Renegotiating Power Purchase Agreements for Renewable Energy Projects

The Indian Government has set ambitious targets for renewable energy, yet must protect the existing portfolio and assure regulatory certainty.

The Government has, over the last decade, taken numerous measures to promote renewable energy. Apart from setting ambitious targets and rolling out programmes at the federal and state level, specialised agencies such as Solar Energy Corporation of India (**SECI**) and Indian Renewable Energy Development Agency (**IREDA**) have also been set up. In 2015, the Government set an ambitious target of achieving 175 GW of installed capacity from renewable sources by the year 2022 (100 GW from solar, 60 GW from wind, 10 GW from bio-power and 5 GW from small hydro). Achieving this target would involve substantial investment from private developers and regulatory certainty for protection of existing investments.

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The Electricity Act, 2003 (**Electricity Act**) provides for an enabling mechanism to promote renewable energy projects and encourage optimum investments. This is clearly discernible from the objectives set out under the Preamble, which reads as follows:

> *"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."*

Further, Section 61 and 86(1)(e) of the Electricity Act specifically puts an onus on the electricity regulatory commissions (being the sectoral guardian) to encourage optimum investments, ensure recovery of costs in a reasonable manner and to promote generation of electricity from renewable sources of energy.

The Electricity Act provides for two modes of

procurement of power by distribution licensees. The first mode is popularly known as the MoU route, where tariff is 'determined' by the Appropriate Commission (as defined in the Electricity Act) on a cost-plus basis. This mode is listed under Section 62 of the Electricity Act.

Of relevance to the renewable energy sector, even under the MoU route, there are 2 modes of determination of tariff, viz:

a) project specific tariff; and
b) generic tariff/feed-in-tariff (FiT)/normative tariff.

Under the project specific determination of tariff, all the components of tariff of an individual project are determined by the Appropriate Commission, on the basis of actual costs involved.

However, under generic tariff determination, the norms with respect to each component of tariff are determined for a defined control period, in order to devise a package basis which, power purchase agreements (**PPAs**) are entered into between the generating company and the distribution licensee. This is applicable to projects throughout the jurisdiction of the Appropriate Commission which are set up during the control period of the relevant tariff order and not to one specific project. The tariff order gives a choice to the developers to either accept the generic tariff or to approach the Commission separately for project specific tariff determination.

Typically, the State Governments issue policies for implementation of a pre-determined capacity, at a pre-approved generic/normative tariff. In turn, the developers or independent power producers submit their respective proposal for allocation of capacity showing acceptability to be bound by the generic tariff, irrespective of whether there are gains or losses in terms of actual costs.

The other route is listed under Section 63 of the Electricity Act and is popularly known as the 'bidding route'. Under this route, the price discovery is done basis a fair and transparent bidding process carried out by the distribution licensee in accordance with the guidelines framed by the Central Government. In such cases, the Appropriate Commission 'adopts' the tariff discovered though the bidding process. Under the competitive bidding regime, bidders quote tariff evaluating the feasibility thereof, based on the location of the project, support from the Government (in terms of land, ease in obtaining clearances, evacuation infrastructure etc.).

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It should be noted that both routes are equally placed under the Electricity Act and there is no preference over the other.

As early as 2006, the Central Government issued the National Tariff Policy (**NTP**) to guide the Appropriate Commissions in discharging their functions under the Electricity Act. The NTP was issued to *inter alia* ensure availability of electricity to consumers at reasonable and competitive rates and ensure financial viability of the electricity sector while attracting investments. The NTP also envisaged minimum purchase of electricity

from non-conventional or renewable sources and directed the Appropriate Commission to fix a minimum renewable purchase obligation (RPO). The NTP further went on state that all power should be procured competitively by distribution licensees i.e., under the bidding route. This particular provision of the NTP providing for migration from the MoU route to the bidding route, led to an ambiguity regarding concluded contracts and also the procedure to be followed for future contracts. In the absence of guidelines and framework especially in the context of renewable energy, the said suggestion was difficult to achieve. Therefore, by way of clarification to the NTP, the Central Government specified that it would take some time before non-conventional or renewable technologies can compete with conventional sources in terms of cost of electricity and thus, contained a provision for procurement of such power at preferential tariff, to be determined by the Appropriate Commission.

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In 2016, the Central Government revised the NTP to *inter alia* promote generation of electricity from renewable sources, increase the RPO of distribution licensees, introduce renewable generation obligation of coal/lignite-based thermal plants to establish/procure/purchase renewable capacity and waive inter-state transmission charges for renewable energy projects. The revised NTP re-emphasized that the States shall endeavour to procure power from renewable energy sources through competitive bidding to keep the tariff low, except from waste to energy plants. The revised NTP provided that the procurement of power by distribution licensees from renewable energy sources from projects above the notified capacity, shall be done through competitive bidding process, "from the date to be notified by the Central Government". It further clarified that till such notification, any such procurement of power from renewable energy sources projects, may be done under Section 62 of the Electricity Act (i.e., under the MoU route).

It is worth mentioning that since the framework/guidelines in respect of renewable energy were not notified by the Central Government as on the date of notification of the revised NTP, the MoU route was the prevalent norm. The Government, in line with the objective of the revised NTP, formulated and notified guidelines for solar competitive bidding in August 2017 and for wind energy in December 2017 (**Bidding Guidelines**). Notably, competitive bidding for renewable energy projects was carried out even prior to the notification of the Bidding Guidelines. However, such procurement was scarce and procurement through the MoU route was the prevailing practice. Post issuance of the Bidding Guidelines, the regime of preferential tariff/MoU route virtually faded out giving way for competitive bidding.

While the shift in regime was appropriate in the context of future procurement, we are today faced with a situation where the sanctity of already concluded contracts under the previous MoU regime have begun facing a threat. One such glaring example of the prevalent confusion is seen in a recent statement made by the Government of Andhra Pradesh. In the statement, the State Government has indicated its intention to review already concluded contracts and to amend the tariff under these contracts to match it with the significantly lower tariff discovered under the new regime of competitively bid projects.

This is not the first attempt to re-open already concluded PPAs. In 2013, Gujarat Urja Vikas Nigam Limited (**GUVNL**) filed a petition before the Gujarat Electricity Regulatory Commission (**GERC**) seeking reduction in tariff by way of revision of generic/preferential tariff for solar projects as determined by the GERC in 2010. Primary reason cited for such tariff reduction was advancement in

technology resulting in lower capital expenditure for the solar project developers and public interest. GUVNL appealed before the Appellate Tribunal for Electricity (APTEL) where the matter was dismissed and an appeal is pending before the Supreme Court.

Another example of this nature was an attempt by the distribution licensees in Andhra Pradesh to seek cancellation of 41 wind PPAs before the Andhra Pradesh Electricity Regulatory Commission (**APERC**), and alternatively, to seek reduction in tariff in lines with the tariff discovered through competitive bidding. The said petition was also dismissed by the APERC upholding the proposition that normative tariff cannot be trued up on actuals i.e., be converted to project specific tariff.

There are other instances where the distribution companies have made attempts to require project developers to reduce generic tariff to bring it in line with that discovered through a competitive bidding process, notwithstanding the fact that such projects were awarded at an earlier point in time. It seems that while doing so, the distribution companies have disregarded that a comparison between prices of already established projects under the generic regime and competitively bid projects which are still under implementation, cannot be made for reasons, including:

a) prices discovered through the 2 (two) routes are distinct and incomparable;
b) previous investments and concluded contracts cannot be disturbed on account of subsequent advancements in technology;
c) bid-out projects have inherent advantages such as being set up in a solar park/wind farm with adequate arrangements in terms of availability of land, evacuation infrastructure, pre-obtained authorisations etc. along with incentives such as deemed generation which insulate them from the perils of forced backing down (which is the reality of the day, despite these projects having a must-run status). These factors result in lower prices; and
d) Generic tariffs are state-specific. 2 (two) states cannot be compared as the cost of land and labour, irradiance/wind velocity etc. would be location specific.

It is an undisputed fact that with reduction in input cost, tariff for renewable projects have declined. However, the question remains as to why a generator who has invested in the past, be made to suffer on account of subsequent drop in input costs. What is further perturbing is the measures being adopted by the states to reduce tariff. In several states, distribution licensees have resorted to arm-twisting tactics by way of not making payments of tariff for months altogether, thereby intending to hamper the operations of the project. While the quoted reasons remain poor financial health of the distribution licensees and the looming 'public interest', the move appears to be a deliberate attempt to force existing projects and their developers to concede to renegotiations for a lower tariff.

It is well a settled principle under the Indian Contract Act, 1872 (**Contract Act**), that a concluded contract between parties can be amended by mutual agreement. Parties can vary the terms of the contract and absolve a party from the original obligations. Section 62 of the Contract Act allows novation, modification/alteration of contracts. The Contract Act also gives rights to parties to put a contract to an end or terminate it. The principle being that a contract is the outcome of a mutual agreement and it is equally open to the parties to mutually agree to bring the said contract to an end, enter into a new contract or modify the earlier contract. However, such amendment should be mutual and not unilateral/forced.

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It can be assumed that revision or amendment in tariff under a concluded PPA can be done by mutual consent of the parties or on account of a drastic change in circumstances which upsets the original bargain between the parties. With respect to the latter, the Supreme Court in the matter of *Gujarat Urja Vikas Nigam Limited v Tarini Infrastructure Ltd & Ors*[1] held that under the Electricity Act, it is the State Regulatory Commission which has been statutorily vested with the power to determine the tariff and that the tariff as may be fixed and incorporated in the PPA between the distribution licensee and the power producer is liable to be reviewed in light of a drastic change in circumstances. If in the changed scenario occasioned by a drastic alteration of the facts and circumstances surrounding the determination of tariff, a review of tariff is declined/refused, the power producer will be left with no option but to shut down its plants. Therefore, a review of the tariff on account of drastic change in circumstances would be fully justified, if the contract so permits. However, such precedents are to be adopted with caution and its application is limited to the circumstances described above. Drastic change in circumstance, by no stretch of imagination, could mean that a subsequent reduction in input costs can be used to upset the sanctity of a concluded PPA, especially when the costs have been frozen prior to the reduction in such costs.

In the concept of 'public interest', the Appellate Tribunal for Electricty has held that a balance has to be struck between the conflicting interests of consumers and other stakeholders.

Another aspect which is of relevance, is the concept of 'public interest'. Does the concept mean interest of the consumers alone? The position on this has been clarified by the APTEL in the case of *Gujarat Urja Vikas Nigam Limited v. Green Infra Corporate Wind Power Limited*[2] wherein it was held that consumer interest will not always override all other considerations or interest of other stakeholders and that a balance has to be struck between the two conflicting interests. It was further clarified that the power sector functions on the joint efforts of all stakeholders and health of all stakeholders should be the concern of the regulator. The regulator must realize its balancing role and recognize that those who generate renewable energy must be encouraged to enable them to remain in the power sector and flourish.

The sanctity of contracts has been upheld by the Supreme Court in a plethora of judgments and such sanctity cannot be disturbed at the whims and fancies of political parties and in the absence of compelling circumstances. The dichotomy in Governments actions are blatant. While at one hand, the Central Government has set ambitious targets for renewable energy and is providing enabling policy framework for expansion of capacity, the State Government on the other hand is looking at reducing tariff by trying to re-negotiate the concluded contracts/PPAs. While expansion programmes are a welcoming step, the Government must realize that preservation of the existing portfolio is equally important. Unless the base is protected, the structure will not stand. To attract fresh investments, regulatory certainty must be assured. ■

NOTES

1 Civil Appeal No. 5875 of 2012

2 2015 SCC OnLine APTEL 15

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