UPDATES

Energy & Infrastructure – Legal Milestones Financial Year 2020-21 and a Look Ahead

14 April 2021

This update covers:

1 The Year that Was

With the black swan impact of the COVID-19 pandemic, much like other sectors, the Indian energy and infrastructure sector was affected to a great extent. The pandemic disrupted the supply chain and derailed project development, with several projects being delayed or postponed. Various structural reforms were proposed by the government to combat the slow growth rate of renewable energy generation and ease investment norms for the infrastructure sector.

Various policy initiatives and regulatory changes brought in by the government in the financial year 2020-21 are hoped to have a positive impact and pave the way for greater investment opportunities in the energy and infrastructure sector in India in the year ahead.

With an aim to achieve a USD 5 trillion economy by the Financial Year (FY) 2024-25, the government is currently working towards implementing the National Infrastructure Pipeline (NIP) which envisages total project capital expenditure in infrastructure in India at approximately INR 111 trillion (approximately USD 1.56 trillion) from 2020 to 2025, in various sectors including energy, roads, urban development, railways, rural and social infrastructure. Recently, during the second review meeting of the NIP, it was highlighted that despite the pandemic, the NIP has managed to achieve substantial progress and has now been expanded to include more than 7,300 projects against 6,835 projects when it was launched in 2019. At present, projects worth INR 44 trillion (approximately USD 619 billion) out of the INR 111 trillion (approximately USD 1.56 trillion) are in the implementation phase and projects worth INR 22 trillion (approximately USD 309 billion) are in the developmental phase. The NIP's progress so far augurs well for the future of the Indian infrastructure sector.

2 Major Developments in the Financial Year 2020-2021

2.1 Renewable power

a. COVID-19 related relief measures

In view of the pandemic, various relief measures were provided to ease the liquidity problems of distribution companies (Discoms). Some of these were:

i. Renewable energy projects were accorded a must-run status during the entirety of the lockdown period imposed due to the outbreak of COVID-19.

ii. Commissioning timelines were extended by five months for all renewable energy projects which were under-implementation as on 25 March 2020 (date of commencement of the lockdown).

iii. Till 31 May 2020, a 50% reduction was provided in the payment security mechanism to be maintained by Discoms with the generating companies. Additionally, a moratorium of three months to make payments to generating companies and transmission licensees was also provided.

b. Waiver of inter-state transmission system charges

The Ministry of Power (MoP) extended the waiver of inter-state transmission system (ISTS) charges and losses on all solar, wind, and hybrid projects, with or without energy storage, commissioned before 30 June 2023. The waiver is for a period of 25 years from the date of commissioning of the power plants. Further, MoP has recently notified that this ISTS waiver will also be given to those renewable power projects which had their scheduled commissioning date on or before 30 June 2023 but have been granted an extension of time either due to delays caused by the transmission licensee or a government agency or due to force majeure and the power plant is commissioned before such extended date.

c. Issue of the Electricity (Rights of Consumers) Rules, 2020

The Ministry of Power (MoP) has issued the Electricity (Rights of Consumers) Rules, 2020 laying down the rights of power consumers to minimum standards of quality and obligations of distribution licensees. The rules lay down that the prosumers will have the same rights as that of consumers. The rules define a prosumer as a person who consumes electricity from the grid and can also inject electricity into the Discom's network, using the same point of supply.

Further, in relation to solar rooftop systems, the rules mandate net-metering only for loads up to ten kW and gross metering for loads greater than ten kW.

d. Guidelines for procurement of wind-solar hybrid power through a competitive bidding process

In October 2020, the MNRE issued guidelines for procurement of wind-solar hybrid power through a tariff-based competitive bidding process. The guidelines provide a framework for procurement of electricity from ISTS (inter-state transmission system) connected wind-solar hybrid power projects, with or without storage, through a transparent process of bidding.

e. Electricity Amendment Bill, 2021

Through the Electricity Amendment Bill, 2021, the government has proposed to delicense the electricity distribution sector, allowing any company who meets the eligibility criteria and registers with the relevant state electricity regulatory commission to supply power in any area. With this amendment, the government intends to improve efficiencies within the electricity distribution sector by creating an environment for greater competition and empowering consumers to switch between Discom networks. The bill also proposes to impose penalties on Discoms which fail to meet their renewable purchase obligations (i.e., fail to procure the minimum prescribed quantum of power from renewable sources).

f. CERC (Power Market) Regulations, 2021

The Central Electricity Regulatory Commission (CERC) has notified Power Market Regulations, 2021. These regulations will be applicable to power exchanges, market participants and over-the-counter (OTC) market, and will be applied to (i) contracts transacted on power exchange, (ii) contracts relating to renewable energy certificates, (iii) contracts relating to energy saving certificates, (iv) contracts in the OTC market, and (iv) any other contracts as may be approved by CERC. The regulations also propose the introduction of OTC platform as an electronic platform for facilitating information exchange amongst buyers and sellers of electricity in the OTC market.

g. Highlights of the energy sector in the Budget speech 2021-22

The Union Budget for the FY 2021-22 lays emphasis on the development of renewable power sources. A few key highlights in relation to the energy sector in the Union Budget are:

i. Additional capital infusion of INR 10 billion (approximately USD 138 million) to Solar Energy Corporation of India Limited (SECI) and INR 15 billion (approximately USD 207 million) to Indian Renewable Energy Development Agency Limited.

ii. Import duty on solar inverters raised to 20% from 5% and on solar lanterns raised to 15% from 5%.

iii. Government to launch hydrogen energy mission in the FY 2021-22.

iv. INR 3 trillion (approximately USD 41 billion) allocated to Discoms over the next five years for financial improvement and infrastructure development.

v. In line with Power System Operation Corporation in the power sector, an independent gas transmission operator will be set up.

h. Some challenges faced in the sector

While the developments discussed above were a step in the right direction, certain developments in the sector have hurt investor confidence, such as:

i. *Delay in signing of power sale agreements*- One of the biggest challenges solar project developers are currently facing is long delays in the signing of power sale agreements (PSAs) with the Discoms by the SECI. Typically, SECI first signs a power purchase agreement with the project developers, and then a PSA with the Discoms to sell the power generated by these projects to the offtaker. There is a massive backlog of such unsigned PSAs, which is a primary concern for developers who find it difficult to secure debt funding from lenders who insist on signed PSAs.

ii. *Threat of curtailment of solar and wind power for commercial reasons*- Although, MNRE has given 'must run status' to renewable energy projects which means that renewable power cannot be curtailed except for grid stability, developers continue to face curtailment of renewable power by Discoms, citing reasons of grid security.

2.2 Boost to Electric Vehicles (EVs)

a. Amendment in the revised guidelines and standards for charging infrastructure for EVs

The MoP has issued an amendment to its guidelines and standards for the charging infrastructure of EVs. The amendment has now specified that the tariff for the supply of electricity to the EV public charging stations should not be more than 15% of the average cost of supply of power. This ceiling was not given in the earlier guidelines. Further, the amendment has prescribed definitions of various terms such as battery charging station, captive charging station, public charging station etc.

b. Electric two-wheelers can operate as taxis

Electric two-wheelers are exempted from the requirement of seeking a permit to operate as a taxi. According to Motor Vehicles Aggregators Guidelines, 2020, State governments would now facilitate the implementation of electric two-wheeler taxis.

c. Sale of EVs without pre-fitted batteries

To boost the wider adoption of EVs, the Ministry of Road Transport and Highway has announced that all the States and Union Territories can register and sell EVs without pre-fitted batteries.

2.3 Revival of the Mining Industry

a. Guidelines for auction of mineral blocks with pre-embedded clearances for mining projects

The Ministry of Mines by way of an order dated 3 June 2020 has issued guidelines for auction of mineral blocks with pre-embedded clearances for mining projects to expedite sale process as well as operationalisation of mineral's blocks. According to the guidelines, each State having mineral resources is required to identify at least five new mining projects for auction with pre-embedded clearance. States will have to set up project monitoring units responsible for completing the preparatory work for obtaining requisite statutory clearances/approval for starting a mining project which, may be transferred to successful bidder seamlessly so that mining operations start without any delay.

b. Foreign Direct Investment (FDI) permitted in commercial coal mining in India

Under the extant FDI framework, 100% FDI under automatic route in coal mining activities is permitted. However, any FDI in commercial coal mining is subject to applicable laws including Press Note 3 of 2020 under which prior government approval is required for any foreign investment in or acquisition/transfer of an Indian company (directly or indirectly), where the acquirer or beneficial owner of such investment is based out of a country which shares land borders with India.

2.4 Privatisation of airports

In India, aircraft movement grew at an annual growth rate of more than 9.5%, from 1.60 million in the FY 2016-17 to almost 2.60 million in the FY 2020-21. According to forecasts by the International Air Transport Association, India will overtake the UK to become the third-largest air passenger market by 2024.

With privatisation of six major airports in India, this sector has witnessed a key change in the bidding parameter. The earlier revenue-sharing model has now been replaced with the per-passenger fee model, with the bidder quoting the highest per-passenger fee (which is in the nature of a concession fee payable by the airport operator to the airport authority) winning the bid. The per passenger fee is computed on the basis of the number of embarking and disembarking passengers at the airport. Moving to the per passenger fee model addresses developer's concerns as it offers a more transparent bid parameter and avoids disputes on the calculation of gross revenue.

2.5 Revised viability gap funding (VGF) scheme

VGF is a grant provided by the Central government with the objective of making an otherwise unviable project, commercially viable. The VGF Scheme is applicable to PPP projects proposed by Central Ministries, State governments or statutory authorities that own the underlying assets.

On 7 December 2020, the government has revised the earlier VGF scheme and has issued an updated Scheme for Financial Support to Public Private Partnerships in Infrastructure (2020 VGF Scheme), with a projected outlay of INR 81 billion (approximately USD 1.14 billion). The 2020 VGF Scheme provides a push to the social infrastructure sector in India by specifically earmarking certain amounts of VGF to be allotted for the purpose of developing social infrastructure projects, while also extending the existing scheme to continue lending support to other infrastructure projects.

2.6 Setting up of an independent Central Transmission Utility

MoP, through its notification dated 9 March 2021, notified the setting up of the 'Central Transmission Utility of India Limited', a government company and wholly-owned subsidiary of Power Grid Corporation of India Limited (PGCIL), as the 'Central Transmission Utility' (CTU), to undertake and discharge all functions of CTU pursuant to the provisions of the Electricity Act, 2003. The CTU's functions include undertaking transmission of electricity through ISTS and planning and coordination in relation to ISTS.

3 Looking Ahead

India has set its sight on becoming a USD 5 trillion economy by the FY 2024-25. If India is to achieve this target, it will necessarily need to build and expand a strong network of quality infrastructure assets, which will form the backbone for the Indian economy to grow and flourish. While government support is fundamental to achieving this, the speed and efficiency of the build out will depend to a large extent on the level of commitment shown by private investment and India's ability to attract long-term strategic investments from the top global players.

India has in the previous two decades focused mainly on the development of core infrastructure sectors such as power, roads, airports, etc., and it is now imperative that we turn our attention to a more holistic and inclusive approach to development, and look to innovative solutions (including PPP models) to initiate and hasten the development of social infrastructure assets alongside our continued efforts to further strengthen our core assets.

Some of the aspects that could have a positive impact on the sector in the FY 2021-22 are:

1 The Indian government is planning to invest USD 1.83 billion to develop airport infrastructure and aviation navigation services by 2026. The positive financial outlook for the Indian airport sector is buttressed by the evolution of the PPP model, with standard form contracts in place, an independent regulator as well as potentially significant gains to be made from non-aeronautical revenue. Despite the short-term impact of COVID-19, India retains the potential to become the second largest, aviation market in the world over the next two decades.

2 For the first time, SEBI has registered a central public sector enterprise in the power sector - Power Grid Infrastructure Investment Trust. This marks the beginning of asset monetisation of transmission assets of Power Grid.

3 The Electricity Amendment Bill, 2021, if passed and notified by the legislature, will overhaul the electricity sector as previously discussed.

4 So far, the policy and regulatory environment has allowed the EV market to grow. Experts estimate that the market for EV infrastructure in India is projected to grow at a staggering 40% compound annual growth rate between 2019 and 2025.

5 Under the NIP, investments worth INR 25 trillion (approximately USD 352 billion) are envisaged in the energy sector, INR 16 trillion (approximately USD 225 billion) in irrigation, rural agriculture and food processing, INR 20 trillion (approximately USD 281 billion) in the highways sector, INR 16 trillion (approximately USD 225 billion) each in mobility and railways and an INR 14 trillion (approximately USD 197 billion) in digital infrastructure, among other sectors. The strong focus on social infrastructure (higher and school education, health and family welfare, sports, and tourism) in the NIP, would help India in reviving the economy and maintaining investor confidence while at the same time balancing social and welfare objectives in the aftermath of the ongoing pandemic.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed here.
