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CONCLUDED PPAS CANNOT BE INTERFERED WITH AND FINANCIAL QUAGMIRE CANNOT BE A GROUND TO SEEK REDUCTION IN THE TARIFF: HIGH COURT OF ANDHRA PRADESH

23 March 2022

Introduction

In a landmark Judgement dated 15 March 2022 (Judgement) in *Writ Appeal No. 383 of 2019: Walwhan Renewable Energy Limited vs. State of Andhra Pradesh & Ors. and batch matters*, the division bench of the High Court of Andhra Pradesh, Amaravati (High Court) comprising of Chief Justice Prashant Kumar Mishra and Justice Ninala Jayasurya has ruled comprehensively in favour of the renewable energy (RE) generators and reinforced the must-run status accorded to RE generators along with the legal principles of regulatory/policy certainty, sanctity of concluded contracts/power purchase agreements (PPAs) and promissory estoppel.

Interestingly, the High Court has pulled up the Single Judge of the High Court for being swayed by the financial difficulty of the Distribution Companies (Discoms) and observed that the financial difficulty of a party to the contract cannot be a ground for the said party to wriggle out of its obligations under the contract. There were broadly four set of appeals which were preferred before the High Court against the impugned order dated 24 September 2019 passed by the Single Judge of the High Court, and the findings thereof are succinctly summarized as follows:

- (a) **Group A Appeals:** These appeals were preferred by the solar and wind power generators challenging the findings in the impugned order in as much as it directed the Discoms to make payments at the reduced interim rate of Rs. 2.44/kWh for solar power and Rs. 2.43/kWh for wind power.

In context of these appeals, the High Court set aside the findings in the impugned order directing the Discoms to make payments at the reduced interim rate of Rs. 2.44/kWh for solar power and Rs. 2.43/kWh for wind power. Further, the Discoms were directed to make payments of all the pending and future bills at the rate mentioned in the PPAs and further to make the payments of the arrears/pending bills within a period of six weeks from the date of the Judgement.

- (b) **Group B Appeals:** These appeals were preferred by the solar and wind power generators challenging the maintainability of the proceedings initiated by the Discoms before the Andhra Pradesh Electricity Regulatory Commission (APERC), seeking a revision/reduction in tariff by amending the applicable

tariff regulations retrospectively by specifying the reduced norms and parameters, in respect of the solar and wind power generators.

In context of these appeals, the High Court has quashed the proceedings initiated by the Discoms before APERC, and has observed that (i) determination of tariff, at a particular point in time, is based on the prevalent market conditions, policies and a host of other factors, and thus, if such tariff is subject to review as and when some parameter/condition changes, then there will be policy uncertainty, which may be discouraging for investors to come forward for development of RE, which is one of the thrust areas to reduce global warming; and (ii) it is not open for the parties to undo the tariff discovered through competitive bidding process under Section 63 of the Electricity Act, 2003.

- (c) **Group C and D Appeals:** Group C Appeals were preferred by the Andhra Pradesh State Load Despatch Centre (“APSLDC”) challenging the findings in the impugned order in as much as it held that curtailment of power from RE sources cannot be ordered and that all the generators are entitled to a notice before any such action is taken. Group D Appeals were also preferred by APSLDC seeking review of the interim order dated 27 January 2020 passed by the division bench in different writ appeals appointing Power System Operation Corporation Limited (POSOCO) to ascertain if the reason of curtailment by APSLDC, was in contravention of the extant laws.

In context of these appeals, the High Court upheld the findings in the impugned order in as much as it observed that curtailment of power generated from RE sources, which runs on must-run basis, cannot be ordered for reasons other than grid safety/security, and that too after giving a prior notice. The High Court also observed that after curtailment of power from solar and wind generators, the deficit power requirement was being met through the purchase of power from thermal generators, which is not permissible, since the RE generators have been accorded the must-run status and should be allowed to operate accordingly.

Brief Background

- The Energy, Infrastructure and Investment Department, Government of Andhra Pradesh had on 1 July 2019 issued its order (EIID Order), constituting a High-Level Negotiation Committee to review, negotiate, and bring down the high wind and solar energy purchase prices of the concluded and settled long-term contracts/PPAs, in view of the purported financial crisis being faced by the Discoms in Andhra Pradesh;
- Pursuant to the aforesaid order, the Discoms had by way of their letter(s) dated 12 July 2019, directed the solar as well as wind power generators (both being projects under Section 62 and Section 63 of the Electricity Act, 2003) in Andhra Pradesh to reduce the tariff to Rs. 2.44/kWh for solar power and Rs. 2.43/kWh for wind power, due to availability of power with cheaper tariff in the market;
- Aggrieved with the unilateral reduction in the tariff under the concluded PPAs by way of the EIID Order as well as the letter(s) dated 12.07.2019, the solar and wind power generators had approached the High Court by way of their respective Writ Petitions i.e., Writ Petition No. 9844 of 2019 in the matter of ReNew Power Limited vs. State of Andhra Pradesh and batch matters. Further, the issue of arbitrary curtailment of power and/or backing down of generation

was also raised by a few of the solar and wind power generators in their respective Writ Petitions;

- The impugned order, while allowing the writ petitions filed by the solar and wind power generators and consequently, setting aside the EIID Order as well as the letter(s) dated 12 July 2019, directed the Discoms to honour the bills raised by the generators by paying the same at the interim rate of Rs. 2.44/kWh for solar power and Rs. 2.43/kWh for wind power. The judge in the impugned order further noted that except for the reasons mentioned in the PPA and/or the applicable Regulations, curtailment of RE power cannot be ordered; and
- Aggrieved with the direction for making payments at the reduced interim rate of Rs. 2.44/kWh for solar power and Rs. 2.43/kWh for wind power, the solar and wind power generators approached the division bench of the High Court by way of their respective writ appeals. Further, aggrieved with the direction to not curtail power from RE sources, APSLDC had also approached the division bench of the High Court.

Conclusion

The Judgement assumes significance as it finally puts an end to almost three years long drawn legal battle between the RE generators and the Discoms in Andhra Pradesh and reinforces the must-run status accorded to RE generators along with the legal principles of regulatory certainty, policy certainty, sanctity of the bidding process, sanctity of concluded agreements and promissory estoppel.

The Judgement is also significant in wake of the Centre's efforts to maximize generation of power from RE sources and will go a long way in reinstating confidence in the RE sector by ensuring financial viability of the RE generators.

While the Discoms have been directed to make the payments of the arrears/pending bills at the rates mentioned under the PPAs within a period of six weeks, however, timely implementation of the Judgement will have to be seen, given the poor financial health of the Discoms in Andhra Pradesh.

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