

JANUARY 2017

GUIDELINES ON CROSS BORDER TRADE OF ELECTRICITY

1. INTRODUCTION

In an effort to harmonise municipal laws, rules and regulations governing the trade of electricity, the Ministry of Power (the "MoP") issued on 5 December, 2016 guidelines for cross border trade of electricity (the "Guidelines").

Currently, bilateral memoranda of understanding or power trade agreements govern the cross-border trade of electricity between India and its neighbours.

The Guidelines essentially further the objective of the SAARC Framework Agreement for Energy Cooperation (Electricity) to enable the cross-border trade of electricity on a voluntary basis.

2. THE GUIDELINES

2.1 Institutional Framework

The Guidelines require the MoP to appoint a *Designated Authority*, which will be assigned with the task of formulating procedures for the cross border trade of electricity and processing approvals. Pursuant to the Guidelines, the MoP on 14 December 2016 appointed the Member (Power System), Central Electricity Authority (the "CEA") as the Designated Authority under the Guidelines.

In addition to the Designated Authority, the Guidelines contemplate that the Central Electricity Regulatory Commission (the "CERC") will frame regulations governing the cross border sale and purchase of electricity in accordance with the Guidelines.

2.2 Eligible Entities

Entities eligible to participate in the cross border trade of electricity are classified into two categories: the first, require *one-time approval* from the Designated Authority and the second, require approval on a *case-to-case basis*.

The following entities are entitled to *one-time approval*:

Indian entities importing electricity:

- (a) from projects located outside India owned or funded by the Government of India or by Indian Public Sector Units¹ ("PSUs"), or private companies in which Indian entities have 51% or more ownership, or companies owned or controlled by the government of the relevant country in which the project is located; and

¹ Companies in which the Central Government or the State Government has 51% paid up equity shareholding.

- (b) from electricity traders, licensed in the relevant neighbouring country, in which 51% ownership vests in an Indian entity (provided that the licensed trader obtains power from the sources set out above).
- (c) from electricity distribution licensees ("**Distribution Licensees**")² and PSUs exporting electricity to the neighbouring country, if surplus capacity is available and certified by the concerned Distribution Licensee or the PSU.

In relation to sub-paragraphs (a) and (b) above, we should point out that neither *ownership* nor *control* is defined in the Guidelines. However, the Guidelines provide that any change in the equity patterns after obtaining one-time approval from the Designated Authority, would necessitate fresh approval from the Designated Authority.

Independent coal based thermal power projects (other than PSUs) can only sell surplus electricity to neighbouring countries after obtaining from the Designated Authority, certification of availability of surplus capacity. The Guidelines further state that the MoP has the right to further identify sources from which electricity can be exported to neighbouring countries electricity to neighbouring countries. This leads to ambiguity as to whether the Guidelines, as drafted currently, only allow export from coal based thermal power projects.

Any entity interested in engaging in the cross border trade of electricity which is not covered above will require approval from the Designated Authority on a *case to case basis*.

2.3 Tariff

The tariff under the Guidelines for cross border sale and purchase of electricity will be determined by: (a) Government to Government negotiations; and (b) competitive bidding and agreements between the parties.

Tariff for import of electricity by Eligible Entities from neighbouring countries may be determined under long term, medium term, and short term agreements, through a process of competitive bidding pursuant to which the determined tariff will be adopted by the appropriate electricity commission as provided under Section 63 of the Electricity Act, 2003³.

However, where electricity is purchased from hydropower projects, the tariff can be determined by CERC under its regulations,⁴ if approached by the hydropower generator (through its Government) and agreed to by relevant Indian entities purchasing such power including Public Utilities and Distribution Licensees.

Tariff for export of electricity by Indian entities to neighbouring countries may be as mutually agreed or through competitive bidding, subject to payment of applicable charges for the transmission and wheeling of power through the Indian grid.

² Any entity that has obtained a license for distribution of electricity under Section 14 of the Electricity Act, 2003.

³ Section 63 states: "*Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government*".

⁴ Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2014.

2.4 Trade through Power Exchanges

Eligible Entities (as covered under paragraph 2.2 above) can sell and purchase electricity through Indian Power Exchanges,⁵ by entering into *term ahead* contracts⁶ and *intraday* and *contingency* contracts,⁷ after obtaining approval from the Authority under the Guidelines and complying with relevant CERC regulations.

Entities other than the Eligible Entities will also be eligible to trade in power on Indian Power Exchanges through the eligible licensees under the regulations.⁸

The Designated Authority will decide the quantum of electricity that can be traded on the Indian Power Exchange.

2.5 Transmission and Interconnection

The electricity transmission and interconnection mechanism will be planned by relevant agencies of the two countries involved. Under the Guidelines, a power generator in a neighbouring country has the option to develop its own transmission system at its own cost. However, the Central Electrical Authority and the Central Transmission Utility (with approval from the MoP) will develop the associated transmission system in India.

Indian entities selling power exclusively to neighbouring countries have the option to build an independent transmission system that will connect to the transmission system of the relevant neighbouring country. Construction of this independent transmission system will require relevant approvals and compliance with the technical and safety guidelines under the Electricity Act, 2003.

Under the Guidelines cross border transmission lines can be constructed between the electricity pooling stations of the respective countries (India and the relevant neighbouring country). The interconnection point between these two pooling station will be monitored and controlled with mutual coordination by the system operators of the respective countries.

Priority to access the transmission system for cross border sale and purchase of electricity will be determined by the Central Transmission Utility as per the CERC regulations to be framed under these Guidelines.

Any transmission charges, scheduling, accounting or deviation settlement involving the Indian grid and matters involving inter connected grids of electricity shall be governed by relevant CERC regulations. The MoP will appoint nodal agencies for each neighbouring country and these nodal agencies will be responsible for the settlement of grid operation related charges in accordance with CERC regulations.

2.6 Dispute Resolution

The Guidelines provide that disputes within India will be settled under the provisions of the Electricity Act, 2003. Disputes between an Indian entity and a foreign entity under the Guidelines can be settled either through arbitration at the Singapore International Arbitration Centre or by any other process mutually agreed to by the parties.

⁵ Power Exchange is an exchange registered under Central Electricity Regulatory Commission (Power Market) Regulations, 2010.

⁶ "Term Ahead market" means a market where physical delivery of electricity occurs on a date more than one day (T + 2 or more) ahead from the date of transaction (T) and the contracts in such market can be transacted weekly / monthly / yearly or more in advance and have a defined delivery period on expiry of contract and is scheduled by Regional Load Despatch Centre or National Load Despatch Centre.

⁷ "Intraday Contract / Contingency Contract" means contracts where transaction occurs on day (T) after the closure of day ahead transaction window and the delivery of power is on the same day (T) or next day (Page 3 T+1) and which are scheduled by Regional Load Despatch Centre or National Load Despatch Centre.

⁸ Central Electricity Regulatory Commission (Power Market) Regulations, 2010.

IndusLaw View:

The Guidelines are a step forward in moving towards the development of a regional market in electricity in South Asia.

While independent (non-Indian) power producers and foreign financiers in South Asia have raised concerns about the one-time approval only being available to Indian and Government owned enterprises, public sector enterprises in neighbouring countries can enhance investment into power projects with the comfort of knowing that the Indian market is available for export.

The Guidelines will also be welcomed by hydropower project developers, such as the 900 MW Upper Karnali project and the 900 MW Arun-3, which are both being developed by Indian companies in Nepal.

The Guidelines have certain ambiguities regarding the sources in India from which electricity can be exported from and the lack of definition of *ownership* and *control* (which may lead to uncertainty in relation to companies with complicated equity structures).

However, the Guidelines merely set out the broad contours of India's policy on cross border trade of electricity and the CERC regulations to be framed under these Guidelines should provide more granularity in this regard.

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