

Andhra Pradesh High Court on Re-Determination of Tariff Under Existing PPAs

17 March 2022

1 Background

In September 2018, the distribution companies in Andhra Pradesh (**Discoms**) filed a petition before the Andhra Pradesh Electricity Regulatory Commission (**APERC**) for reduction in the preferential feed-in tariff applicable to wind power projects determined under Section 62 of the Electricity Act, 2003 (**Electricity Act**).

Subsequently, they also filed a similar petition impacting solar developers, requesting the APERC to revise the tariff payable by the Discoms for procurement of solar power (discovered under Section 63 of the Electricity Act through competitive bid process). They contended that the tariff discovered in other states pursuant to competitive bidding was lower than the preferential tariff fixed by the APERC and also the tariff discovered through the competitive bid process.

Thereafter, various solar and wind power developers approached the High Court of Andhra Pradesh to challenge the proceedings before the APERC. A single judge of the High Court dismissed the petitions on 24 September 2019 (**Common Order**), with a direction to the APERC to decide the issues raised by the developers. However, it directed the Discoms to pay interim tariff (which was lower than the tariff under the PPAs) to the wind and solar power generators until the matter was adjudicated by the APERC.

The Common Order created numerous hardships for the power generators - to the extent that in few instances even the lower interim tariff was not paid by the Discoms. Lenders to these projects were forced to declare few assets as 'non-performing', resulting in project developers having to seek relief from the courts to restrain lenders from proceeding against these projects as 'non-performing assets'.

Aggrieved by the Common Order, the developers filed writ appeals before the Division Bench of the High Court. Pursuant to a fairly lengthy process of over 3 years, the Division Bench has determined several long-standing issues and provided much-needed relief to the power generators. In summary, it held that: (i) the tariff under concluded PPAs cannot be re-negotiated; (ii) financial difficulty of Discoms is not a ground to permit non-performance of the PPAs or to reduce the tariff set out under the PPAs; (iii) tariff determined through competitive bidding process under Section 63 of the Electricity Act cannot be re-determined; and (iv) since the renewable energy plants operate on a 'must-run basis', any arbitrary curtailment of power by the state load despatch centre (without any prior notice and not based on grid security or safety reasons) is illegal.

We discuss the key issues and the decision in detail below.

Settling long-standing issues plaguing the renewable energy sector in Andhra Pradesh, a Division Bench of the Andhra Pradesh High Court has held, amongst other directions, that the tariff under concluded power purchase agreements between power generating companies and state distribution companies cannot be renegotiated.

2 Issues and proceedings before the Division Bench

2.1 Re-determination of the PPA tariff

The Division Bench held that once tariff is discovered through competitive bidding under Section 63 of the Electricity Act, it cannot be revised by the APERC. In respect of tariff determined under Section 62 of the Electricity Act, it observed that the validity of PPAs entered into between the parties through mutual consent and the tariff determined pursuant to a regulatory proceeding cannot be re-opened or questioned by the APERC unless the PPAs expressly provided the State Electricity Regulatory Commission a right to do so.

2.2 Paucity or insufficiency of funds not an excuse for non-payment

The Division Bench held that the inability or financial difficulty of Discoms cannot be a ground to avoid payment of dues to generating companies, since Discoms are realising tariff from customers. This argument raised by the Discoms appears to have swayed the single judge in issuing the interim relief (for payment of reduced tariff). The Division Bench set aside the interim relief granted to Discoms while also observing that the reason for poor financial condition of the Discoms may be different than the tariff fixed in the PPAs.

2.3 Applicability of res judicata

The Discoms had earlier approached the APERC for withdrawal of 41 wind PPAs entered into with developers, citing unreasonable tariff rates under those concluded PPAs. The APERC in its order stated that it may be unjust to invalidate the PPAs previously entered into by the Discoms. While determining this issue raised under the writ petitions, the Division Bench held that the principles of res judicata prevent the Discoms from filing the same claim, as the issue has already been decided by the APERC (without any appeal being preferred by the Discoms) and is therefore, final and legally binding.

2.4 Arbitrary curtailment

The Division Bench upheld the Common Order where the single judge disapproved the arbitrary curtailment of power by state load despatch centres. It observed that the despatch centres were unable to substantiate any threat to the grid security or safety of any equipment (or person) on the occasions when curtailment was ordered for solar and wind power plants, and that the energy equivalent to the capacity curtailed was in fact sourced from thermal power projects.

The Division Bench held that load despatch centres should take efforts to evacuate the power generated by solar and wind power projects first, treating them as must-run units and not subject them to merit order despatch principles.

3 Conclusion

The validity and sanctity of concluded PPAs and tariff is probably the most important factor that underpins private capital investment in the renewable energy sector and attempts at renegeing and renegotiating the terms of these PPAs undermine the credibility of the Indian renewable energy market.

This decision comes as a relief to the industry and all its stakeholders. Notably, the High Court has also highlighted how policy uncertainty in the sector affects investor sentiment and discourages investment in this critical sector.

UPDATES

While the 6 week period granted by the High Court to the Discoms to pay all arrears and pending bills to the power generators underlines a sense of urgency to the relief, it is likely that Discoms will seek an extension.

The High Court's observations that the reason for poor financial condition of the Discoms may be other than the tariff fixed under PPAs should serve as a precedent to prevent other Discoms from raising this as a ground to re-open PPAs and we hope this judgement will also discourage other states (such as Punjab) who seek to re-determine tariffs under concluded PPAs. That said, one cannot rule out the possibility of the Discoms considering an appeal before the Supreme Court of India – while this may be a pursuit in vain.

If you require any further information about the material contained in this newsletter, please get in touch with your Trilegal relationship partner or send an email to alerts@trilegal.com. The contents of this newsletter are intended for informational purposes only and are not in the nature of a legal opinion. Readers are encouraged to seek legal counsel prior to acting upon any of the information provided herein.