entity’ and had mixed up the concept of captive plants with cogeneration plants. APTEL agreed with JSWSL’s contention that its case does not fall in definition of ‘obligated entities’ but was based on Section 86(1)(e) of the EA where the intention of the legislation was to provide special status to cogeneration as well.
 - As regard whether the provisions of MERC RPO Regulations overrule the statute, APTEL directed that the regulation, being a subordinate legislation must yield to the EA and thus allowed the appeal.
 - APTEL directed that JSWSL was exempted from the RPO obligations/targets in relation to its Dolvi unit for the period between FY 2010-11 to FY 2015-16 (period during which MERC RPO Regulations of 2010 were applicable) as well as for subsequent years (period covered by MERC RPO Regulations 2016 and MERC RPO Regulations 2019) as long as the power from cogeneration was in excess of presumptive RPO targets.
 - Further, APTEL directed that irrespective of the type of fuel utilized in the cogeneration of CPPs of the Dolvi Unit, JSWSL was entitled to set-off its presumptive RPO obligation with regard to the open access consumption, against the electricity generated and consumed from its cogeneration plants.

Our view: Co-generation plants must be treated like renewable energy generating plants. Vide this order, the APTEL has reiterated its earlier position that captive consumers of power from their own generating plants should not be imposed with the obligation of procuring electricity from renewable energy sources, as this goes against the objectives of the EA. The order would be very helpful for other captive consumers facing similar issues as there was earlier a controversy as to whether cogeneration plants should be exempt from RPOs. In certain states such as Gujarat and Karnataka, cogeneration plants are exempt. However, in states such as Maharashtra, it had previously been held that cogeneration plants are not exempt.

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