NEWSLETTER

ENERGY AND INFRASTRUCTURE

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Bangalore Electricity Supply Company Limited (BESCOM) v. E.S. Solar Power Pvt. Ltd. & Ors

(03.05. 2021)

INTRODUCTION

The Supreme Court by way of its judgment dated 03.05.2021in a batch of Civil Appeals filed by Bangalore Electricity Supply Company Limited (**BESCOM**) has held that the terms of the contract have to be reads into the context to what they actually, mean what the express intention is and not what the undisclosed intention may be.

The Civil Appeals had been filed by BESCOM challenging the judgment of the Appellate Tribunal for Electricity (**APTEL**) in which the Tribunal had set aside the orders passed by the Karnataka Electricity Regulatory Commission (**KERC**) regarding the reduction in tariff based on the commissioning date of solar projects in Karnataka.

BRIEF FACTS

Karnataka Renewable Energy Development Limited (**KREDL**) issued a Request for proposal on 20.11.2015 from bidders for undertaking development of Solar PV ground mount Power Plants in Karnataka pursuant to a decision taken by the State Government for development of 1200 MWA of Solar power to be implemented in 60 Taluks through private sector participation.

E.S. Solar Power Pvt. Ltd**.** (**ES Solar**) is a SPV constituted by Emmvee PV Power Pvt. Ltd. (**EPPPL**) for setting up a Solar PV ground mount Project with a capacity of 10 MWA (AC) in Bidar Rural Taluk, Bidar District. On the other hand, E.S. Sun Power Pvt. Ltd (**ES Sun**) is another SPV of EPPPL for setting up a 20 MWA (AC) capacity Solar PV ground mount Project in Bagepalli Taluk, Chikkaballapura

Accordingly, after emerging as the successful bidders, on 31.03.2016, the projects were awarded to ES Solar and ES Sun pursuant to which PPAs were entered into between the parties on 23.05.2016 (supplementary PPA was also entered on 07.12.2016). The same were also approved by the KERC on 17.10.2016. Thereafter, on 17.10.2017 and 23.11.2017, Karnataka Power Transmission Company Limited (**KPTCL**) issued Commissioning Certificates for the respective projects.

Thereafter on account of an alleged delay in achieving Commercial Operation Date ("**COD**") by the ES Solar and ES Sun, BESCOM had reduced the Tariff of both the Solar Power Developers (**SPD**) from Rs. 6.10 per unit to Rs. 4.36 per unit apart from levying Rs. 20,00,000/- and Rs. 40,00,000/- as Liquidated Damages (**LD**).

Aggrieved by the aforesaid action of BESCOM, the SPDs approached the KERC. The KERC vide its order dated 23.10.2018 dismissed the said Petitions observing that the Scheduled Commissioning date for the Solar Power Projects of the Developer was 16.10.2017 and not 17.10.2017, In addition, KERC further opined that the injection of power into the Grid from a Solar Power Project is a sine qua non for declaring that the Project is commissioned and the injection of power from the Solar Power Project into the Grid was only on 17.10.2017.

Against the Order dated 23.10.2018, the SPDs filed an Appeal APTEL. APTEL vide its order held that that the COD of both ES Solar and ES Sun according to KPTCL was 16.10.2017. Moreover, The Tribunal was also of the view that the Scheduled date of Commissioning was done within the time limit prescribed under the agreements even if the commencement of the Solar Plants is taken as 17.10.2017 as the 12 months period concluded on 17.10.2017.

Aggrieved by the aforesaid Order passed by the APTEL, BESCOM filed the present Civil Appeal before the Hon'ble Supreme Court of India

ISSUE

(a) Whether the SPDs commissioned the Solar Projects before the expiry of 12 months from 17.10.2016 which is the date of approval of PPA by KERC.

(b) Whether injection of power is a pre-requisite for deciding the Date of Commissioning of the Projects and hence, whether or not the COD and 'Commissioning Date' are one and the same.

RULING

The Supreme Court while dismissing the said Appeals filed by BESCOM placed heavy reliance on the age old settled law of how words/terms in a contact be interpreted and that the same have to be taken in the literal sense. The Hon'ble Supreme Court relied upon a plethora of precedents in this regard and accordingly opined as follows:

(a) The crucial provision which has to be taken note of is the definition of the term 'Month' in Article 21.1 of PPA which envisaged the term "excluding the date of the event". Therefore, if the date of the event i.e., 17.10.2016 is excluded, the SCOD would be 17.10.2017.

(b) The KERC had incorrectly applied Article 1.2.1 (m), which refers to a period commencing from a specified date to a specified day for the purpose of including the date of the event. According to Article 1.2.1 (k), any reference to a month shall mean a reference to a Calendar month as per the Gregorian Calenda. Therefore, clearly the KERC had failed to appreciate the true import and mention of "twelve months" in the definition of SCOD. Thus, date of Approval of the PPAs, i.e., 17.10.2016 was indeed to be excluded from the calculation of 12 months and hence, the Scheduled Commission Date was 17.10.2017.

- In so far as the second issue is concerned, the Hon'ble Supreme Court refrained from adjudicating the same in light of the findings rendered in the first issue as the question of LD does not arise as the SPDs commissioned within the contractual timelines.

Please find link to Judgment here

SKV Comment...

The Hon'ble Supreme Court by way of the present Judgment has reinforced the need to interpret the terms of the contract in the literal sense and their express intention. Words cannot be added/intention of the words cannot be assumed while interpreting the terms of the contract. The intention should always be understood from the words/language used in the contract in reference to its main object.

Timely Issuance of Tariff Orders under the Electricity Act, 2003

(03.05. 2021)

INTRODUCTION

The Ministry of Power (**MoP**) vide notification dated 03.05.2021 directed the State Electricity Regulatory Commissions **(SERC)** to issue tariff orders for the financial year 2020-2021 in a time bound manner as it is necessary to ensure the financial stability of the distribution companies in various states, therefore, the present Status of the Tariff Orders was sought by the Ministry.

Compliance to the Order passed by the Appellate Tribunal

The notification directed the SERC's to comply with the directions ordered by the Appellate Tribunal for Electricity **(APTEL)** in OP No. 1 of 2011 dated 11.11.2011, elaborating on the issues related to Tariff Revisions which are as under:

(a) Ensure regular and timely revisions of Tariff, including regular truing up of Tariffs.

(b) Allow carrying cost of past Regulatory Assets (RA), and non-creation of fresh RA's; and

(c) Ensure a mechanism for Fuel and Power Purchase cost adjustments.

Importance of the Distribution Sector

The notification has further highlighted the importance of the distribution sector in the energy value-chain in view of the fact that the power sector is entirely dependent upon the growth and stability of the distribution companies.

Draft Proposal for the Amendment of the Electricity Act, 2003

The MoP in the draft proposal for the year 2020 had focused on the Cost Reflective Tariff and concluded that the tariff determined by the SERC's is not reflective of the actual costs, which is the reason behind weak financial health of them. Therefore, the SERCs should determine the tariff for retail electricity sale without any subsidy, and any specific subsidy is to be provided then the same should be the direct responsibility of the Government.

Therefore, MoP ordered 14 States to comply with the provisions of the Electricity Act, 2003 and the direction passed by the APTEL at the earliest and issue tariff orders for the financial year 2021-2022, to ensure the financial health of the distribution companies in their respective states.

Please find link to Notification here

SKV Comment...

This is a much-needed direction issued by the MoP to ensure that the ethos of the Electricity Act and the directions passed by APTEL are met. It is of paramount importance and in the utmost interest of the stakeholders that all SERCs across the country issue the Tariff Orders in a timely manner. This would essentially lead to efficient recovery enshrined under Section 61 of the Act. This is especially critical during these times when the whole sector is under a financial crunch.

Electricity Regulators Suggest Measures to Reduce Retail Power Tariff

INTRODUCTION

India has been experiencing an ever-increasing rise in the cost of power, therefore vide the Special meeting held on 16.10.2020, the Forum of Regulators **(FOR)** deliberated on the need to evolve and analyse measures to reduce the Retail Power Tariff **(RPT)**. The FOR recognized that there are various factors which lead to high power tariffs, some of which are beyond their control.

Therefore, a Working Group **(WG)** was formed by the FOR to investigate the matter, and it broadly focused on the following:

(a) Analysing the various components of Power Purchasing Cost **(PPC)** and the impact of the same on the RPT;
(b) Analysing both external and internal factors affecting the retail tariff;
(c) Suggesting possible measures for addressing the above-mentioned issues; and
(d) Any other matter incidental or related to the above-mentioned issues.

RECOMMENDATIONS OF THE WORKING GROUP

The FOR considered data from twelve different states namely Andhra Pradesh, Assam, Bihar, Gujarat, Haryana, Jharkhand, Karnataka, Madhya Pradesh, Odisha, Uttar Pradesh, and Uttrakhand, which account for 50% of the total energy consumption of the country. Out of which the PPC is the largest contributor to the average cost of supply, averaging around 70% of the total cost borne by the distribution company. Other related aspects which hold a major share are the transmission charges, operation and maintenance expenses.

Therefore, the WG highlighted the need for concerted effort on account of both the Centre and state to address the high retail tariff, and made the following recommendations under two broad categories, namely External Factors like Coal, Railway Freight, Clean Energy Cess, New Environment Norms New norms related to disposal and transportation of Fly Ash and Internal Factors such as High transmission costs, Stranded Generation Assets, Return on Equity, Depreciation on Tariff, etc.

External Factors

Coal

The cost of coal is considered to be a major contributor to the PPC. There was a 28% increase in coal price, which was higher than the estimated price increase based on the weighted average of the consumer price index and the wholesale price index. The WG, therefore, recommended bringing the coal sector under an independent regulator, while also emphasizing on the need for installing electricity regulators to monitor and regulate the calorific value and station heat rate.

Railway Freight

The freight charges have increased by over 40% in the past four years as observed by the WG, and therefore it was recommended to bring the same under the control of an independent regulatory body. Further, an emphasis was placed that the Central Government should consider subsidising the freight for a distance beyond 750 km.

Clean Energy Cess

Since the year 2010, around $15.6 (USD) billion has been collected in the clean energy cess until the Financial Year 2019-2021. The WG recommended that if the Cess is to be continued, despite an increased investment into the renewables sectors, the same should be used to mitigate the incremental costs of environmental norms in the electricity sector

New Environmental Norms

To eradicate toxic Sulphur dioxide emissions, India initially set up the deadline for thermal power plants to comply with the emissions standard by installing Flue Gas Desulphurization (FGD) infrastructure by the year 2017, which was later pushed to various timelines ending in 2020, for different regions. The Ministry of Power proposed to contribute $11.70 billion (USD) to meet the cost and development requirements of FGD's at coal plants. The WG proposed that the installation of FGD's will increase sustainability of cost per unit of energy, which can be compensated from the clean energy cess collected from the consumers of the electricity sector.

New norms related to disposal and transportation of Fly Ash

According to the 2017 draft notification issued by the Ministry of Environment, Forest and Climate Change, the total cost disposal and transportation of the fly ash was to be borne by the thermal plants. The WG believed that such a move will impact the overall cost of production and suggested that the partial cost can be borne by the Central and State governments.

Internal Factors

High transmission costs

The WG pointed out that there is an underutilization of the inter-state transmission assets, as compared to the investments. Therefore, it is suggested that transmission should be planned on accurate demand, and that the Central government should step in to share the cost of stranded assets by utilizing the clean energy cess. Further, the WG suggested that the State Electricity Regulatory Commissions (SERC's) should consider adopting a tariff-based competitive bidding for projects above a certain normative threshold.

Stranded Generation Assets

The WG noted that there is a fixed cost of transmission paid by the consumer and suggested that the government should help the distribution companies to meet the fixed cost of the Power Purchasing Agreements (PPA) associated with stranded assets.

Return on Equity

The WG observed that the overall performance of the distribution company has an impact on the overall retail tariff for the consumers, and therefore, it was suggested to link the recovery of return of equity to the performance of utilities based on demand, supply, and network availability, and aggregate commercial and technical loss reduction.

Depreciation on Tariff

The WG suggested that the depreciation rate should be rationalized, and the period should be extended from 12 to 15 years. It was further suggested that the accumulated depreciation should be utilized to reduce the equity base for the return on equity.

Growing Share of Renewables

The WG observed that the renewable energy was available at a much lesser cost, though the transmission and balancing costs are hindering with the benefits of the same. Therefore, the WG suggested that focus should also be brought to the distributed generation that will potentially minimize transmission infrastructure and essentially reduce the overall cost, instead of just focusing on large scale renewable projects.

Short-Term PPA's

The WG encouraged adopting shorter duration PPA's with exit clauses, as the 25-year PPA agreements contracted via competitive bidding are too long.

Cost Optimisation

The WG suggested that the power procurement can be optimised if the Merit Order Dispatch is followed strictly, essentially reducing the Purchasing Power cost.

Curtailing Trading Margins

The WG is of the view that the ceiling margin provided by the Central Electricity Regulatory Commission (CERC) is being misused by the public sector. The group therefore suggested the CERC to fix the cap limit for the same at about $0.0003/kWh.

Waiver of Charges for Hydro Projects

The WG suggested that the matters related to the waiver of charges should be taken up by the Ministry of Power.

Distribution Level Efficiency in Operation

The WG suggested that the State and Central Electricity Regulatory Commissions need to devise a long-term trajectory for loss reduction and ensure the distribution companies follow them strictly.

ANALYSIS

The WG further suggested that all the future electricity projects (hydro, nuclear, etc.,) should only be contracted via competitive bidding. Further, it was highlighted that all the norms pertaining to maintenance and operations expenses should be made more uniform and stringent to ensure higher outputs and efficiency.

These suggestions come with the backdrop of aligning the current RPT along with the evolving field of renewables and managing the high prices through collaborative central and state coordination by providing conducive policies for the distribution companies.

Please find link to Regulations here

SKV Comment...

It is a step in the right direction as the Regulators are taking note of the ever increasing rise in the cost of power and how/what steps can be taken to mitigate the same. Awarding contracts/projects through only competitive bidding is the need of the hour as it not only meets the objective of the Electricity Act, 2003, i.e. to protect consumer interest and at the same time promote Competition and economical use of resources but will also encourage private participation and ensure a more efficient, cost effective and transparent process for procurement of power.

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