

UPDATE (ENERGY & INFRASTRUCTURE)

Andhra Pradesh High Court Upholds the Sanctity of Power Purchase Agreements

A Division Bench of the Andhra Pradesh High Court ("**Court**"), *vide* a common order dated March 15, 2022 [W.A.Nos.383, 384, 388, 392, 393, 394, 396, 401, 423, 424, 433, 435, 436, 440, 441, 443, 444, 445, 446, 447, 452, 463, 470 and 477 of 2019; 6, 70, 75, 105, 110, 114, 138, 143, 156, 168, 172, 174, 175, 176, 190 and 191 of 2020; W.P.No.11461 of 2021 and W.A.Nos.880, 909, 910, 935 and 936 of 2021], has allowed the appeal filed by solar and wind developers against the order dated April 29, 2019, of the Single Judge Bench of the Court ("**Impugned Order**").

Background of the Appeal:

Government Order bearing number G.O.Rt.No.63, Energy (Power-II) dated July 1, 2019, was passed by the Government of Andhra Pradesh ("**GO**") wherein it modified the tariff rates payable by the distribution companies ("**DISCOM**") to the power producers under the power purchase agreements ("**PPA(s)**"). The order was challenged by the solar and wind power developers before the Single Judge Bench of the Court *vide* a writ petition.

PRIMARY ISSUE OF PETITIONERS- WHETHER THE TARIFF DISCOVERED AND ADOPTED BY THE ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION ("**APERC**"), UNDER SECTION 63 AND SECTION 62 OF THE ELECTRICITY ACT, 2003 ("**ACT**") CAN BE ALTERED OR INTERFERED WITH?

THE SINGLE JUDGE BENCH OF THE COURT ALLOWED THE PETITION AND PASSED THE IMPUGNED ORDER HOLDING THE FOLLOWING:

- a. a third-party cannot direct modification of the PPAs and the State cannot use its executive power to effect such a modification;
- b. the GO was quashed, however, based on the financial distress of the DISCOMs, it was directed that payments were to be made at the reduced interim rate of Rs. 2.43 for wind power and Rs. 2.44 for solar power ("**Interim Rate**");
- c. the original petitions filed before APERC for reduction of tariff were allowed to continue as they were, *prima facie*, considered to be maintainable without going into merits; and
- d. curtailment of power by state load dispatch center ("**SLDC**") was not allowed without prior notice to the generators and any such curtailment shall not be undertaken except for in a "very grave and sudden emergency".

The Impugned Order was challenged before the Division Bench of the Court through the aforementioned writ appeals. For convenience, basis the grounds of the writ filed, and the issues framed, the Court has segregated the orders into 4 (four) groups:

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Group A Matters

The appeals under this group had been filed challenging the Impugned Order, on the ground that despite allowing the writ petition and quashing the GO, the Impugned Order directed the DISCOM to pay for the power consumed at the reduced Interim Rate.

Issue raised:

Among the contention made by the parties, the primary issue considered by the Court was whether while allowing the writ petitions, was the Single Judge Bench of the Court justified in ordering the interim arrangement to continue, especially when none of the parties had made a specific prayer for it?

Judgment:

The Court, after considering various precedents, set aside the part of the Impugned Order requiring the DISCOM to pay for the power consumed, at the discounted Interim Rate. The order of the Court was based on the following findings:

- a. while exercising jurisdiction under Article 226 of the Constitution of India, an interim relief may not be granted in favor of the respondents after allowing the writ petition;
- b. while balancing equity, the Court cannot interfere or rewrite the terms of the PPAs;
- c. financial difficulty of the government is not a valid ground to allow reduction of the tariff or avoiding the contract. The Court also opined that being a distribution licensee, the DISCOM had recovered the actual cost of energy from the consumers, and it may not raise a plea of financial instability, when payment is due to the power producers.

Basis the findings above, the Court ordered the DISCOM to make payment of all pending and future bills at the rate mentioned in the PPAs. Further, the Court provided a period of 6 (six) weeks from the date of order, for the DISCOM to clear all arrears.

Group B Matters

The appeals under this group had been filed against the part of the Impugned Order which disposed of the writ petitions challenging the maintainability of the original petitions preferred by DISCOM before APERC.

Issue raised

The primary contention in the writ appeal is against the maintainability of original petition filed before APERC for:

- a. the reduction of the tariff: determined by the APERC under the Regulation (as defined hereinafter), and as stipulated under the PPAs; and
- b. revising certain parameters of the APERC (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulations, 2015 (“**Regulations**”). The period of the Regulations was curtailed from March 31, 2020, to March 31, 2017.

Judgment

The Court set aside the relevant part of the Impugned Order and quashed the proceedings before the APERC through a writ of certiorari. The Court arrived at its judgement basis the following findings:

- a. determination of tariff at any instance is based on the policy of the government, other governmental authorities, the prevalent market practice, and a host of other factors. The tariff adjudged basis such factors, cannot be allowed to be revised, as this will lead to policy uncertainty inhibiting investment in the sector;

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- b. the APERC is not allowed to amend parameters and reduce tariff which has already been made operative for 25 (twenty-five) years by separate tariff orders, in absence of a specific clause stipulating that the tariff is subject to periodic review. Further, the parameters of the Regulations cannot be amended post its expiry; and
- c. once tariff is adopted under Section 62 of the Act, the APERC cannot seek to undo the tariff discovered by issuing a public notice.

Group – C and Group D matters

Matters in this Group C were preferred by the Andhra Pradesh State Load Dispatch Centre (“APSLDC”) against Impugned Order holding that curtailment of power is not allowed without proper notice to generators and shall be allowed only in grave and sudden emergency.

Matters in Group D were review applications against the interim order dated January 27, 2020, passed by a Division Bench of the Court in separate set of writ appeals, appointing Power System Operation Corporation Limited as the authority to ascertain the reason for curtailment undertaken by APSLDC.

Issue Raised:

The primary issue herein was whether the curtailment undertaken by the APSLDC was in accordance with the applicable law?

Judgment:

The Court dismissed the appeal filed by the APSLDC and upheld the operative part of the Impugned Order holding that such a curtailment cannot be undertaken without appropriate prior notice, or when there is no grave or sudden emergency. The Court’s opinion was based on the following findings:

- a. SLDC is required to make all efforts to evacuate the power available from solar and wind generators;
- b. Must run status of solar and wind plants cannot be substituted with merit order dispatch principles;
- c. There was no evidence of any threat to grid security or safety when curtailment was ordered;
- d. There was no curtailment before the petitions were filed before the court or before the interim order was passed.

Argus Comment:

The order comes as a relief to the renewable power investors in the State of Andhra Pradesh as it emphasizes upon the State’s responsibility towards certainty in policy making, non-interference of executive orders in concluded contracts, and jurisdiction of APERC. The decision has significant importance considering that it will bolster investment in the Indian renewable market.

Please find attached a **copy** of the order, [here](#).

Contributors



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