JURISPRUDENCE & REGULATORY PERSPECTIVE :

Important judgments pertaining to electricity sector

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PRINCIPLES OF INTERPRETATION OF STATUTES

Key Principles

- Words are not scientific symbols having any precise or definite meaning, and language is but an imperfect medium to convey one's thought, much less of a large assembly consisting of persons of various shades of opinion.
- The function of the Courts is only to expound and not to legislate.
- A Statute has to be interpreted /construed according to the intent of the legislation. If a statutory provision is open to more than one interpretation, the court has to choose the interpretation which represents the true intent of legislature.
- Intention of legislature must be found in the words used.
- Statute must be read as a whole in the context.
- Statute must be construed to make it effective and workable.
- If meaning is plain, effect must be given to it irrespective of consequences.

Key Principles

- Avoid addition and substitution of words. Avoid rejection of words.
- The words of a statute, if there is a doubt about their meaning, are understood in sense in which they harmonize with the subject of enactment and its objective.
- Courts have declined to go by letter, when it frustrates the patent purpose of the Statute.
- When more than one interpretation is feasible, the Courts prefer that which remedy and supress the mischief.
- If language used is capable of bearing more than one construction, then have regard to consequences. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly and uncertainty has to be rejected.

IMPORTANT JUDGEMENTS OF SUPREME COURT

CASE - 1

CIVIL APPEALS NO. 3902 OF 2006 AND BATCH, (2010)4 SCC 603, PTC INDIA V CERC

Facts

- CERC issued Regulations fixing ceiling of trading margin of 4 P/Kwh on inter-state trading of electricity

- PTC challenged validity of these Regulations inter alia on the ground that Commission could cap trading margin by issuing an order U/S 79 (1)(j) and not by issuing Regulations U/S 178

- APTEL rejected the appeal on grounds that it did not have jurisdiction U/S 111 and 121 to examine validity of the Regulations

- PTC filed an appeal U/S 125 before the Supreme Court

Section 178(1)- The Central Commission may, by notification make regulations consistent with this Act and rules generally to carry out the provisions of this Act.

Section 178(2)(ze) any other matter which is to be , or may be specified by regulations.

Issues

- Whether APTEL has jurisdiction U/S 111 of EA, 2003 to examine the validity of CERC Regulation on Trading Margin framed U/S 178?
- Whether Parliament has conferred power of judicial review on APTEL U/S 121?
- Whether Capping of trading margin could be done by CERC by making regulations U/S 178?

Key Decisions

- Wide powers has been conferred on CERC U/S 178(1) and 178(2) (ze) to frame Regulations of general application. Regulations can be made provided they are consistent with the provisions of the Act and made for carrying out the provisions of the Act.
- CERC can therefore, issue Regulations even though it is equally open to CERC to issue specific order U/S 79(1)(j).
- Making of Regulations U/S 178 became necessary because such a Regulation has the effect of interfering and overriding existing contractual relationship between regulated entities.
- Regulation U/S 178 is in the nature of subordinate legislation. Such Subordinate legislation can even override existing contracts including PPA's which have got to be aligned with the Regulation U/S 178.
- The word "order" in section 111 cannot include Regulations made U/S 178.
- Section 121 does not confer power of judicial review on the Tribunal.
- Validity of Regulations therefore cannot be challenged by way of appeal U/S 111.
- Only judicial review of the regulations can be sought by filing writ petition under Article 226 in High Court. However, APTEL can interpret the Regulations in exercise of its appellate power.

Case-2

Civil Appeal No. 179 of 2017 - Nabha Power Ltd. v PSPCL & another.

Facts

- Nabha Thermal Power Station developed through competitive bidding u/s 63.
- Competitive bidding based on fixed charges and Station Heat Rate.
- Clarification given by the bidder during competitive bidding process regarding washing of coal was *"Washing to be arranged by the successful bidder".*
- Plant commissioning without last mile rail connectivity due to delay in procurement of land for railway siding.
- After commissioning of power plant, there was dispute between the parties regarding cost of washing coal, GCV of coal to be used for calculating energy charges, cost of road transportation between colliery and washery and road transportation required at the plant due as the railway siding was not ready.

- NPL filed petition before the State Commission.

- State Commission dismissed the petition.

- APTEL also upheld the State Commission’s order.

Issues

- Whether the washing cost has to be considered as part of Fuel Cost while calculating energy charge?
- Whether road transportation cost has to be considered as part of Fuel Cost?
- Whether GCV of coal is to be taken “as billed” or “as received” at the power project?
- Whether certain essential costs incurred viz., transit & handling losses, liaising charges etc., are to be considered as part of Fuel Cost?

Rulings relied and findings

“It is often said that the courts only imply a term in a contract when it is reasonable and necessary to do so in order to give business efficacy to the transaction.”

“In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen.”

“I cannot agree … that it is open to us in the court at the present day to imply a term because subjectively or objectively we as individual judges think it would be reasonable so to do. It must be necessary in order to make the contract work as well as reasonable so to do, before the court can write into a contract as a matter of implication some term which the parties have themselves, assumedly deliberately, omitted to do.”

- “Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. *In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied:* (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.”

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case?', they would both have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear."

In ***The Union of India vs. M/s. D.N. Revri & Co. andOrs.12***, P.N. Bhagwati, J. speaking for the Bench of two Judges said in para 7 as under:

"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation….."

FINDINGS

- The contract did not provide for a fixed energy charge, or a periodic revision of that charge, as the formula for energy charge was designed in such a manner that it would be influenced by the actual cost of coal. Thus, the basis is the actual cost incurred with regards to the coal.
- FCOALn is the weighted average actual cost to the Seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project before the beginning of month “m” (expressed in Rs./MT in case of domestic coal).
- PCVn is the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month “m” expressed in kcal/kg.”

The word ‘to’ obviously would have reference to transporting while the word ‘at’ would have relationship with unloading since it would be ‘transporting to’ and ‘unloading at’. Not only that, all the three, i.e., purchasing, transporting and unloading, have a reference to “the Project.” Thus, the definition of FCOALn is the weighted average actual cost incurred by the appellant of purchasing the coal and transporting it to the project site and thereafter unloading the coal at the project site.

- The fact that the property in coal passed on to the appellant vis-à-vis SECL, on delivery being taken at the mine-end would not change the definition of coal pricing as is required for the purposes of calculation of the tariff.

"**(e) Reddendo Singula Singulis**

The rule may be stated from an Irish case in the following words. Where there are general words of description, following an enumeration of particular things such general words are to be construed distributively, reddendo singular singulis; and if the general words will apply to some things and not to others, the general words are to be applied to those things to which they will, and not to those to which they will not apply; that rule is beyond all controversy. Thus, in the sentence: 'If any one shall draw or load ant sword or gun' the word 'draw' is applied to 'sword' only and the word 'load' to gun only, because it is impossible to load a sword or draw a gun."

The prior activity of ‘washing’, before receiving the coal at the project site would be part of the pricing of coal and cost of purchasing the same. The appellant did seek to obtain clarity on the issue of the quality of coal to be used, to which the first respondent did answer that it would have to be ‘washed’ coal. . In fact, this was in conformity with the Notification issued by the MoEF since the travel distance was more than 1,000 kilometers. The reference to coal in the formula would, thus, be only a reference to ‘washed’ coal and not to ‘unwashed’ coal.

“*Actual definition in the PPA*: FCOALn is the weighted average actual cost to the Seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project.

PSPCL’s Interpretation: FCOALn is the weighted average actual cost to the Seller of purchasing ***unwashed*** coal, transporting ***washed*** and unloading the ***washed*** coal most recently supplied to and at the Project”

- The fact that the clarification made it clear that the appellant had to “arrange” the washing of coal, did not imply that the cost of washing the coal had to be borne by the appellant, as the energy charge formula alone would have to be referred to for the purposes of calculation of the coal price.
- The principle of ‘business efficacy’ would also require us to read the ‘Monthly Energy Charges’ formula in a manner as would be normally understood.
- ‘Washed’ coal is a necessity for the project as a quality requirement for the formula envisaging the requisite quality of coal to be obtained at the project site and, thus, including all the relevant costs up to that quality. The mere term ‘coal’, therefore, would have to mean ‘washed’ coal, as no other type of coal could be used in the matter at hand.

- Road transportation costs at the colliery and last mileage at the power plant cannot be excluded, as the transportation costs to the project site have to be compensated to the appellant. It is also a matter of necessity, since the railway siding had not reached the project site due to some complications in acquisition of land.
- The plea of the first respondent that despite the absence of rail siding, if the appellant proceeded to operate the plant, that was their ‘business decision’, cannot be sustained for the reason that the project was set up for obtaining electricity for the first respondent and as a prudent business decision for both, it would be required to operate the plant at the earliest. The complication in obtaining land by the State Government, cannot imply that the project should be on hold for two years, causing loss to everyone and lack of availability of electricity.

- Application of the formula for energy charge which provides for PCVn as the weighted average Gross Calorific Value delivered to the project. This Calorific Value of coal would have to be, thus, on the same parameter determined at the project site.

- The formula contains only three elements and thus, the appellant cannot be permitted to plead that any other element, other than those would also incidentally form a part of the formula.

CASE - 3

CIVIL APPEAL NO. 5479 OF 2013 (SESA STERLITE V OERC)

Issues

- Whether Sesa Sterlite being a developer of notified SEZ and having the only unit in SEZ has the status of Deemed Distribution Licensee or it has to get a distribution license from SERC U/S 14?

- Whether such Deemed Distribution licensee is liable to pay Cross Subsidy Surcharge to the Discom?

- APTEL held that Sesa Sterlite is not a deemed distribution licensee and has to pay CSS.

Key decisions

Supreme Court upheld the judgment of APTEL and held as under

- Distribution licensee has to operate, and maintain a distribution system and supply power to the consumers. By merely being authorized to operate and maintain a distribution system as a deemed licensee would not confer the status of distribution licensee to a person. In this case the entire power is meant to be consumed by the Appellant for its own use and not for the purpose of distribution and supply/sale to consumers.
- The legal fiction created by notification under SEZ Act, the developer of SEZ who distributes electricity can be deemed for a distribution licensee. The legal fiction cannot go further to make a person who does not distribute electricity to consumers, a distribution licensee.
- CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access, the Consumer would pay tariff applicable for supply which would include an element of CSS. Consumer situated in an area is bound to contribute to subsidizing a low end consumer if he falls in a category of subsidizing consumer.
- Surcharge is meant to compensate the distribution license for the loss of cross subsidy that the distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.

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CASE - 4

CIVIL APPEAL NO. 7303-7704 (BHARAT JHUNJHUNWALA V UPERC)

Facts

- One individual, not being a consumer of the distribution licensee, filed an appeal against the order of UPERC regarding tariff for power to be procured by the State Distribution licensees from an IPP (hydro project) located in Uttrakhand.

- APTEL held that the Appellant was not a “person aggrieved“ by the order of the State Commission as it is not a consumer of UP Discoms. Appellant argued that it had filed a PIL. APTEL dismissed the application on the ground that PIL is not maintainable. It was challenged by the individual before SC. SC upheld the decision of APTEL.

SC dismissed the Appeal filed against the order of APTEL as Public Interest Litigation is not maintainable before the Regulatory Commission.

CASE - 5

(2002)8 SCC 715 (WBERC V CESC)

Issues

- Whether the audited accounts of the regulated entity binding on the Commission?

- High Court in the Appeal filed by the licensee came to conclusion that since there is no challenge to the accounts of the company by the consumers, the said accounts should be accepted by the Commission.

Key Decisions

- There may be number of instances when an account may be genuine and may not be questioned, yet the same may not reflect good performance of the Company or may not be in the interest of consumers. Therefore, there is an obligation on the Commission to examine the accounts.

- The accounts of the Company are not ipso facto binding on the Commission. However, the Commission has to be give weightage to such accounts and should not differ from the same unless for good reasons permissible in the 1998 Act.

CASE - 6

CIVIL APPEAL NO. 3510-3511 DECIDED ON 6.5.2009 (TATA POWER V MERC)

Issues

- Whether the Commission while applying the provisions of Sec. 86(1)(b) could also take recourse to Section 23 and 60 thereof?
- Whether equitable allocation of power generated by a generating company permissible?

Section 23. Directions to licensees- If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

Section 60. Market Domination- The Appropriate Commission may issue such directions as it may consider appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.

Statement of objects and Reasons- Generation is being delicensed and captive generation is being freely permitted.

Key Decisions

- A statute must be construed having regard to Parliamentary intent. For that purpose it is open for the Court to not only to take into considerations the history of legislations including the mischief sought to be remedied.
- Commission not empowered to issue directions to the generating company to supply electricity to a distribution licensee who has not entered into any PPA with it.
- If by reason of a provision of a statute the generating companies are excluded from the licensing provisions, one of the principal tool of interpretation is that the mischief which was sought to be remedied may not be brought back by a side door. It has to be borne in mind that if the licence raj is brought back through the side door or regulations seeking to achieve the same purpose which the Parliament intended to avoid, there would be a possibility of mis-interpretation and mis-application of statute.
- Even though generating company is free to enter into an agreement, and in particular long term agreement with the Discom, terms and conditions of such agreement are subject to grant of approval of Commission.

CASE - 7

CIVIL APPEAL NO. 5881 OF 2016, ALL INDIA POWER ENGINEER ASSOCIATION V SASAN POWER

Facts

- Reliance Power Ltd. selected successful bidder through Competitive Bidding U/S 63 to develop Sasan UMPP (6x660MW).
- COD as per PPA to be achieved only by operating a unit at least on 95% rated capacity for 72 hours and completing the specified tests.
- First year of the agreement was from the date of COD to 31st March of the FY.
- Sasan sought permission from RLDC on 27th March, 2013 to carry out commissioning test at full load from 27th March to 30th March. Permission denied by RLDC for testing of unit at 660 MW due to low demand due to Holi festival. Sasan carried out commission test at 101 MW from 27th to 30th. Sasan declared the COD of unit at 101 MW on 30.3.2013 after Independent Engineer issued test certificate. Beneficiaries also accepted COD at 101 MW and allowed Sasan to schedule the Unit at 101 MW.

Facts

- RLDC filed a Petition before CERC.
- CERC in its order set aside the COD at 101 MW and also recorded some adverse remarks against the Independent Engineer. This order was challenged by Sasan Power and the Independent Engineer.
- APTEL set aside the order of CERC taking the acceptance of COD by the beneficiaries as waiver and held that no public interest is involved.
- This order was challenged in the Supreme Court.

Key Decisions

- Waiver is an intentional relinquishment of a known right and that, therefore, unless there is a clear intention to relinquish the right that is fully known to a party, a party cannot be said to waive it.
- If any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest.
- In this case waiver resulted in increase in cost of electricity which is not in public interest.
- The test certificate issued by the Independent Engineer was not as per the terms of the PPA.
- SC Set aside the order of APTEL

CASE - 8

CIVIL APPEAL NO. 5875 OF 2012, GUVNL V TARINI INFRASTRUCTURES LTD & OTHERS AND 1973-1974 OF 2014, GUVNL V JUNAGARH POWER PROJECTS LTD.

Facts

- In Tarini, tariff agreed in the PPA was with the understanding that the power was to be evacuated at nearest sub-station of STU at a distance of 4 Km but later on it was realized that the distance to sub-station was 23 Km. The generator therefore sought redetermination of tariff which was not accepted by SERC.
- In Junagarh, the tariff incorporated in PPA was as per the generic feed in tariff for Biomass Energy Projects determined by the State Commission. The energy charges were determined by the Commission on the basis of base cost of bio-mass with annual escalation. However, biomass fuel price increased substantially making the operation of the biomass plant unviable. Commission allowed increase in tariff on account of air cooled condenser (one of the prayers of the generator) but refused to intervene with respect of fuel price as it was a concluded PPA.
- APTEL overruled the view taken by SERC as it felt that review of tariff in exercise of statutory power vested in the SERC was fully justified.

Key Decisions

- The power of tariff determination/fixation is statutory as held in Transmission Corporation of Andhra Pradesh v Sai Renewable Power Pvt Ltd. The tariff incorporated in the PPA is tariff determined by the Commission in exercise of its statutory power.
- It is not possible to hold that the tariff agreed between the parties though finds mention in contractual context, is the result of an act of volition of parties which can, in no case, be altered except by mutual consent. Rather, it is determination made in exercise of statutory powers which got incorporated in a mutual agreement between the parties.
- Generation, transmission, distribution and supply of electricity required to be conducted on commercial principles; while the consumers' interest is to be safeguarded, recovery of cost of electricity in a reasonable manner has to be ensured (Section 61 referred).

Key Decisions

- Not only tariff fixed is subject to periodic review, furthermore the Tariff Regulations provide for taking into consideration FM events. FM is considered as an uncontrollable factor.
- When tariff order itself is subject to periodic review, it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for 20 years, as envisaged in the PPA in Junagarh case.
- Modification of tariff on account of air cooled condenses and denying the same on account of biomass price is itself contradictory.
- Power to regulate tariff u/s 86(1)(b) -As held in VS Rice & oil mills & others v State of AP and K. Ramanathan v State of TN and DK Trivedi v State of Gujarat, power of regulation is indeed of wide import.

Key Decisions

- In view of Section 86(1)(b), the Court must lean in favour of flexibility and not read inviolability in terms of the PPA in so far as tariff is stipulated therein as approved by the Commission.
- It would be a sound principle of interpretation to confer such power if public interest dictated by surrounding events and circumstances require a review of tariff. The facts noted in these cases would suggest that court must lean in favour of such a view.
- SC differentiated the findings made in GUVNL v Emco Ltd and Bangalore Electric Supply Co. v Konark Power Projects Ltd.

CASE-9

Civil Appeal No. 1220 of 2015 dated 02.02.2016, GUVNL v Emco Ltd

Facts:

- GUVNL and Emco entered into long term PPA at a tariff determined by the State Commission for solar projects to be commissioned up to 31.12.2011(First tariff order) with the provision that if the project is delayed, the tariff as effective on the date of commissioning of the project (Second tariff order) or the above tariff, whichever is lower, will be applicable.
- The first tariff order determined tariff with accelerated depreciation but gave choice to the generator to approach the Commission to determine the tariff, if it did not avail benefit of accelerated depreciation. In the second tariff order the Commission determined tariff with and without accelerated depreciation.
- Project was commissioned after 31.12.2011. Emco wanted tariff without accelerated benefit, as per second tariff order. State Commission allowed. APTEL upheld the order of the Commission.

Key Decisions

- PPA did not entitle Emco to the tariff as determined by the Commission by the Second tariff order.
- Availing of option under IT Act whether or not avail accelerated depreciation does not relieve the power producer from the contractual obligations incurred under the PPA.
- Power Producer has freedom either to accept the price offered by the DISCOM or not before PPA is entered into. But such freedom is extinguished after PPA is entered into.
- Appeal decided in favour of GUVNL.

CASE - 10

CIVIL APPEAL NOS. 5399-5400 OF 2016 ENERGY WATCHDOG V CERC & OTHERS AND BATCH (CGPL/ADANI POWER COMPENSATORY TARIFF CASE)

Facts

- Promulgation of Indonesian Regulations on coal export resulted insubstantial increase in cost of imported coal for power projects which had entered into agreements with DISCOMs at a competitively bid tariff u/s 63.
- CERC granted compensatory tariff exercising its regulatory powers and also held that it had jurisdiction over Adani Power being a composite scheme supplying power to more than one State.
- APTEL upheld the finding as far as jurisdiction of CERC is concerned but held that Commission had no power to regulate tariff determined u/s 63. However, it held that the cases relating to Indonesian Regulations were covered under FM clause under the PPA and directed CERC to determine compensation under FM clause.
- As regards change in National Coal Distribution Policy and advisory to the Central Commission to consider to pass on the difference in price of imported coal and indigenous coal in tariff in projects having PPAs u/s 63, APTEL held that change in policy of the Government would not be construed as “Change in Law”.

Key Decisions

- The State Commission's jurisdiction is only where generation and supply takes place within the State. The moment generation and sale takes place in more than one State, The Central Commission becomes appropriate Commission. The "Composite Scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.
- General regulatory power of the Commission to regulate u/s 79(1)(b) is the source of power to regulate, which includes power to determine or adopt tariff. Sections 62 & 63 deal with "determination" of tariff, which is part of "regulating" tariff.
- In a situation where guidelines issued by GOI u/s 63 cover the situation, the Central Commission is bound by these guidelines and must exercise its regulatory functions, albeit u/s 79(1)(b), only in accordance with these guidelines. It is only in a situation where there are no guidelines framed at all or guidelines do not deal with a given situation that Commission's general regulatory powers u/s 79(1)(b) can be used.

Key Decisions

- Change in Indonesian Law would not qualify as change in law under GOI guidelines read with PPA but change in Indian law certainly would.
- Both the letter dated 31.07.2013 by GOI to CERC regarding shortage in domestic coal availability and consequent change in NCDP and the revised tariff policy are statutory documents being issued under Section 3 have force of law.
- Set aside APTEL's finding regarding FM. Under FM, there must be something which partly prevents the performance of the obligation under the agreement. Mere price rise rendering the contract more expensive to perform will not constitute "hinderance".
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IMPORTANT JUDGMENTS/ORDERS OF APTEL

I. Retail Supply Tariff

Differentiation of consumer tariffs u/s 62(3)- Commission may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, nature of supply or the **purpose for which supply is required.**

Judgment

Appeal 256 of 2013 (Dated 8/10/2014)

- Classification of Pvt. and Govt. owned Educational institutions into two different classes would satisfy the test of reasonable classification
- Govt. is under the constitutional mandate to provide educational facilities to all the citizens irrespective of social or economic status
- Educational institutions run by Pvt. bodies on commercial basis cannot be treated at par with Govt. Institutions.
- Differentiated on the basis of purpose of supply.

Appeal 300 of 2013 (Dt 12/08/2014)

- The hospitals run by Pvt. Parties on commercial basis cannot be treated at par with the hospitals run by Govt. as the Govt. is under a constitutional mandate to provide medical facilities to all the citizens irrespective of their social or economic status.
- Differentiated tariff on the basis of purpose of supply.

II. Open Access

Appeal 38 of 2013 (Dated 1/08/2014)

- Issue : “ whether consumer is liable to pay cross subsidy surcharge to Discom for availing power under Open Access during the period when Discom is unable to supply power and has imposed power cuts?”
- Tribunal held that when Discom has failed to procure adequate power to meet its obligation to supply its consumer and imposed power cut on the consumer, there is no justification in imposing surcharge on such consumer if it avails OA to meet its demand.
- If surcharge is allowed to Discom it would result in rewarding the Discom for its failure to procure power to meet its obligation of supply
- CSS is a compensatory charge (Sesa Sterlite). In this case there is no loss to Discom due to consumer meeting its demand through OA

Judgment

Appeal 245 of 2012 & batch (Dt 12/09/2014)

- State Commission had decided to impose uniform wheeling charges of 124 p/kwh to all OA consumers irrespective of voltage
- Tribunal held: wheeling charge should be based on the use of system for conveyance of electricity to the OA consumer
- Levy of wheeling charges for Distribution System on consumers connected to 220/132 kV contrary to the regulations
- OA charges cannot be revised retrospectively

Appeal 169 of 2017 (Dt 22/04/2015)

- Issue : Whether a consumer can be prohibited to procure power from more than one source through OA?
- Tribunal held: There is no restriction on a consumer to source power from more than one sources in the EA, 2003 or Regulations

III. Directions by APTEL u/s 121

Section 121- The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under the Act.

Order u/s 121

OP 1 of 2011

Suo moto proceedings on the ref. from MOP

Directions to SERC's u/s 121

- Every State Commission has to ensure Annual Tariff Determination & True Up every year
- Tariff to be decided before 1st April of the tariff year
- In case of delay in filing of the ARR and truing up petition, State Commission must initiate suo-moto proceedings
- Regulatory Asset should not be created as a matter of course and to ensure its recovery in time bound manner. Carrying cost should be allowed to the utilities
- FPPCA mechanism to be put in place

Order u/s 121

OP1 &2 of 2013 (Dt 20/04/2015)

- Directions given by Tribunal u/s 121 of EA,2003
- State Commission to decide RPO Targets before commencement of MYT period to give adequate time to Discoms to plan and arrange procurement of Renewable Energy
- The preferential tariff should also be in place before the commencement of MYT period
- As part of ARR petition, State commission has to obtain Discom's proposal for procurement of Renewable Energy / purchase of REC's
- State Commission should monitor RPO compliance periodically during the FY and after the of FY also give directions as per the Regulations after a public hearing

OP1 &2 of 2013 (Dt 20/04/2015) contd…

- Carry forward / review of RPO should only be as per Regulations.
- Power to relax and remove difficulty to be used only in exceptional circumstances and not regularly.

IV. Other Business of Distribution Licensee- Section 51

Section 51- A distribution licensee may, with prior approval of the Appropriate Commission, engage in any other business for optimum utilization of its assets:

Provided a proportion of revenue from such business, as specified by the State Commission, be utilized for reducing its charges for wheeling:

Provided the distribution licensee shall maintain separate accounts for such business to ensure that distribution business neither subsidies such business undertaking nor encumbers its distribution assets to support such business.

Provided nothing contained in this section shall apply to local authority engaged before the commencement of the Act, in the business of distribution of electricity.

Judgment u/s 51

Appeal 155 of 2013 (Dt 31/10/2014)

- State Commission had approved recovery of Transport business deficit of BEST in the form of Transport Deficit Loss Recovery Charges to be levied on Electricity consumers
- Tribunal Held: BEST could not be allowed to subsidize its transport business by the electricity business u/s 51 of EA 2003
- A provision of the Act (Sec 51) should not be interpreted to defeat the other provisions of the Act (Sec 61, 62 , 64 and 65 and Regulations framed there under)

V. Section 11- Directions to generating companies

(1) Appropriate Government may specify that a generating company shall, in extraordinary circumstances operates and maintain any generating station in accordance with the directions of the State Government.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.

Judgment u/s 11

Appeal 37 of 2013

- Principle of determination of rate of supply of power by a generating company to a distribution company in compliance of directions of the State Government u/s 11(1)
- Tribunal held: offsetting the adverse financial impact on the generator would mean fixing a rate keeping in view the revenue the generator would have realized in short term market subject to condition that the rate covers the variable cost of generation so that the generator does not incur loss.
- There is no inifirmity in the State Commission's decision to link the rate of power supplied u/s 11(1) to market rate of power. The only check that is to be exercised is that the rate decided by the Commission should recover the variable cost + a reasonable profit.

VI. Powers of the Commission to intervene in tariff agreed in concluded PPA

Judgment on sanctity of contract

Appeal 132 of 2012 & batch (Dt 02/12/2013)

- In Junagarh case State Commission determined generic tariff for biomass fuel based generators with a base fuel price to be escalated @5% p.a. for 20 years. Discoms entered into long term PPA with biomass generators at the generic tariff determined by the Commission
- There was significant hike in biomass fuel price within one year plant making the plant operation unviable. Bio mass plants in the State operating at very low PLF (@5-20%) as against normative level of 80%
- State Commission refused to re-determine the biomass fuel price and interfere with the concluded PPA's.

Judgment on sanctity of contract

Appeal 132 of 2012 & batch (Dt 02/12/2013) Contd……

- Tribunal held : PPA for power supply for 20 yrs has to be differentiated from a contract where goods are supplied. One time supply & goods at less than reasonable profits or loss cannot be compared with term PPA for supply of power which involves sustaining operation from the entire period of PPA.
- EA 2003, NEP & Tariff Policy mandates the Regulatory Commission to promote Renewable Energy generation
- Biomass fuel market is an unorganized market and fuel price an uncontrollable factor. If the estimate of fuel cost by the Commission in tariff determination was an underestimate , the State Commission could revise the fuel cost to ensure sustainable operation of the Renewable Energy Plants.

VII. Whether Tariff Policy and NEP are binding on the Commission?

Judgment on binding nature of tariff policy

Appeal No. 103 of 2012 (Dt 24/03/2015)

- Issue: whether Tariff Policy/ NEP is binding on the State Commission?
- Tribunal held: The Act has distanced the Govt. from all forms of Regulations, viz Licensing tariff regulations , Grid Code, facilitating competition through open access. This distance cannot be bridged by the Tribunal by holding that NEP and Tariff Policy is binding on the Regulatory Commission . They can only be guiding factors.
- If the Regulatory Commissions have to be independent and transparent bodies , they are expected to frame Regulations u/s 178 & 181 independently. They can take guidance from NEP or Tariff Policy but are not bound by them

Judgment

Appeal No. 103 of 2012 (Dt 24/03/2015)

- Tariff Policy and NEP as mentioned u/s 61, 79 and 86 are merely guiding factors. They do not control or limit the jurisdiction of Appropriate Commission. (Basis SC's judgment PTC and AP Transco Case)
- However Regulations should be in consonance with the provisions of the Act. (if the State Commission is specifying a different formulae for cross subsidy surcharge , it should give reasons for adopting a different formulae and why the tariff policy formulae has not been adopted.)

VIII. Tariff u/s 63

Judgment on tariff determined u/s 63

Appeal No. 304 of 2013 (Dt 08/05/2015)

- State Commission altered the point of supply from that stipulated in RFP / PPA between the generating company and Discom following tariff based competitive bidding under Section 63 (case 1)
- Point of delivery of power / connectivity was bus bars of the power plant in the State. Generating Co. was subsequently directed by the Commission to get connectivity at the State Transco's sub station.
- Tribunal held: RFP document based on SBD of GOI covered procurement of power from Generating stations in various configurations viz power plant which the State , outside the State connected to CTU or STU system , etc.

Judgment

Appeal No. 304 of 2013(Dt 08/05/2015) contd….

- It was clear that for power project within the State the delivery point , point of connectivity was power plant Bus bar. Some redundant clauses had appeared in the PPA creating same ambiguity .
- Where the words of the document are ambiguous , they shall be construed against the party who prepared the document.
- In case of ambiguity the court should look at all parts of the documents to ascertain intention of the parties.

Judgment

Appeal No. 304 of 2013(Dt 08/05/2015)

- True construction of a contract must depend on the impact of the words used and not upon what the parties choose to say afterwards.
- Act provided laying of dedicated transmission line by the generating company as also establishment of entire evacuation system by the transmission licensee
- State commission cannot alter the position on the basis of which the PPA was entered into and tariff was quoted.
- State commission cannot direct LILO of dedicated transmission line of the generating company to CTU System at STU substation.

Judgment on tariff determination u/s 63

Appeal No. 288 of 2013 (Dt 12/09/2014)

- Calculation of compensation due to change in law (change of levy on coal by the Govt.)
- Compensation to be calculated with respect to increase / decrease of revenue / expenses of the seller following change in law. Linking tax on coal with the variable charges quoted in the bid is wrong
- Purpose of compensation is to restore the affected party in the same economic portion as if such change in- law has not occurred at the time of occurrence of change in law and not seven days prior to bidding date. 7 days prior to bidding date is relevant only as the base date with respect to which the occurrence of change in law has to be recognized.

THANK YOU