

## BACKGROUND OF THE CIRP PROCESS

Lanco Amarkantak Power Limited (“**LAPL**”) was admitted into corporate insolvency resolution process (“**CIRP**”), under the provisions of IBC, on 05 September 2019, by an order of the Hon’ble National Company Law Tribunal, Hyderabad Bench (“**NCLT**”), in a company petition filed by Axis Bank Limited.<sup>1</sup> Mr. Saurabh K. Tikmani was appointed as the interim resolution professional (“**IRP**”) of LAPL, thereafter his appointment as the resolution professional (“**RP**”) of LAPL was confirmed in the meeting of the committee of creditors (“**COC of LAPL**”) dated 11 October 2019. On 09 January 2023, the resolution plan submitted by the PFC-REC led consortium (“**Successful Resolution Applicant**”) was granted approval by the COC of LAPL and the approved resolution plan has been submitted with the adjudicating authority on 11 February 2023 for NCLT approval.

## BACKGROUND OF THE APPROACH PAPER

The Central Electricity Regulatory Commission (“**CERC**”) has the powers of tariff determination and frame the regulations with an aim to enhance the investment of private stakeholders in the electricity regulatory sector, so as to create a sustainable and effective system of tariff determination that is cost efficient so that such benefits percolate to the end consumers.

The process of tariff determination is carried out in accordance with the Electricity Act, 2003 on a cost-plus basis method. The cost-plus basis determination of tariff implies that the tariff shall be determined in a manner that the tariff allows recovery of all the costs incurred by the distribution licensee and provides for a specific amount as a return.

In light of the above, CERC released an “*Approach paper on terms and conditions of tariff regulations*” for the tariff period 01.04.2024 to 31.03.2029 (“**Approach Paper**”). The CERC invited suggestions and feedback from various stakeholders on the Approach Paper to arrive at the methodologies and principles for the tariff determination.

Section 4.3 (*Capital Cost for Projects acquired post NCLT Proceedings*) of the Approach Paper deals with the aspect of tariff determination for entities undergoing CIRP. The CERC has invited comments and suggestions on the following issues under section 4.3 of the Approach Paper:

1. Historical Cost or Acquisition Value whichever is lower should be considered for the determination of tariff post approval of Resolution Plan.
2. Tariff provisions to be included to address the issue of the cost of debt servicing, including repayment, that were allowed as a part of the tariff during the CIRP process.

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<sup>1</sup> C.P. No. 420/7/HYD/2018

S. Nos.	Proposals highlighted in the Approach Paper for suggestions and comments:	Implication of the proposal	Suggestions	Rationale behind the suggestion
1.	<p>Historical Cost or Acquisition Value whichever is lower should be considered for the determination of tariff post approval of resolution plan.</p>	<p>The tariff is determined in accordance with the capital cost incurred by the distribution licensee. Higher the capital costs incurred by the distribution licensee, higher will be the tariff offered, so as to allow the recovery of costs and also ensure reasonable returns to the distribution licensee.</p> <p>In a typical IBC process, it can be observed that the acquisition value of the assets (<i>i.e., the cost at which a successful resolution applicant acquires the assets</i>) is much lower than the historical value of the assets (<i>i.e., the cost at which the assets were originally constructed</i>) as the creditors take significant haircuts and the defaulting entities have to forego their equity investments.</p> <p>The Approach Paper seeks to determine the tariff in accordance with the acquisition value or historical value, which is lower. Since the acquisition value is lower in a typical</p>	<p>The Historical Cost or Acquisition Cost, whichever is higher, should be considered for the determination of tariff post approval of resolution plan.</p> <p>Alternatively, it is suggested that Historical Cost as previously approved by the Hon'ble Commission may be considered for purpose of determination of tariff.</p>	<p>If the tariff is determined in accordance with the acquisition value or historical value, whichever is lower, then in most cases the tariff determined for the power projects (which have been already revived through the CIRP process) will significantly reduce.</p> <p>The tariff rates play a key role in determining the resolution value offered by a resolution applicant through its resolution plan.</p> <p>A resolution applicant, after analyzing the extant tariff policies submits a considered proposal for successful resolution of the assets of the corporate debtor. A submitted resolution plan is binding and irrevocable as between the CoC and the successful resolution applicant in terms of the provisions of the IBC and the CIRP Regulations.</p> <p>A reduction in tariff will not only make the previously approved resolution plans commercially</p>

		<p>IBC process, the tariff which will be offered to the resolution applicants will significantly reduce.</p>		<p>unviable for the successful resolution applicants but will also adversely impact the ongoing CIRP processes in the power sector. A reduction in tariff rates will negatively impact the commercial viability of already approved resolution plans and the resolution plans will no longer be capable of being implemented due to the erosion of commercial basis of the resolution plan.</p> <p>Additionally, IBC envisages the resolution of corporate debtor with the objective that the commencement or the conclusion of the CIRP should not have any adverse impact on the corporate debtor. Every effort is made to resolve the corporate debtor on <i>going concern</i> basis to fulfil this objective of IBC. The same has been highlighted in the report issued by Bankruptcy Law Reforms Committee, and in various judgments of Supreme Court. This Therefore, CIRP in itself must not be the reason for change having an impact on commercial aspects especially when the corporate debtor is to be resolved as <i>going concern</i>, otherwise it would defeat</p>
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				<p>the objective of IBC which is to negate the impact of the CIRP on the Corporate Debtor and maintain <i>status quo</i>.</p> <p>Moreover, the lower of the Historical Cost or Acquisition Cost, should not be considered for the determination of tariff post approval of resolution plan as it would pose twin disadvantage to the resolution applicant. On one hand it would disincentivize them from making further investments into the machineries for its upkeep, and on other hand it would also not provide the advantage of acquiring the assets as a <i>going concern</i>.</p> <p>In our specific case, the Successful Resolution Applicant has already submitted a binding resolution plan and inclusion of the tariff provisions, as suggested in the Approach Paper, may impose difficulties for the Successful Resolution Applicant in the successful implementation of the resolution plan.</p> <p>It may be noted that implementation of this tariff proposal may not impact the COC of LAPL during the CIRP (<i>ended</i></p>
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				<p>on 23 February 2023), however, may impact the successful implementation of the approved resolution plan.</p>
2.	<p>Tariff provisions to be included to address the issue of the cost of debt -servicing, including repayment, that were allowed as a part of the tariff during the CIRP process.</p>		<p>The tariff provisions should remain unchanged irrespective of the fact that the cost of debt servicing stops during the moratorium.</p>	<p>The inclusion of these tariff provisions will negatively impact the commercial considerations provided by a resolution applicant in the resolution plan submitted for a corporate debtor.</p> <p>As we understand, debt servicing is not performed by a corporate debtor in accordance with the moratorium imposed in accordance with the provisions of IBC and therefore the cost of debt servicing becomes nil. If the cost of debt servicing during the moratorium period is considered while determination of tariff, the same will go against the objectives laid out in IBC as it will make the revival process more difficult and entirely negate the principle of value maximization for the power projects currently undergoing CIRP process.</p> <p>In various supreme court judgments, the court has emphasized upon the objectives of the IBC, which is to revive the</p>

				<p>corporate debtor and maximization of value of assets of the corporate debtor.</p> <p>Additionally, Regulation 32 of the CERC (Terms and Conditions of Tariff) Regulations, 2019-24 deals with interest on loan capital which provides that the interest on loan is paid on normative average loan (average of opening loan and closing loan of the financial year) basis without considering the actual loan availed by the generating company, i.e., LAPL.</p> <p>Further, Regulation 61 of the CERC (Terms and Conditions of Tariff) Regulations, 2019-24 deals with Sharing of saving in interest due to re-financing or restructuring of loan, which provides for sharing of net savings on interest after accounting for cost associated with such refinancing or restructuring between the beneficiaries and generating company in the ratio of 50:50.</p> <p>After the initiation of CIRP, payment to lenders towards interest &amp; principal repayment is put on hold in view of moratorium. The amount pertaining to repayment of</p>
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