

# PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER  
OCTOBER-NOVEMBER 2022



# LEGAL & POLICY UPDATES



## In this Section

Guidelines under Section 63 of the Electricity Act, 2003 for procurement of power on FOO basis the SHAKTI Policy

CERC notifies the effective date of operation of CERC (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022

## Guidelines under Section 63 of the Electricity Act, 2003 for procurement of power on FOO basis the SHAKTI Policy

On October 20, 2022, the Ministry Of Power issued guidelines under Section 63 of the Electricity Act, 2003 for procurement of power on Finance, Own and Operate (FOO) basis under para B(v) of the SHAKTI Policy, with the objective of facilitating the procurement of power on long-term and medium-term basis by the Nodal Agency through transparent bidding to meet power requirement of group of states with coal linkage.

### Key aspects

- Power requirement of group of States can also be aggregated and procurement of such aggregated power can be made by an agency designated by Ministry of Power or authorized by such States on the basis of tariff-based bidding.
- Coal linkages will be earmarked for such agencies by pre-declaring the availability of coal linkage with description, based on which such agency will undertake tariff based competitive bidding for long-term and medium-term procurement of power and recommend grant of these linkages to successful bidders. The methodology in this regard shall be formulated by Ministry of Power.
- These guidelines are being issued under the provisions of Section 63 of the Electricity Act, 2003 for procurement of electricity by States/ distribution licensees (Procurer) for:
  - Long-term procurement of electricity for a period of 12 years to 15 years
  - Medium term procurement for a period of up to 7 years but exceeding 1 year
- For procurement of electricity under these guidelines, the tariff shall be paid and settled for each payment period (not exceeding one month).
- A multi-part tariff structure with separate Fixed Charge and Variable Charge components of tariff shall form the basis for bidding.
- The Base Fixed Charge and the Base Variable Charge specified in the bid shall each be at least 35% of the quoted Tariff.
- The Responsibility for arranging access, payment of transmission charges and for bearing losses in respect of intra-state transmission shall be that of the supplier.

## CERC notifies the effective date of operation of CERC (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022

---

- CERC has notified the effective date of operation of CERC (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022 (**GNA Regulations**) in exercise of powers conferred on it by Regulation 1.2 of the GNA Regulations.
- The GNA Regulations shall come into operation with effect from October 15, 2022, except the provisions of Regulations 23 to 24, 26 to 36, 37.9, 38, 40, and 43, whose date of commencement shall be notified by CERC separately.
- Fresh Applications for Connectivity and GNA and their processing and grant under GNA Regulations shall be made effective from a date to be notified by CERC separately.
- Scheduling and Despatch of electricity, and Billing, Collection and Disbursement of the inter-State Transmission Charges and Losses, shall continue to be based on the quantum of Long-Term Access (LTA), Medium-Term Open Access (**MTOA**) and Short-Term Open Access (**STOA**) of each of the Designated ISTS Customers (**DICs**) and other users of the grid in accordance with the provisions of the CERC (Indian Electricity Grid Code) Regulations, 2010, and CERC (Sharing of inter-State Transmission Charges and Losses) Regulations, 2020, respectively as amended from time to time, till further notification.
- STOA shall continue to be granted under the CERC (Open Access in inter-State Transmission) Regulations, 2008, as amended from time to time and the Detailed Procedures issued thereunder, till further notification.

# RECENT JUDGMENTS



## In this Section

BSES Rajdhani Power Ltd v. Delhi Electricity Regulatory Commission  
And  
BSES Yamuna Power Ltd v. Delhi Electricity Regulatory Commission

Tamil Nadu Generation and Distribution Corporation Ltd v. Central Electricity Regulatory Commission & Ors

MB Power (Madhya Pradesh) Ltd v. Central Electricity Regulatory Commission & Ors  
And  
Central Transmission Utility of India Ltd v. Central Electricity Regulatory Commission & Ors

Parampujya Solar Energy Pvt Ltd & Ors v. Central Electricity Regulatory Commission & Ors

Parampujya Solar Energy Pvt Ltd v. Central Electricity Regulatory Commission & Ors  
Mahoba Solar (UP) Pvt Ltd v. Central Electricity Regulatory Commission & Ors  
Prayatna Developers Pvt Ltd & Ors v. Central Electricity Regulatory Commission  
Chhattisgarh State Power Distribution Company Ltd v. Central Electricity Regulatory Commission & Ors

Wardha Solar (Maharashtra) Private Ltd & Ors v. Central electricity regulatory commission & Ors

Parampujya Solar Energy Pvt Ltd & Ors v. Central Electricity Regulatory Commission & Ors

## BSES Rajdhani Power Ltd v. Delhi Electricity Regulatory Commission

And

## BSES Yamuna Power Ltd v. Delhi Electricity Regulatory Commission

Supreme Court of India | Civil Appeal No(s). 4323 of 2015 & Civil Appeal No(s). 4324 of 2015

### Background facts

- The Appeals were filed by BSES Rajdhani Power Ltd (CA No. 4324 of 2015) and BSES Yamuna Power Ltd (CA No. 4323 of 2015) (**Appellants**) challenging the findings of Appellate Tribunal for Electricity (**APTEL**) in the common judgment and order dated November 28, 2014 (**Impugned Order**) passed in Appeal Nos. 61 and 62 of 2012 (**Tariff Appeals**).
- The Tariff Appeals were filed by the Appellants before APTEL challenging certain findings of the Delhi Electricity Regulatory Commission (**DERC**) in the Tariff Order dated August 26, 2012 for Truing Up of financials for FY 2008-09 and FY 2009-10 and Aggregate Revenue Requirement (**ARR**) for FY 2011-12.
- The Appellants stated that since privatization the ARR determined by DERC was not even sufficient to meet the actual power purchase cost which led to a creation of a huge revenue gap. The Appellants also stated that DERC in repeated disregard to its statutory regulations and its own statutory advice has refused to make periodic increase in the tariff rate.
- The actions of DERC have resulted in a situation where the Appellants are deeply indebted and have been forced to borrow/take loans to fund their day-to-day operations which, in turn, have also dried up leaving the Appellants without adequate monies to pay their suppliers.

### Issues at hand

- The Appellants challenged the findings of APTEL in the Impugned Order on the following issues:
  - Change in methodology in computation of Aggregate Technical and Commercial (AT&C) losses
  - Change in methodology for computation of Depreciation:
  - Disallowance of salary for Fundamental Rules and Supplementary Rules (FR/SR) structure (this issued raised only by BSES Rajdhani Power Ltd
  - Disallowance of interest incurred on Consumer Security Deposit by DPCL
  - Disallowance of Fringe Benefit Tax
  - Reduction in Million Units (Mus) in relation to Enforcement sale for the purpose of calculation of AT&C Loss

## Decision of the Court

- In view of the submissions made by the parties, Supreme Court, while allowing the Acquisition Price as a Change in Law, determined the first issue under:
  - While truing up for the year in question, the DERC has retrospectively sought to take away part of the LPSC revenue by deducting the Financing Cost on LPSC in comparing the actual Collection Efficiency with the projected Collection Efficiency.
  - Allowing the Financing Costs on LPSC revenue and then deducting it from the LPSC revenue would be tantamount to giving by one hand and taking it away by the other. This order of the DERC is contrary to the original MYT determination.
- On the second issue, the Supreme Court reiterated that it is not permissible to amend the tariff order during true up exercise. On the pretext of prudence check and truing up, DERC could not have amended the tariff order.
- On the third issue, the Supreme Court has held that DERC in Tariff Order dated August 26, 2011 has erroneously changed its own methodology at the stage of truing up, by not allowing employee expenses of FR/SR employees as per actuals. The DERC, at the stage of truing up, has changed the methodology and disallowed the actual salary of FR&SR employees, which is impermissible. The DERC in the Tariff Order dated August 26, 2011 has acted contrary to its own undertaking of truing up the impact of employee expenses on account of the Sixth Central Pay Commission Report.
- On the fourth issue, the Supreme Court has held as under:
  - Disallowing interest paid by the Appellants towards Consumers Security Deposit held by DPCL in the ARR of the Appellants is wholly misconstrued. Interest on consumers' deposit which is being paid by the Appellants is a legitimate expense. It is not in dispute that the security deposit was not transferred by the DPCL to the Appellants. However, the Appellants were required to bear the costs of the same. In case, the principal sum on Consumers Security Deposit held by DPCL is transferred to the Appellants with interest, the Appellants would, subject to their legitimate expenditures, retain such interest and benefit of any balance of excess interest received by the Appellants would be passed on to the consumers in tariff. Therefore, there is no merit in the contention of the Respondents that if the interest burden is passed on to the consumers presently, the Appellants would, in effect, receive a double benefit in case they succeed in the writ petition pending before the Court.
  - Appellants are entitled to recover interest on Consumers Security Deposit as held by the DPCL. The Supreme Court directed the DERC to allow the interest on Consumers Security Deposit held by the DPCL and impact thereof to the Appellants.
- On the fifth issue, the Supreme Court reiterated that DERC cannot re-open the basis of determination of tariff at the stage of truing up. Revision or redetermination of the tariff already determined by DERC on the pretext of prudence check and truing up would amount to amendment of tariff order, which is not permissible in law. Truing up stage is not an opportunity for DERC to re-think de novo the basic principles, premised and issues involved in the initial projection of the revenue requirements of the licensee.
- On the sixth issue, the Supreme Court has held that the methodology adopted by DERC is contrary to the settled principles of law that when the law deems a certain imaginary state of affairs as real, DERC would not let its imagination boggle at treating the 100 units as sales. That such imaginary state of affairs must be taken to its logical end and commend the treatment of 100 units as 'sales'. The assessed energy has to be considered as supply by the Appellants in enforcement cases.



### HSA Viewpoint

The Supreme Court has reaffirmed that State Commissions cannot re-open the basis of determination of tariff at the stage of truing up and that truing up stage is not an opportunity for DERC to re-think the basic principles and issues involved in the initial projection of the revenue requirements of the licensees.

## Tamil Nadu Generation and Distribution Corporation Ltd v. Central Electricity Regulatory Commission & Ors

APTEL | Appeal No. 333 of 2022

### Background facts

- The Appeal was filed regarding the agreement signed between the **Appellant** (Tamil Nadu Generation and Distribution Corporation Ltd) and the **Respondents** (GMR Energy Trading Ltd) for a period of 15 years (June 01, 2014 to September 30, 2028) for the purchase of electricity up to the contracted capacity of 150 MW, which was to be supplied from GWEL's Thermal Power Plant

in Maharashtra, for this system, GMR Trading and GWEL entered into an Agreement dated March 01, 2013 for Sale of Power, by way of which, the GWEL agreed to sell 150 MW of power from its Thermal Power Plant to the GMR Trading for the purpose of further sale to the Appellant. In the course of the contract (November-December, 2015), the availability of power was affected due to certain grid disturbance/grid constraints, resulting into present dispute between the TANGEDCO and GMR Trading regarding the cumulative availability of power during that period.

- The Appellant stated that, no party under the contract has any liability in case of disruption in supply due to grid constraint, whereas the Respondents claim that the Appellant is liable to pay tariff for the disruption caused as per PPA and only in case of Force Majeure event the Appellant can be exempted to pay the tariff. The Appellants claim that they informed the Respondents for the error committed while raising the invoices for November 2015 and December 2015. As GMR Trading had not taken these constraints into account while raising invoices for these months, there was a difference in monthly incentive calculation of INR 1,27,375 and INR 11,09,469 for November 2015 and December 2015.
- The Respondents (GMR Trading) vide their response (March 10, 2016) to the disputed notice accepted that the grid constraints accounted to Force Majeure and agreed to account for the grid constraints while calculating the monthly incentive for the months of November 2015 and December 2015. Further, the Appellant issued another notice against the invoices of November 2015, December 2015 and January 2016 for the discrepancies caused in the invoices. The Appellants in the notice also stated that SRLDC has imposed certain restrictions while scheduling the power due to transmission constraints in the months of November 2015, December 2015, and January 2016, which is recognized as Force Majeure event. The Appellants again raised another dispute notice against the Respondent for not following the revised method of calculation in the notice (March 31, 2016). The Respondents vide its response to the disputed notice dated March 31, 2016, claimed that these events does not constitute to Force Majeure under the PPA. The Appellants further claim that the Respondents have retracted its stand taken in response order (March 10, 2016).
- The dispute resulted in filing of a petition by the GMR Trading before the CERC seeking amount claimed in response dated May 13, 2016, along with interest, and seeking a declaration to the effect that the bill disputes raised by the Appellant were illegal and void. The Appellant in its reply to the filed petition mentioned that the grid constraint was a natural Force Majeure event as the Appellant could not get the contracted quantum of power at its delivery point for reasons beyond its control, in any event, grid constraints are also independently recognized as Force Majeure which do not give rise to any liability on either side. Further they stated that as the available capacity had been admittedly reduced during the period of grid constraints, their liability to pay for tariff was also limited to the power it availed.

### Issue at hand

- Whether grid constraint amounts to a natural Force Majeure event under the PPA?

### Decision of the Tribunal

- No tariff is payable by the Respondent only for natural Force Majeure events and the definition of natural Force Majeure event does not include grid constraint according to Article 9.3.1 of PPA
- The submission of the Respondent that grid constraint is a natural Force Majeure event and that it is not liable to pay tariff for that period, is rejected keeping in view the observations made by the supreme Court in the Civil Appeal No.11133 of 2011.
- The Respondent is liable to make payment for capacity charges as per schedule 4 of PPA corresponding to the contracted capacity of 150 MW or declared capacity, whichever is lower, for the period from November 2015 to March 2016 irrespective of grid constraint. The Respondents were also held liable to pay late payment surcharge for the unpaid amount in terms of Article 8.3.5 of PPA and they were directed to make the payment within one month of issuing the supplementary Bill incorporating the late payment surcharge by the Petitioner.



#### HSA **Viewpoint**

The issue of grid constraint being a Force Majeure event has plagued the sector for some time now. In such a scenario, a finding from APTEL will set the course for the time to come. In the present scenario, the PPA expressly provided that any restriction imposed by PGCIL/RLDC/SLDC in scheduling of power due to breakdown of transmission/grid constraint shall be treated as Force Majeure without any liability on either side. Therefore, APTEL has rightly held that neither the procurer nor the seller can be held liable in such circumstances.

# MB Power (Madhya Pradesh) Ltd v. Central Electricity Regulatory Commission & Ors

And

# Central Transmission Utility of India Ltd v. Central Electricity Regulatory Commission & Ors

APTEL | Appeal No.73 of 2018 and Appeal No. 196 of 2019

---

## Background facts

- MB Power (Madhya Pradesh) Ltd (**Generator / MBPMPL**), the Appellant in the first captioned Appeal i.e. Appeal No. 73 of 2018 is a Generating Company, has filed the Appeal-73 against the order passed by Central Electricity Regulatory Commission (**Central Commission**).
- Separately, the Central Transmission Utility of India Ltd (CTU), the Appellant in the second captioned Appeal i.e. Appeal No. 196 of 2019 aggrieved by order dated May 10, 2019 (**Impugned Order-96**) passed by CERC in Petition No.96/MP/2018, filed the second captioned Appeal i.e. Appeal-196.
- The Connectivity agreement was signed for the Generating capacity of 1200 MW with effective date from February 01, 2013 (evacuation capacity for 1122 MW, reduced due to auxiliary consumption) against the scheduled date of commissioning of Unit-1 of the Generating Station as on August 01, 2013 and on December 01, 2013 for Unit-2, through 400 kV transmission system to be built by PGCIL whereas the BPTA was signed for supply of power to the tune of 392 MW for 25 years starting from August 01, 2013 with target beneficiaries as Western Region (WR) and Northern Region (NR).
- As per the relevant provisions of the 2014 Tariff Regulations, a transmission asset can be declared operational/commissioned, if the following is accomplished:
  - The transmission asset is in ‘regular service’
  - The transmission asset has achieved ‘successful trial-run operation’
  - Successful charging of the transmission asset for 24 hours at continuous flow of power, with requisite metering system along with protection system in service
  - Concerned Regional Load Despatch Centre (**RLDC**) has issued certificate endorsing ‘successful trial-run operation’
- In addition to the aforementioned mandatory compliances under 2014 Tariff Regulations, the Central Electricity Authority, which has been statutorily vested with powers and functions to specify technical standards and safety requirements and conditions for installation of meters.
- Also added that CEA (Measures relating to Safety and Electric Supply) Regulations, 2010 (CEA Safety Regulations) mandates that prior to commencement of supply of power, a certificate under Section 43 of the CEA Safety Regulations will be obtained, the Respondent – PGCIL has failed to comply with the aforementioned statutory and regulatory mandates and the Central Commission, has regardless allowed COD and tariff for the transmission asset in utter disregard to the settled law.

## Issues at hand

- The Generator, in Appeal, has challenged the decision of the Central Commission on the following issues:
  - Declaring the commissioning of the Transmission Asset on August 08, 2014 and DOCO on February 25, 2015, directing the Appellant to pay IDC & IEDC to PGCIL from August 08, 2014 to the DOCO (February 25, 2015) of the Transmission Asset.
  - (ii) Directing the Generator to pay transmission charges in relation to the Transmission Asset from February 25, 2015 to May 19, 2015.
- The CTU, in Appeal, has challenged the decision of the Central Commission vide the Impugned Order-96 on the following issues:
  - Directing CTU to pay transmission charges to the Generator from May 20, 2015 till August 26, 2015 for the period for which LTA has been delayed.
  - CTU to return the bank guarantee of INR 60 crore (subsequently reduced to INR 30 crores) to the Generator within 15 days of issuance of the Impugned Order.
  - CTU to reimburse the bank charges paid by the Generator to the issuing bank towards extension of validity period of the bank guarantee beyond November 20, 2015 till the date of release of the said bank guarantee.

## Decision of the Tribunal

- APTEL has allowed for payment of reverse transmission charges by the transmission licensee i.e., PGCIL to the generator MBPMPL, and held that the Connectivity of the Dedicated Transmission

Asset cannot be treated as separate and distinct from the grant of Long Term Access (LTA) for providing end-to-end connectivity for supplying power to the beneficiaries under the LTA and the 'regular service' of the transmission line cannot be achieved without first operationalisation of the LTA.

- With regard to transmission charges to be paid by generator i.e., MBPMPL, APTEL held that MBPMPL will be liable to pay the charges for evacuation of power generated to the pooling substation through the Dedicated Transmission Asset, only to the extent of supplying power to the other beneficiaries, and not the beneficiaries under the LTA. The said issue is remanded back to the Central Electricity Regulatory Commission (CERC) for re-examination.
- APTEL considered the submission of MBPMPL and PGCIL. It has been held that such demand of PGCIL was against the provisions of the Connectivity Regulations and the Detailed Procedure framed thereunder. The Petitioner had to pay bank charges in keeping the BG alive only because of insistence of PGCIL to extend the BGs.
- Having declared that the BGs should have been returned by November 20, 2015, APTEL directed PGCIL to reimburse bank charges towards extension of validity period of the Bank Guarantee kept with the bank for issuance of the Bank Guarantee.
- In terms of the above, the Generator, MBPMPL's appeal was allowed and CTU's appeal was dismissed by APTEL.



HSA  
**Viewpoint**

APTEL's decision is one of its kind where PGCIL/CTU was directed to return the Bank Guarantee to MBPMPL. [HSA Advocates successfully represented MBPMPL in these proceedings](#). The allowance of payment of reverse transmission charges is perhaps the first of its kind. This course setting decision will have far reaching impact on the sector.

## Parampujya Solar Energy Pvt Ltd & Ors v. Central Electricity Regulatory Commission & Ors

## Parampujya Solar Energy Pvt Ltd v. Central Electricity Regulatory Commission & Ors

## Mahoba Solar (UP) Pvt Ltd v. Central Electricity Regulatory Commission & Ors

## Prayatna Developers Pvt Ltd & Ors v. Central Electricity Regulatory Commission

## Chhattisgarh State Power Distribution Company Ltd v. Central Electricity Regulatory Commission & Ors

## Wardha Solar (Maharashtra) Private Ltd & Ors v. Central electricity regulatory commission & Ors

## Parampujya Solar Energy Pvt Ltd & Ors v. Central Electricity Regulatory Commission & Ors

APTEL | Appeal No. 256 OF 2019 Appeal No. 299 of 2019, 427 of 2019, 23 of 2022, 35 of 2022, 131 of 2022, and 275 of 2022

### Background facts

- Batch Appeals were filed by solar power project developers (SPPDs) who were aggrieved by the orders passed by the Central Electricity Regulatory Commission (CERC) mainly for the reason that the orders denied the relief of 'carrying cost' after approving CIL events. A cross-appeal to one of the Appeals, was also filed by the distribution licensees of State of Chhattisgarh raising the issue of jurisdiction exercised by CERC.
- The SPPDs in the Appeals claimed compensation for CIL with reference to GST regime introduced in July, 2017. By the impugned orders, CERC accepted the enactment of laws bringing in GST albeit with the following restrictions:

- Compensation allowed only till the date of commissioning
- Compensation did not include the element of carrying cost on the reasoning that the RE-PPAs do not have any restitutive provision
- Compensation disallowed on operation and maintenance (O&M) expenses on the ground that such services have been outsourced

### Issues at hand

- Whether the provision of CIL in the RE-PPAs includes within its scope, the mechanism to provide all relief in case of a CIL event including 'carrying cost'?
- Whether the restitutionary principle of CIL, as recognized by APTEL and the Supreme Court of India can be denied to the SPPDs after CIL events stand approved?

### Decision of the Tribunal

- 'Carrying cost' compensation as being the additional expenditure incurred by the SPPDs on account of CIL consequent upon enforcement of the GST laws.
- CIL relief post COD as there is no restriction in the RE-PPAs for application of the CIL clause for period prior to the COD. The activities of generation of electricity and its supply, post COD, are bound to include non-recurring expenditure, O&M expenses being one such area.
- The entitlement to CIL compensation during the O&M period in view of the Coastal Gujarat Power Ltd judgement.
- APTEL has directed CERC to take up the claim cases of SPPDs for further proceedings and for passing necessary orders consequent to the findings recorded in the judgment. APTEL further held that it is desirable that decisions in terms of this remit are taken expeditiously, in accordance with law, at an early date, preferably within 4 (four) months of this judgment.

HSA  
**Viewpoint**

APTEL has passed a precedent setting judgment, wherein it has held that the objective of restitution is an inherent aspect of a Change in Law provision in a PPA and the aggrieved party is to be compensated/restituted for time value of money. This decision will help the developers in seeking compensation due to Change in Law event.

## CONTRIBUTIONS BY

Shreshth Sharma | Partner

Nishant Talwar | Senior Associate

Surbhi Pandey | Senior Associate

Molshree Bhatnagar | Partner

Nipun Sharma | Senior Associate

Utkarsh Singh | Associate

Parichita chowdhury | Senior Associate

Allan Massey | Senior Associate

Neel Rahate | Associate

# HSA AT A GLANCE

## FULL-SERVICE CAPABILITIES



**BANKING &  
FINANCE**



**DEFENCE &  
AEROSPACE**



**INVESTIGATIONS**



**PROJECT  
FINANCE**



**RESTRUCTURING &  
INSOLVENCY**



**COMPETITION &  
ANTITRUST**



**DISPUTE  
RESOLUTION**



**LABOR &  
EMPLOYMENT**



**REAL  
ESTATE**



**TAXATION**



**CORPORATE &  
COMMERCIAL**



**ENVIRONMENT,  
HEALTH & SAFETY**



**PROJECTS, ENERGY  
& INFRASTRUCTURE**



**REGULATORY &  
POLICY**



**TECHNOLOGY, MEDIA &  
TELECOMMUNICATIONS**

## GLOBAL RECOGNITION



## CONTACT US



[www.hsalegal.com](http://www.hsalegal.com)



[mail@hsalegal.com](mailto:mail@hsalegal.com)



HSA Advocates

## PAN INDIA PRESENCE

**New Delhi**

Email: [newdelhi@hsalegal.com](mailto:newdelhi@hsalegal.com)

**Mumbai**

Email: [mumbai@hsalegal.com](mailto:mumbai@hsalegal.com)

**Bengaluru**

Email: [bengaluru@hsalegal.com](mailto:bengaluru@hsalegal.com)

**Kolkata**

Email: [kolkata@hsalegal.com](mailto:kolkata@hsalegal.com)