

## Energy Sector – Regulatory Update

### A. Taxing the wind? Madras HC quashes controversial Wind Resource Charge sought to be levied by Tamil Nadu

1. The Madras High Court has struck down the levy of a resource charge of Rs 50 lakh/ MW (**Resource Charge**) imposed by Tamil Nadu Green Energy Corporation Limited (**TNGECL**), on CTU connected wind power projects proposed to be set up in Tamil Nadu. The High Court, by way of its judgement<sup>1</sup>, held the imposition of the Resource Charge to be arbitrary, discriminatory, and violative of constitutional principles, including Article 14, Article 19(1)(g) and Article 301 of the Constitution. The Wind Independent Power Producers Association alleged that the said charges targeted CTU-connected projects while exempting STU-connected projects, creating an unequal playing field.
2. After scrutinising TNGECL's jurisdiction and authority to levy such charges, particularly in light of the Electricity Act, 2003 (**Electricity Act**), which has de-licensed electricity generation, the High Court held that since state governments do not have the competence to levy taxes on generation of electricity, the levy of Resource Charge was against Article 265 of the Constitution of India, which prohibits the levy of taxes without the authority of law.
3. This judgement comes in the wake of increasing attempts by State Governments to impose resource-based levies in the power sector, including the Himachal Pradesh and Uttarakhand state governments, which have levied water cess on



hydro-electric projects. The levy of Water Cess in Himachal Pradesh under the Hydropower Generation Act, 2023, has been struck down by the High Court of Himachal Pradesh<sup>2</sup>, wherein the court directed the State Government to refund the levies collected. Although the Himachal Pradesh Government has challenged the said judgement before the Supreme Court, only the direction to refund the water cess collected thus far has been stayed<sup>3</sup>.

4. The levy of water cess, in these cases, has been challenged on the ground that the cess is unconstitutional, citing violations of constitutional principles, including legislative competence and federalism. A similar challenge is also pending before the Jammu and Kashmir High Court in respect of a similar levy on hydro projects set up in the state.

<sup>1</sup> Judgement of the Hon'ble Madras High Court dated December 17, 2024, in *Wind Independent Power Producers Association v. State of Tamil Nadu*, W.P. Nos .26250 & 26253 of 2024.

<sup>2</sup> Judgement of the Hon'ble High Court of Himachal Pradesh dated March 5, 2024 in *NHPC Limited v. State of Himachal Pradesh & Ors.* 2024 SCC OnLine HP 533

<sup>3</sup> Order dated May 17, 2024 of the Hon'ble Supreme Court in State of *Himachal Pradesh & Ors. v. NHPC Limited & Anr.*, SLP (C) Nos. 10443 of 2024.

5. The judgement of the Madras High Court reaffirms settled constitutional principles, clarifying that States do not possess the jurisdiction to impose taxes on generation of electricity.

## B. Relevance of arbitration in the power sector – APTEL revisits the law

1. The Supreme Court has upheld<sup>4</sup> the APTEL judgement<sup>5</sup> in Appeal No. 309 of 2019, rekindling the relevance and application of arbitration in respect of regulatory disputes in the power sector.
2. For over a decade, the Essar judgment<sup>6</sup> has held that all disputes between a licensee and a generating company, in respect of and subject to Section 86(1) of the Electricity Act, can only be resolved by the State Commission or an arbitrator appointed by it.
3. This case has reignited the jurisdictional debate between the Electricity Act and the Arbitration and Reconciliation Act, 1996 (**Arbitration Act**). In this case, the APTEL was deciding on the validity of CERC's reasoning in declining to refer to arbitration a dispute arising out of termination of a PPA between a generating company and a distribution licensee. Relying on the Essar judgement, the CERC held that the dispute between the parties fell within the realm of Section 79(1)(a) of the Electricity Act, and, therefore, is not arbitrable. What the APTEL had to decide on was whether a dispute, such as termination of PPA, could be referred to arbitration by CERC under Section 79(1) of the Electricity Act, read with Section 8(1) of the Arbitration Act, if the PPA contained an arbitration clause and on account of the CERC being a judicial authority in terms of Section 8(1).
4. While the Hon'ble Supreme Court, in the Essar judgement, merely highlights the special character of the Electricity Act qua the Arbitration Act, the APTEL, in this case, has not only explained the meaning of tariff and non-tariff disputes, but has also clarified

the scope of such disputes. The APTEL has held that:-

- a. All matters having a bearing on tariff of a generating company would constitute 'tariff disputes', namely disputes related to Change in Law, delayed completion of projects, invocation of Force Majeure events, etc.;
  - b. Matters impacting tariff of a generating company directly would fall solely within the jurisdiction of the CERC under Section 79(1) of the Electricity Act;
  - c. Disputes related to termination or breach of contract, which do not impact tariff either directly or indirectly, can be considered as non-tariff related disputes, and would be referable to arbitration;
5. Whereas the Essar judgement does not explicitly comment on the arbitrability of issues, whether tariff or non-tariff, in view of provisions of clauses (a) to (d) of Section 79(1) of the Electricity Act, the APTEL, in this case, held that only non-tariff disputes can be referred to arbitration, and that the meaning of 'tariff disputes' may be wider than previously understood.

## C. APTEL decides the AP GBI deduction challenge – reaffirms sanctity and finality of generic tariff orders

1. In *Green Infra Wind Solutions Limited vs. APERC*<sup>7</sup> critical questions were raised on Andhra Pradesh Electricity Regulatory Commission's (**APERC**) authority to amend a generic preferential tariff order for wind power generation mid-way through its term. The said tariff order had originally fixed a levelised tariff for 25 years and incorporated this in the PPA for wind power projects.
2. However, APERC's decision to amend the generic tariff by factoring in Generation Based Incentive (**GBI**), provided by the Government of India, was questioned before the APTEL, on the ground that such amendment violated the Electricity Act,

<sup>4</sup> Order dated September 23, 2024, in *Damodar Valley Corpn. v. M.P. Power Management Co. Ltd.*, C.A. No. 10480 of 2024.

<sup>5</sup> Judgement dated August 28, 2024 of the Hon'ble APTEL *M.P. Power Management Co. Ltd. v. Damodar Valley Corpn.*, 2024 SCC OnLine APTEL 76.

<sup>6</sup> Judgement dated March 13, 2008 of the Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*, (2008) 4 SCC 755

<sup>7</sup> Judgement dated December 19, 2024 of the Hon'ble APTEL in Appeal No. 284 of 2018.

particularly Section 86(1)(e) of the Electricity Act, which mandates promotion of electricity generation from renewable sources.

3. In its judgement dated December 19, 2024, APTEL found APERC's decision to amend the generic tariff order mid-way and retrospectively deduct GBI benefits to be violative of the principles of regulatory stability and predictability, essential for renewable energy promotion. While allowing the appeal, APTEL also highlighted that such retrospective amendment of tariff undermines the objectives of the Electricity Act, and the GBI scheme.
4. The APTEL has directed AP to refund the GBI amounts recovered, with simple interest. This decision reinforces that tariff orders must be clear, stable, and adhere to existing regulatory frameworks. This judgment further recognises that the GBI benefit, as indicated in the GBI scheme itself, is to be considered over and above the generic tariff determined by the State Commission.

## D. Karnataka High Court declares Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2022, unconstitutional

1. In 2022, the Central Government had framed the Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules 2022, (**GEOA Rules**), under the Electricity Act, to *inter alia*, provide for uniform Renewable Purchase Obligation on all obligated entities, the establishment of a nodal agency, regulating the banking of energy, etc.
2. Certain hydro power generators, which had entered into agreements for wheeling and banking with transmission and distribution licensees of Karnataka, challenged it before the Karnataka High Court, by way of a writ petition<sup>8</sup>. The said Writ Petition also challenged the validity of the Karnataka Regulatory Commission (Terms and Conditions for Green Energy Open access) Regulations, 2022 (**KERC Regulations**), notified by the Karnataka Electricity Regulatory Commission (**KERC**) in furtherance of the GEOA Rules.



3. The Writ Petitioners alleged that neither did the Central Government have the legislative competence to frame the GEOA Rules, nor did they have the power to issue a directive to the State Commissions and act as a supervisory body to them.
4. While partly allowing the writ petitions, the Karnataka High Court, by way of its judgement<sup>9</sup> in the said writ petition, quashed the GEOA Rules and the KERC Regulations and directed KERC to frame appropriate regulations for granting open access to green energy generators and consumers. The High Court held that the National Electricity Policy, 2005, framed by the Central Government, provides that only the State Commission may exclusively regulate and administer the working of the electricity sector. The Central and the State Government are only required to provide a supportive role. Moreover, since the power to administer and monitor open access is conferred on the State Commission, the High Court found that it is obvious that the Central Government does not have the power to frame any rules. As such, the High Court directed KERC to be guided by the National Electricity Policy and the Tariff Policy, framed by the Central Government, and to independently consider the interests of all stakeholders before framing regulations.
5. While this judgement reiterates the exclusive jurisdiction of the State Commissions to frame regulations for the State, pursuant to the Electricity

<sup>8</sup> W.P. (C) 11235 of 2024 & batch.

<sup>9</sup> Judgement dated December 20, 2024 of the Hon'ble High Court of Karnataka in the case of **Brindavan Hydropower Pvt. Ltd. v. Union of India**

Act, it also raises concerns regarding the validity of other such rules notified by the Central Government from time to time (for example the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021, and the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022), and any regulations framed by the State Commissions in furtherance of such rules.

6. In compliance with the High Court direction, the KERC has recently published the Draft Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access (OA)) Regulations, 2025, seeking comments and objections from the public.

## **E. Andhra Pradesh High Court clarifies that Solar Projects set up pursuant to composite EPC contracts under the original GST rate schedule are liable for 5% GST and such contracts do not amount to “Works Contracts”**

1. The High Court of Andhra Pradesh has held<sup>10</sup> that solar power generating systems are not embedded in the earth to bring it within the meaning of immoveable property, attracting a levy of 18% GST applicable on “Works Contracts”, even if they are set up through composite EPC contracts.
2. The controversy arose because the tax authority contended that the solar power generating system was immoveable property, which would fall within the ambit of the definition of ‘works contract’ under Section 2(119) of the GST Act, 2017, and thereby attract 18% GST. The central issue was whether the transaction, i.e., supply of solar modules, should be treated as simple composite supplies or as works contract.
3. The High Court noted that the distinction between ‘works contract’ and a ‘composite supply’ would be whether the end product handed over to the contractee, was moveable or immoveable property. The High Court held that the solar power generation system was a movable property, but the supply from the solar generating power station was a composite supply, and thus, it would not amount to a works

contract. Therefore, it would attract GST at the rate of 5%.

4. While there are various conflicting rulings passed by the Authority for Advance Rulings (**AARs**) on this issue, this appears to be the first instance where a constitutional court has taken a view on this subject. This ruling may be helpful for generators who may be facing tax demand for deficit payment of GST. However, the Ministry of Finance, Government of India, has removed this ambiguity prospectively, with effect from December 31, 2018, by suitably amending the GST rate notifications.

## **F. CERC rejects adoption of tariff discovered through e-reverse auction for SECI’s 1000 MWh BESS Project**

1. The CERC, by way of a recent Order<sup>11</sup>, has rejected Solar Energy Corporation of India’s (**SECI**) petition to adopt tariffs for its 500 MW/ 1,000 MWh standalone Battery Energy Storage Systems (**BESS**) pilot projects.
2. CERC cited inordinate delay in signing of the Battery Energy Storage Purchase Agreement (**BESPA**) and a sharp decline in tariffs of BESS projects discovered in the intervening period, rendering the tariffs proposed by SECI *not aligned to the market*.
3. The matter centred around SECI’s initiative to implement a standalone BESS on a pilot basis. Subsequent to an e-reverse auction conducted by SECI, in accordance with the Guidelines for Procurement and Utilization of Battery Energy Storage Systems as part of Generation, Transmission and Distribution assets, along with Ancillary Services 2022, issued by the Ministry of Power (**BESS Guidelines**), certain BESS developers were awarded Letter of Awards for setting up the BESS projects.
4. While the CERC did observe that the bidding process was conducted in a transparent manner, it found the proposed tariff to be misaligned with prevailing market conditions on account of (i) significant delays in the implementation of the project, and (ii) falling prices of battery modules.

<sup>10</sup> Judgment dated January 10, 2025 of the Hon’ble High Court of Andhra Pradesh, in *Sterling And Wilson Private Limited v. The Joint Commissioner and Ors.*

<sup>11</sup> Order dated January 2, 2025 in *Solar Energy Corporation of India Limited v. JSW Renew Energy Five Limited & Ors.*

5. The CERC held that the tariff proposed to be adopted will give an undue advantage to the BESS developer (by taking advantage of further reduction in the price of the BESS) and will be against public interest, and hence, rejected the adoption of the tariff so discovered. In this regard, the CERC relied on a judgement<sup>12</sup> of the Hon'ble Supreme Court to hold it has the power to examine whether the prices quoted are market-aligned or not while adopting a completely discovered tariff.
6. While it appears that the Competitive Bidding Guidelines<sup>13</sup>, referred in the aforesaid Supreme Court judgement, contained provisions enabling the evaluation committee to reject all price bids if the rates quoted were not aligned to the prevailing market prices – in this case, however, the BESS Guidelines does not seem to prescribe such a provision. It instead states that after the conclusion of the bidding process, the Evaluation Committee constituted for evaluation of bids would have to certify the propriety of the bidding process. Hence, it seems that the BESS Guidelines, unlike the Competitive Bidding Guidelines, do not contain any provision where the bid may stand to be rejected on account of their rates not being in alignment with the market.
7. The CERC has, however, clarified that it is conscious that price decline post bidding cannot generally be a ground for rejecting an earlier bidding process and price discovery.
8. This clearly seems to be one of the rare instances where the CERC has rejected the adoption of a competitively discovered tariff, ostensibly on the grounds of change in market conditions since the conclusion of the auction process.

The matter is currently pending adjudication before APTEL.

## F. Amendment to CERC (Cross Border Trade of Electricity) Regulations, 2024

1. CERC published the draft Central Electricity Regulatory Commission (Cross Border Trade of Electricity) (Second Amendment) Regulations, 2024, on December 31, 2024. These amendments aim to address recent regulatory developments and align the CERC (Cross Border Trade of Electricity) Regulations, 2019, with the updated guidelines and requirements under the CERC (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022 (**GNA Regulations**).
2. Some of the key changes contemplate streamlining the application process for connectivity, GNA and T-GNA for cross-border transactions, and introducing a uniform application fee for GNA and T-GNA applications. The draft regulations also contain provisions for granting permission to Indian generators supplying electricity exclusively to neighbouring countries for constructing dedicated transmission lines for such supply.
3. By aligning with the GNA Regulations and MoP guidelines, these amendments seek to ensure a cohesive regulatory framework and promote interaction with regional energy markets.

<sup>12</sup> Judgment dated January 8, 2024 of the Hon'ble Supreme Court in **Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd.**, (2024) 8 SCC 513.

<sup>13</sup> Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees notified by the Government of India vide Notification dated January 19, 2005.

# regulatory update

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