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GMR Warora Judgement: A Milestone for 'Change in Law' Disputes in the Power Sector

Introduction

In a significant development for the power sector in India, the ruling of the Hon'ble Supreme Court in *GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors. 2023/INSC/398* (**"GMR Warora Judgement"**) has brought clarity and finality to 'Change in Law' disputes. These disputes had been a source of contention between power generators and distribution companies (**"Discoms"**) for several years, leading to delayed payments and exacerbating the issue of stressed assets in the sector. The GMR Warora Judgement not only settles critical issues surrounding 'Change in Law' disputes but also aims to strike a balance between the interests of private generators and end consumers.

Background: Understanding 'Change in Law' Disputes

'Change in Law' disputes arise when there are alterations in legislation, regulations, or government policies that impact the cost structure of power generation. These changes can lead to increased expenses for power generators, which they seek to recover from Discoms as compensation. Such disputes can be a protracted process, often leading to financial distress for generators due to delayed payments.

The GMR Warora Judgement: A Watershed Moment

The GMR Warora Judgement addresses a batch of 11 civil appeals that challenged judgements of the Hon'ble Appellate Tribunal for Electricity (**"APTEL"**) regarding 'Change in Law' claims. These appeals encompassed issues ranging from levies/surcharges imposed by Coal India Limited and Indian Railways to changes in taxes/duties and notifications of governments on coal quality. The Hon'ble Supreme Court upheld APTEL's findings and affirmed that 'Law,' as understood under Power Purchase Agreements (**"PPAs"**), includes notifications and circulars issued by instrumentalities of the State like Coal India Limited or Indian

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Railways. This decision provides a concrete definition of 'Change in Law' and sets a precedent for similar cases in the future. Furthermore, the GMR Warora Judgement allowed additional levies, such as busy season surcharge, add-on premium, and evacuation facility charges, to be considered as 'Changes in Law.' This expansion of eligible claims for compensation brings relief to private generators who had sought payments for these factors since 2013.

Restitutive Compensation and Carrying Cost

The Hon'ble Supreme Court emphasized the objective of restitutive compensation, ensuring that generators are adequately compensated for the impact of 'Change in Law.' The Hon'ble Supreme Court also ruled that carrying cost, which accumulates monthly, should be included as part of the compensation. This ruling could significantly improve the financial health of private generators and encourage investments in the sector.

Regulatory Certainty and Deterrence of Unwarranted Litigation

The GMR Warora Judgement acknowledges the importance of concurrent findings of expert bodies like APTEL and Electricity Regulatory Commissions (**"ERCs"**) and that no interference ought to be pursued in such concurrent findings by the courts. By advising against unwarranted interference in such decisions, the Hon'ble Supreme Court provides greater regulatory certainty and a more streamlined adjudicatory process.Moreover, the ruling lays down a significant criterion for statutory appeals, stating that they should be entertained only if they raise substantial questions of law under Section 100 of the Code of Civil Procedure, 1908. This requirement will discourage parties from initiating frivolous litigation and contribute to the efficient resolution of disputes.

Balancing Interests and Implications

One of the essential takeaways from the judgement is the Hon'ble Supreme Court's emphasis on striking a balance between the interests of private generators and end consumers. While ensuring a reasonable margin of profit and return on capital for generators, the Hon'ble Supreme Court underlined the significance of protecting consumers from undue burden.

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Looking Ahead: Implications for the Power Sector

The GMR Warora Judgement represents a milestone for 'Change in Law' disputes in the power sector. By providing clarity on the definition of 'Law' and expanding the scope of eligible claims, the judgement offers much-needed relief to private generators and strengthens the sector's financial stability

The ruling's emphasis on regulatory certainty and deterrence of unwarranted litigation is likely to streamline the adjudication process, reducing delays in cost recovery for generators. Additionally, the judgement calls for a more thoughtful approach by statutory and regulatory bodies, public sector enterprises, and central and state governments when taking actions that could qualify as 'Change in Law' and impact contracting counterparties.

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GREEN DEPOSITS: EMPOWERING SUSTAINABLE FUTURES AND ADDRESSING CLIMATE CONCERNS

Introduction

The Reserve Bank of India ("**RBI**") issued a circular dated April 11, 2023 (**"Circular"**) to various financial institutions of the country notifying them about the Framework for Acceptance of Green Deposits (**"FAGD"**). The Circular outlines guidelines and regulations for encouraging regulated entities (**"REs"**), including scheduled commercial banks, small finance banks, deposit-taking non-banking finance companies, and housing finance companies, to offer green deposits. The FAGD defines green deposits as ***"'green deposit' means an interest-bearing deposit, received by the RE for a fixed period and the proceeds which are earmarked for being allocated towards green finance."***

The purpose of these green deposits is to mobilize funds for financing green activities and projects that contribute to the reduction of carbon emissions, advancement of energy efficiency, the promotion of climate resilience and the enhancement of natural ecosystems and biodiversity. The RBI recognized that the green finance is gaining traction in India and the financial sector can play a pivotal role in mobilizing the resources and allocate the resources thereof to green projects in the country.

Objective of FAGD

The primary objective of FAGD is to facilitate green finance wherein REs provides green deposits to the customers while safeguarding the interest of the depositors. It facilitates customers to achieve their sustainability agenda and supports the enhancement of credit flow towards green activities. The primary significance of the FAGD is to mitigate greenwashing, which entails the prevention of misleading claims about the positive environmental impact of an activity. It is imperative for REs to maintain transparency with customers, ensuring that depositors are well-informed about the allocation of their funds under the green deposit scheme, thus enabling them to fully benefit from the program. Consequently, companies seeking to invest in environment-friendly initiatives can gain access to the funds raised and earmarked by banks through green deposits.

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Types of Green Deposits

There exist various categories of green deposits namely fixed deposits, savings deposits, recurring deposits, and certificate of deposits. These options provide distinct choices for individuals and organizations to select the most appropriate alternative. Renewable energy, waste management, clean transportation, energy efficiency and afforestation are the eligible sectors to receive green deposits.

Green Deposit Framework

The Master Direction - Reserve Bank of India (Interest Rate on Deposits) Directions, 2016 dated March 03, 2016, Master Direction – Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 2016 dated August 25, 2016 and Master Direction - Non-Banking Financial Company – Housing Finance Company (Reserve Bank) Directions, 2021 dated February 17, 2021 shall apply to interest rates and tenor of green deposits, which will be issued as cumulative/non-cumulative deposits and denominated in Indian Rupees. The terms and conditions as applicable to regular deposits in the above-mentioned master circulars will also apply to green deposits. REs are required to have a comprehensive Board-approved policy on green deposits and make it available on their websites.

Financing Framework

REs need to establish a Board-approved Financing Framework for effective allocation of green deposits, covering eligible green activities/projects, project evaluation and selection, allocation of proceeds, reporting, and validation of sustainability information provided by borrowers, and make it available on their websites.

Green Taxonomy

The funds obtained from green deposits should conform to the approved Indian green taxonomy. In the absence of finalized taxonomy, the proceeds should be allocated through green deposits exclusively for green activities and projects. The list should prioritize projects aimed at carbon emission reduction, climate resilience, adaptation, energy efficiency and enhancing the natural ecosystems and biodiversity.

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Independent Third-Party Verification

The allocated funds raised through green deposits by REs during a financial year shall be subjected to an annual independent third-party verification/assurance. The independent third party shall be responsible for verifying the claims made by banks regarding utilization of funds and ensuring the verification of sustainability credentials associated with such projects.

Disclosures

The banks that accept green deposits from customers are required to disclose all relevant information to the customers depositing such funds. It is mandatory for the banks to establish new set of rules which the customers will have to comply with while investing in green deposits. Furthermore, the green deposit rules and regulations must be made accessible to the public and ensuring that the customers are adequately informed about the enviromental impact of their investments.

Exclusions

The exclusion of projects involving extraction, production, distribution of fossil fuels, nuclear power generation, and direct waste incineration, alcohol, weapons, tobacco, gaming, landfill projects and hydropower plants larger than 25 MW ensure that the green deposits are channelled towards sustainable projects.

Conclusion

Through allocation of funds towards renewable energy and green transportation, these deposits assume a significant role in promoting the sustainability objectives. Such deposits provide individuals and organizations with the opportunity to invest their funds for a sustainable future. Depositors, by investing their funds, inherently contribute to the nations well-being and make a positive impact, while these deposits serve as a tangible asset for the nation. Such green deposits will ensure that the proceeds are utilized effectively to address climate change concerns.

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PROMOTING PUMPED STORAGE PROJECTS (PSPS) FOR A SUSTAINABLE ENERGY FUTURE

Introduction

The world is witnessing a rapid shift towards renewable energy sources, such as solar and wind, in an effort to combat climate change and transition towards a sustainable future. However, the integration of variable and intermittent renewable energy sources (**"VREs"**) into the grid poses significant challenges in maintaining stability and ensuring a reliable power supply. In response to this, energy storage and ancillary services have emerged as crucial components of the power system, with pumped storage projects (**"PSPs"**) standing out as a clean, efficient, and domestically available solution. PSPs serve as crucial infrastructures for storing substantial energy quantities, playing a vital role in supplying grid-balancing power by accumulating surplus energy and subsequently utilizing it at later stages. PSPs boast a long service life of more than 40-50 years, providing a sustainable energy storage solution for the long term. PSPs stand out for their large-scale storage capacity, accounting for over 95 percent of installed global energy storage capacity, thereby offering the necessary scalability to stabilize grids. The Ministry of Power vide notification dated April 10, 2023 has formulated and notified comprehensive guidelines ("**Guidelines**") aimed at promoting the development of the PSPs across the nation.

Allotment of Project Sites

To facilitate the development of PSPs, State Governments will allocate project sites to developers through various methods:

i. **On Nomination Basis to CPSUs and State PSUs** During the initial phase of development, States may directly award PSP projects to hydro CPSUs or State PSUs on a nomination basis. To ensure a fair process, consideration will be given to the experience and financial strength of the CPSUs/State PSUs. Additionally, projects may be allotted to Joint Ventures (JVs) between CPSUs and/or State PSUs, promoting collaborative development. However, it is mandated that awarding contracts for equipment supply and project construction be done through competitive bidding to ensure transparency and cost-efficiency.

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ii. **Allotment through Competitive Bidding** In a bid to promote private sector participation, PSP projects may also be awarded to private developers through a two-stage competitive bidding process. This approach will involve pre-qualification of developers based on criteria such as financial strength, experience in infrastructure project development, track record, turnover, and ability to meet performance guarantees. In the second stage, bids will be called based on quantifiable parameters, including the concession period of the project. Furthermore, PSUs will also have the opportunity to participate in the bidding process.

III. **Allotment through Tariff-Based Competitive Bidding (TBCB)** Under the TBCB mode, PSPs can be awarded to developers. To streamline this process, the task of conducting a Site Identification Study (S&I) and preparing a Detailed Project Report (DPR) may be assigned to an SPV (Special Purpose Vehicle) under a CPSU/ State PSU. The SPV will be responsible for pre-construction activities, such as land acquisition, environmental and forest clearances, and preparation of the project report. Tariffs for these projects will be determined through competitive bidding based on factors like the cost of input power.

iv. **Self-Identified Off-Stream PSPs** Recognizing the potential for off-stream PSPs, developers are encouraged to identify suitable sites away from riverine systems. These sites eliminate the need for allotment from State Governments. However, developers must obtain all necessary statutory clearances from State and Central agencies before commencing construction. This approach aims to expedite the harnessing of off-stream potential in the country.

Timelines for Start of Construction

To ensure timely execution of projects, developers must commence construction within 2 years from the date of project allotment. Any delays attributable to pending Environment Clearance (EC) and Forest Clearance (FC) applications may be granted a 1-year relaxation, provided that the applications were submitted within the agreed timelines at the time of project award.

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No Upfront Premium for Project Allocation

To enhance the financial viability of PSPs, State Governments are required to refrain from charging any upfront premium for the allocation of PSP projects. This measure aims to reduce the financial burden on developers and facilitate the successful implementation of PSPs.

Market Reforms

PSPs offer a wide range of ancillary services that contribute to grid stability. To fully realize the economic benefits of these projects, the government plans to undertake market reforms, including:

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PSPs offer a wide range of ancillary services that contribute to grid stability. To fully realize the economic benefits of these projects, the government plans to undertake market reforms, including:

i. **Monetization of Ancillary Services:** Services like spinning reserves, reactive sup port, black start, peaking supply, tertiary and ramping support, and faster start-up and shutdown, which contribute to grid stability, will be suitably monetized.

ii. **Peak and Off-Peak Tariffs:** Appropriate Commissions will notify Peak and Off-Peak tariffs for Generation, providing appropriate pricing signals to Peak and Base Load Generating Plants.

iii. **Power Exchange Participation:** PSPs and other storage projects will be allowed to participate in all market segments of the power exchange, including the high-price segment of the Day Ahead Market (HP-DAM), enabling them to take advantage of price differentials between Peak and Off-Peak tariffs.

iv. **Power Sales and Sharing:** During the monsoon period when PSPs operate as conventional hydro power stations (i.e., no pumping energy required for power generation), 80% of the power generated will be offered to the home state at a rate fixed by the Central Electricity Regulatory Commission. The remaining energy can be sold to cover the developer's Operation & Mainte-

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costs and other expenses. If the contracted capacity is not fully utilized by the contracting agency, the developer may transfer the usage to other interested entities, and gains made shall be shared with the original beneficiary.

Financial Viability

Given the increasing penetration of electricity storage, PSPs are expected to be operated in two cycles for as long as variable renewable energy infusion continues to rise. As a result, PSPs are anticipated to be utilized to their full capacities, ensuring cost recovery in a minimal period. To maintain the financial viability of PSPs, the Central Government may notify a benchmark tariff for storage, taking into account the prevailing and anticipated difference between peaking and non-peaking rates. This will help in ensuring that only economically viable PSP projects are considered for development.

Financial institutions like PFC (Power Finance Corporation), REC (Rural Electrification Corporation), and IREDA (Indian Renewable Energy Development Agency) will treat PSPs on par with other renewable energy projects while extending long-term loans with tenure ranging from 20 to 25 years. The debt equity ratio of PSP projects can be up to 80:20 in consultation with the financial institutions, further easing the funding process for developers.

Taxes and Duties

To promote the long-term benefits and socio-economic development of states, certain tax and duty exemptions have been granted:

i. **Reimbursement of SGST:** State Governments shall consider reimbursing the State Goods and Services Tax (SGST) on PSP project components.

ii. **Stamp Duty and Registration Fees Exemption:** Land acquired by off-the-river PSPs may be exempt from payment towards stamp duty and registration fees. In cases where government land is available, it may be provided at a concessional rate to developers on an annual lease rent basis.

iii. **Electricity Duty ("ED") and Cross Subsidy Surcharge ("CSS") Exemption:** Since PSPs are intermediary systems facilitating the conversion of energy, ED and CSS shall not be applicable on pumping power for charging PSPs. These charges will be levied only on the final consumption of electricity.

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iv. **Water Cess Exemption:** Similar to Hydro Power Projects, no water cess shall be levied on PSPs due to their non-consumptive use of water.

Utilization of Exhausted Mines to Develop PSPs

A notable aspect of the guidelines is the exploration of the potential of utilizing exhausted mines, including coal mines, for the development of Hydro Pumped Storage Projects. The government, in coordination with the Ministry of Coal, Ministry of Mines, and respective State Governments, aims to identify and transform these discarded mines into natural enablers for PSPs. This innovative approach not only repurposes previously unused areas but also contributes to the efficient utilization of existing infrastructure, making a positive impact on the environment.

Rationalization of Environmental Clearances for PSPs

Recognizing the minimal impact of off-river PSPs on riverine ecology, the Ministry of Environment, Forest & Climate Change (**"MoEF & CC"**) has initiated action to simplify the process of obtaining Environmental Clearances (EC) for these projects. Under the draft notification issued by MoEF & CC on 11.10.2022, off-river PSPs that meet certain criteria will be appraised under the B2 category for EC, regardless of their power generation capacity. This streamlined approach will help expedite the approval process and encourage the development of environmentally friendly PSPs.

Additionally, further liberalization will be undertaken to allow baseline data collection for off-stream closed-loop PSPs for one season and off-stream open-loop PSPs (excluding monsoon season) for two seasons, as part of the Environment Impact Assessment and Environment Management Plan studies. This approach ensures the availability of essential data before the issuance of Terms of Reference, facilitating the planning and execution of PSP projects.

Green Finance for Sustainable Growth

Given the critical role of PSPs in integrating renewable energy sources and reducing greenhouse gas emissions, the guidelines emphasize the importance of supporting these projects through concessional climate finance. Sovereign green bonds issued to mobilize resources for green infrastructure, as part of the Government's overall market borrowings, may be deployed to fund the development of PSPs that utilize renewable energy for charging. This

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strategic financial support further promotes a sustainable and eco-friendly energy landscape.

Conclusion

The Guidelines represent a significant milestone in the advancement of India's energy sector. These comprehensive guidelines aim to streamline the allocation, construction, and operation of PSPs, facilitating their vital role in energy storage, grid stability, and the seamless integration of renewable energy sources. By providing a clear framework for project allotment, financial viability, market reforms, and environmental clearances, these guidelines foster a conducive environment for public and private sector participation, driving the rapid development of PSPs across the nation.

The implementation of these guidelines not only propels India's energy infrastructure into a greener and more sustainable future but also reinforces the country's commitment to combating climate change and reducing greenhouse gas emissions. PSPs are poised to play a crucial role in achieving energy security, enabling grid stability, and promoting sustainable development. As we embrace the era of clean energy transition, these guidelines stand as a testament to India's vision of a robust and resilient power grid, leading the way towards a brighter and greener energy landscape for generations to come.

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