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IMPACT OF COVID-19 ON THE RENEWABLE ENERGY SECTOR IN INDIA

INTRODUCTION

The CoViD-19 outbreak has brought the world to a standstill, and it would not be inaccurate to state that we, the present generation, collectively have no prior experience in dealing with a pandemic of this magnitude. CoViD-19 has affected all walks of life in every manner possible. Many countries all over the world including India have imposed a complete lockdown on all public activities for a temporary period. In India, the lockdown has been presently imposed for a period of 21 days, which is likely to be further extended to the end of April.

This perplexing time of social distancing, working from home and quarantine, gives us an opportunity to recognise electricity's imperative role not just as a pillar to our economy, but also as a contributor to public order and social stability. Having said that, the power sector including the renewable energy sector in India, is not immune to the negative impact of the pandemic. The sector is witnessing immense pressure and the Government of India is acting swiftly to ensure this essential pillar to our economy and social order does not crumble due to the prevailing circumstances. The stakeholders

have also attempted to insulate themselves from the impact of CoViD-19.

Through this article, we would like to discuss and assess the actions undertaken by and for the key stakeholders in the renewable energy sector to counter the effects of the pandemic.

RELIEF TO RENEWABLE ENERGY GENERATING COMPANIES

"ESSENTIAL SERVICE" AND "MUST RUN" STATUS OF RENEWABLE ENERGY POWER GENERATORS

The Ministry of New and Renewable Energy, Government of India ("MNRE") has notified¹ and declared that power generation and transmission (including renewable power generation) is an essential service and is exempted from the closure requirements of the 21 day lockdown announced by the Ministry of Home Affairs *vide* Order No.40-3/2020-DM-I (A) dated March 24, 2020. The MNRE has also permitted the movement of goods and/ or people necessary for the generation and/ or transmission of power.

Further, the MNRE through its Office Memorandums dated April 01, 2020² and

¹ Ministry of New and Renewable Energy, D.O. Number 283/18/2020-GRID SOLAR dated 26th March, 2020, available at

https://mnre.gov.in/img/documents/uploads/file_f-1585207142578.pdf

² Ministry of New and Renewable Energy, Office Memorandum, F. No. 283/20/2020 - GRID SOLAR(ii),

April 04, 2020³ has clarified that renewable energy generating stations have a ‘must run’ status and will continue to be accorded the same status even during the lockdown.

It may be pointed out here that Central Electricity Regulatory Commission (CERC) (Indian Electricity Grid Code) Regulations, 2010 (read with the Electricity Act, 2003) (“**Grid Code**”) provides that all renewable energy power plants except biomass power plants, and non-fossil fuel based co-generation plants whose tariff is determined by CERC shall be treated as ‘must run’ power plants⁴. The status has been accorded to promote the use of renewable sources of energy, and ensure that the generation of power by renewable sources doesn’t stop on account of demand and supply based commercial considerations. Given the must run status accorded to wind and solar energy generators, the load dispatch centres - the state load dispatch centres (“**SLDC**”) and regional load dispatch centres (“**RLDC**”), are under an obligation to evacuate the power produced by such power generators or simply put, under an obligation to inject all the power produced by wind or solar energy into the grid⁵.

The must run status also restricts the RLDC(s) and SLDC(s) and thereby the distribution companies from curtailment of renewable energy power. The curtailment is permissible only on account of grid safety reasons, which has been clarified by the MNRE vide its Office Memorandum dated April 04, 2020 wherein it is clearly stated that any curtailment but for grid safety reason would amount to deemed generation.

available at
https://mnre.gov.in/img/documents/uploads/file_f-1585801699131.pdf

³ Ministry of New and Renewable Energy, Office Memorandum, F. No. 283/20/2020 - GRID SOLAR(ii), available at,
https://mnre.gov.in/img/documents/uploads/file_f-1586142405322.pdf

EXTENSION OF THE COMMISSIONING DATES FOR ONGOING PROJECTS

There is no doubt that the lockdown has made the fulfilment of certain obligations impossible, and certain others commercially burdensome. The chain of power generation, transmission and distribution has also been hit by the impossibility and/ or hardships in the performance of the contracts relevant to this chain. The impossibility of performance frustrates a contract and frees the parties of any obligations of performance and thereby insulates them from any liability therefrom.

The doctrine of frustration is captured under section 56 of the Indian Contract Act, 1872 (“**Act**”). The second para of Section 56 of the Act provides that “*a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*”

The ‘force majeure’ clause is the commercial expression of the legal principle of frustration. A force majeure provision in a commercial arrangement is an express provision of circumstances wherein the intention is to save the performing party from the consequences of anything over which he has no control⁶. The scope of the force majeure clause and the circumstances it covers may vary on a case to case basis. The term has been derived from the Latin word ‘vis major’ which means ‘a superior force’, but it has been given a wider import through judicial interpretation and evolution of contract drafting.

⁴ Regulation 6.5 (11), The Central Electricity Regulatory Commission (CERC) (Indian Electricity Grid Code) Regulations, 2010

⁵ Regulation 5.2 (u), The Central Electricity Regulatory Commission (CERC) (Indian Electricity Grid Code) Regulations, 2010

⁶ *Dhanrajamal Gobindram v. Shanji Kalidas & Co.*, AIR 1961 SC 1285.

Post the announcement of the lockdown, there was a large scale invocation of the force majeure provisions in all major commercial contracts. The MNRE received multiple requests for time extension in respect of the commissioning dates of the renewable energy projects, and accordingly issued an Office Memorandum dated March 20, 2020⁷ stating that all renewable energy implementing agencies of the MNRE were required to:

- a) Treat delay on account of disruption of supply chains, as a force majeure event (subject to submission of valid documentation evidencing disruption on account of CoViD-19).
- b) Grant suitable extension of time for the ongoing projects due to the disruption in the supply chain (subject to submission of valid documentation evidencing disruption on account of CoViD-19).

The MNRE also requested the state departments to do the same.

INVOICING INSTRUCTIONS

The MNRE has taken into consideration the representations received from the renewable energy industry and has thereafter relaxed invoicing requirements⁸ permitting email based invoices where billing is done through regional energy account (REA) or state energy account (SEA), and where joint meter reading (JMR) is available. There are further relaxations even where the signed JMR is not available.

⁷ No. 283/18/2020- GRID SOLAR, https://mnre.gov.in/img/documents/uploads/file_f-1584701308078.pdf

⁸ Ministry of New and Renewable Energy, Office Memorandum, F. No. 283/20//2020-GRID SOLAR dated April 01, 2020, available at https://mnre.gov.in/img/documents/uploads/file_f-1585747702498.pdf

The hard copies of invoices are to be submitted within 15 days after the lockdown is over and the necessary adjustments shall be made from the subsequent bill(s).

RELIEF TO DISCOM(S)

The Ministry of Power, Government of India, has identified the liquidity crisis which has engulfed DISCOM(s) following the lockdown announced by the Ministry of Home Affairs on March 24, 2020 and has issued directions⁹ under section 107 of the Electricity Act, 2003 to provide adequate relief. The directions made public by the Ministry of Power include:

- a) *The continuous supply/ transmission of electricity even to DISCOM(s) which have large outstanding dues to the central public sector undertakings/ transmission companies. Further, there is a restriction on curtailment of supply to any DISCOM(s).*
- b) *The relaxation of the payment security mechanism to be maintained by the DISCOM(s) with the generating companies for dispatch of power.*

The Ministry of Power's letter No.23/22/2019-RR dated March 27, 2020, relaxed the requirement of making prepayment or giving Letter of Credit (LoC) for the entire cost of the power sought to be scheduled, as was previously made mandatory after the Ministry of Power's order in June 28, 2019 (effective from August 01, 2019)¹⁰. From March 24, 2020 to June 30, 2020, the requirement of

⁹ Ministry of Power, PIB Release dated March 28, 2020; available at <https://pib.gov.in/newsite/PrintRelease.aspx?relid=200742>

¹⁰ Available at https://powermin.nic.in/sites/default/files/webform/notices/Opening_and_maintanig_of%20adequate_Letter_of_Credit_as_Payment_Security_Mechanism_under_Power_Purchase_Agreements.pdf

prepayment / giving LoC before power is scheduled is reduced to 50% off the entire cost of power sought to be scheduled. The remaining 50% will have to be paid within the period given in the respective PPAs, failing which delayed surcharge will apply.

- c) *A moratorium of three months to DISCOM(s) to make payments to generating companies and transmission licensees and not to levy penal rates of late payment surcharge (“LPS”). The states have been requested to issue similar directions.*

Keeping in view the directions issued by the Government of India under section 107 of the Electricity Act, 2003 and to address the difficulties faced by the distribution companies, the CERC in exercise of its powers¹¹ under Regulation 76 of the 2019 Tariff Regulations relaxed the provisions of Regulation 59 of 2019 Tariff Regulations to provide that if any delayed payment by the distribution companies to the generating companies and inter-State Transmission licensees beyond 45 days from the date of the presentation of the bills falls between March 24, 2020 and June 30, 2020, the concerned distribution companies shall make the payment with LPS at the reduced rate of 12% per annum that translates into 1% per month (except in case of inter-state transmission licensees, whose LPS shall be governed in accordance with the applicable Transmission Services Agreement).

For generating companies whose tariff has been determined under section 63 of the Electricity Act, 2003 by the CERC, relief on the LPS for payments which become delayed beyond 45 days (from the date of presentation of the bill) during the period from March 24, 2020 to June 30, 2020 may be claimed in terms of the force majeure provisions of the respective power purchase agreements (“PPAs”).

There have been further clarifications on the relaxations relating to the LoC and LPS vide the Ministry of Power’s letter No. 23/22/2019-R&R Part 4 dated April 06, 2020¹².

- a) It is clarified, that though the initial direction from the Ministry of Power was for a 3 months moratorium, the obligation to pay has not been done away with completely by the CERC, and the obligation to pay within 45 days of the presentation of bills or as provided under the applicable PPA remains. The LPS thereafter has been reduced and may be done away with on request with valid supporting documents.

- b) It is further clarified that the relaxations apply only to LoC or LPS requirements arising from March 24, 2020 to June 30, 2020, not before or afterwards.

In view of the above, it is clear that (a) the obligation to pay for power within 45 days of the presentations of the bill or the time period provided in the PPA remains unchanged, (b) LPS is to apply only for the

¹¹ Refer *suo moto* petition by the CERC dated 03.04.2020; available at <http://www.cercind.gov.in/2020/orders/6-SM-2020.pdf>

¹² Available at [https://powermin.nic.in/sites/default/files/webform/notices/Final Clarification to the orders of MoP letter dtd 06042020.pdf](https://powermin.nic.in/sites/default/files/webform/notices/Final%20Clarification%20to%20the%20orders%20of%20MoP%20letter%20dt%2006042020.pdf)

period between March 24, 2020 to June 30, 2020, and (c) obligation to pay for capacity charges as per the PPA and transmission charges shall continue.

The Ministry of Power also intends to infuse liquidity in the power sector, however, the details have not been made public yet.¹³

THE 'MUST RUN' STATUS v RELIEF TO DISCOM(S)

CoViD-19 has been claimed as a force majeure event by DISCOM(s) who had started curtailing renewable energy power.

The MNRE has through its office memoranda dated April 01, 2020¹⁴ and April 04, 2020¹⁵ reiterated that the 'must run' status of the renewable energy power generators continues to exist and no curtailment shall be permissible except on account of grid safety reasons. It specifically clarifies that any curtailment but for grid safety reasons would amount to deemed generation and the DISCOM(s) are under an obligation to pay for the scheduled capacity of the relevant renewable energy project.

The Office Memorandums further clarify that the payment relaxations including the LoC and LPS relaxations, which have been extended to DISCOM(s) are sufficient and do not apply in case of renewable energy generators, and the regular process for payments needs to be followed¹⁶. The relaxations have not been extended to renewable energy power generating stations because these constitute only a minor portion of the total electricity generation in the country.

It is also relevant to mention here that CoViD-19 has been recognized by the MNRE as a force majeure event in relation to

permitting extension of time period for commissioning dates for projects only, and extension of its application to non – payments by DISCOMs of overdue invoices and other payments is incorrect.

CONCLUSION

The outbreak of CoViD-19 and the consequent lockdown has set upon us unprecedented challenges. Two key focus areas have emerged (i) liquidity crunch; and (ii) performance failures.

The government has tried to balance the liquidity requirements of both the energy generators and the distributors. Having said that, it is speculated that the government is considering further infusion of liquidity in the power sector, which is going to be a much needed relief for all stakeholders.

As far as performance failures are concerned, relaxations have been made either through statutory means or through the recognition of CoViD-19 as a force majeure event in certain cases. As far as relaxations on account of force majeure provisions are concerned a balance has to be created. While the impossibility of performance relieves the parties of the obligations of performance and thereby insulates them from any liability therefrom, hardships in respect of performance do not have the same effect on the discharge or enforceability of contracts¹⁷. An extravagant application of the force majeure provisions will also dent the prospects of the power sector in battling the present crisis. For commercial hardships in the performance for fulfilment of contractual obligations with respect to the generation, transmission or supply of power, force majeure provisions may not be helpful, and the Government will have to provide

¹³ *Ibid.*

¹⁴ *Supra* note 2

¹⁵ *Supra* note 3

¹⁶ *Supra* note 2

¹⁷ *Sachindra Nath v. Gopal Chandra*, AIR 1949 Cal 240

additional support in the form of liquidity infusion.

Until now, the Government has taken swift and balanced measures to combat the impact of CoViD-19. It is anticipated that the lockdown may be extended, and in the event the extension happens, while some relaxations such as the LoC and LPS requirements may continue to apply, the term and application of the remaining relaxations/ notifications, particularly with respect to renewable energy will need to be extended too.

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