

The Continued Rise of Renewable Corporate PPAs in India

A power purchase agreement, or a “PPA”, enables an entity to procure electricity directly (*i.e.*, ‘offtake’) from a producer of power. State-owned/licensed distribution companies (“discoms”) are the main off-takers in India:¹ they first procure power from “gencos” (generating companies),² and then distribute such power onwards – via grid³ transmission – to and among end-users (including across segments like commerce and industry (“C&I”), agriculture, households, etc.).⁴ Pursuant to a PPA, the genco raises monthly invoices for the units of power sold/supplied. In turn, discoms are obliged to meet the applicable demand in their respective supply areas. For instance, the Maharashtra State Electricity Distribution Company Limited (“MSEDCL”), India’s largest discom, distributes power to the entire state of Maharashtra (including some parts of suburban Mumbai).⁵

However, ‘corporate’ PPAs have proliferated over the past few years, including in India. Specifically with respect to renewable energy (“RE”), India appears to have witnessed one of the largest spikes in the world, next only to the US. A corporate PPA differs from the traditional model (‘utility’ PPAs) – where discoms (*i.e.*, utilities) invite bids from power generators and then select a seller.⁶ Instead, in a corporate PPA, a non-utility company

¹ Private utilities serve only 10% of the country’s power consumers. Globally, too, 70% of distribution utilities are publicly owned; the remaining 30% of the privately owned companies are located primarily in middle and high-income countries.

² Gencos, too, can be either state-owned or private. For instance, NTPC Limited and Adani Power Limited, respectively.

³ Private discoms may also own assets on the grid, in whole or part (the distribution licensee model – as opposed to the franchisee model, where the grid assets are not owned). E.g., Tata Power Company Limited (Tata Power), New Delhi.

⁴ The vast majority of consumers in India continues to be served by state-owned utilities.

⁵ Mumbai is served by three private distribution licensees: Adani Electricity Mumbai Limited (AEML), Tata Power Company Limited, Tata Power, and the Brihanmumbai Electricity Supply and Transport Undertaking (BEST).

⁶ Such selection typically happens at the end of the bidding process through a pre-announced and templated mechanism, subject to financial and technical qualifications.

looks to design a bespoke power purchase arrangement with an appropriate energy producer, commensurate to the former's appetite and commercial purpose.

WHY ARE SO MANY CORPORATE PPAS GETTING SIGNED IN INDIA?

To begin with, an entity may have some unique consumption needs, whether sector- or company-specific, including in terms of running and/or expanding its business. For example, companies engaged in sectors such as technology, infrastructure, construction, automotive, textile, etc. – especially those with high power requirements (like running a data center or a high-load factory in a concentrated hub) – may find it worthwhile to *secure* their power supply in order to reduce business disruption.

More generally, however, one key reason for the growth of Indian corporate PPAs in respect of RE is the coal-centric reality of high tariffs on the grid – coupled with the fact that non-fossil RE is now widely available in India, and that too for cheap (especially solar energy, on account of substantial gains made in photovoltaic (“**PV**”) cell/module-based technologies).

Further, sustainability and climate awareness are both worthy pursuits today, what with robust Environment, Social and Governance (“**ESG**”) norms, alongside green taxonomies, bound to arrive in the country soon – possibly extending to unlisted companies as well. Even while pursuing creative eco-labeling practices (whether to impress investors and/or customers, or to distinguish one's brand from the rest), companies need to look out for 'greenwashing' laws that are expected to go beyond extant corporate governance-related disclosure and reporting standards.⁷ Accordingly, a demonstrable trail of direct RE procurement (through renewable PPAs) might enable such entities which are involved in environment/climate-friendly messaging to *not* run afoul of the law, including in the future.

In addition, the Indian government's firm pivot towards RE – pursuant to ambitious climate goals under the Paris Agreement – has produced a plethora of green policies and regulation (including the democratized 'open access' and RE certificate (REC) regime, as recently modified, in 2022). Increasingly, the government has created an environment punctuated by incentives and opportunities to go green. As a result, the number of corporate PPAs in the RE sector has mushroomed and is likely to grow further still.

On the supply side generally, the energy market is dominated by private players (barring a few notable exceptions like NTPC Limited). In respect of RE in particular, the power production space is getting populated very quickly (including by independent power

⁷ Including the extant Business Responsibility and Sustainability Reporting (BRSR) framework for large listed companies

producers (“**IPPs**”) and a growing number of foreign gencos, duly benefiting from India’s liberalized FDI policy on RE). From such gencos’ perspective, corporate PPAs make a lot of sense. After all, a corporate entity is more likely to pay up – and on time – compared to cash-strapped discoms with a history of delayed or failed payments, including attempts at contract renegotiation. Besides, discoms may refuse to buy from private gencos unless the latter bid really low (which, in turn, can make the project unviable in the long run, especially with rising costs associated with inflation, inputs, indirect tax, and imports). Thus, rather than face situations of unmet (i) demand (on account of project failure) or (ii) supply (because of unsold capacity), private gencos can inject excess RE into the grid for willing corporate off-takers, especially those in the C&I segment with high(er) power requirements.

WILL THIS TREND CONTINUE? WHY?

To be sure, corporate PPAs have (thus far) mainly been entered into by the big boys of Indian business. What about the rest, however? The US, for instance, has seen smaller companies enter the renewables market. To overcome the burden of long-term, high-volume commitments, smaller companies can pool their power needs together and each claim a portion of the aggregate capacity. Additionally, these participants can partner with an ‘anchortenant’ – a larger and more experienced purchaser with a strong balance sheet, superior bargaining power, and previous accounting/legal experience in this regard. In India too, this ‘group captive’ structure brings together equity from multiple off-takers, along with an IPP’s own. In particular, the structure has the advantage of routing RE-related capital from those companies in the C&I segment who otherwise may not have invested in renewables.

EXAMPLES OF ‘GROUP CAPTIVE’ PROJECTS

For instance, the Nellai power plant in Tamil Nadu is a large greenfield solar park commissioned at utility-scale. Developed under a group captive model, Nellai’s customers buy the solar energy produced under long-term corporate PPAs. Pursuant to the Electricity Act, 2003, as amended (the “**Electricity Act**”), read with the Electricity Rules, a power project is considered ‘captive’ if the consuming entities use at least 51% of the power generated every year and collectively own a minimum 26% equity in the project company (Nellai Renewables Private Limited (“**NRPL**”) is the project company in this example). In fact, NRPL has a 74:26 equity mix.

Further, a combination of discoms could also constitute the captive group – although, from the genco’s perspective, this leads to a counterparty credit risk, with more than 50% of the project’s capacity (potentially) exposed to payment delays. Meanwhile, a diversified

portfolio of C&I customers could constitute a separate off-taker group, pursuant to a separate network of PPAs – albeit within, and in respect of, the same RE project.

For example, Watsun Infrabuild Private Limited (“**WIPL**”),⁸ a project company operating in Tamil Nadu (like NRPL), has commissioned both wind and solar capacity for its utility-scale power plant. Importantly, it has agreed to sell this entire capacity to group captive and third-party customers pursuant to separate PPAs. Thus, 51% of WIPL’s total capacity is tied up with discoms – MSEDCL (27%) and Madhya Pradesh Power Management Company Limited (MPPMCL) (24%). The remaining 49% is tied up with C&I customers. Under this combination of third-party and captive group buyers, WIPL’s customer mix is diversified – including pursuant to PPAs signed with around 90 customers, where no single customer accounts for more than 8% of the total C&I capacity. Moreover, the average tariff for such C&I buyers is at a discount of Rs.1-2 per unit (relative to grid tariffs). Such discounts not only help customers in terms of being able to procure power at cheaper rates (than are available on the grid), but also mitigate the project’s offtake risk from the genco’s point of view.

RECENT REGULATORY DEVELOPMENTS

Among other things, the open access rules of 2022 in respect of green energy (the “**Open Access Rules**”)⁹ reduce transactional thresholds in respect of RE from 1 MW to 100 kW, thus paving the way for small consumers to purchase ‘green energy’¹⁰ easily. Earlier, on account of higher eligibility thresholds in respect of load, only large C&I establishments found open access feasible. Pursuant to the new relaxation, however, even small and medium-sized enterprises with modest energy requirements can procure RE via open access. Since C&I consumers constitute more than 50% of the aggregate power demand (and consumption) in India, a more democratized and inclusive open access regime will significantly increase RE procurement through corporate PPAs.

⁸ A special-purpose project company (SPV) within the wider Singapore-headquartered Continuum group, including other Indian subsidiaries/SPVs of Singapore-incorporated Continuum Green Energy Limited (CGEL), all assets of which are located in India.

⁹ The Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022 (the “**Open Access Rules**”), notified on June 6, 2022

¹⁰ Section 2(d) of the Open Access Rules define “green energy” as the electrical energy from renewable sources of energy, including hydro and storage (if the storage uses renewable energy) or any other technology as may be notified by the Government of India from time to time, including any mechanism that utilizes green energy to replace fossil fuels such as the production of green hydrogen or green ammonia as per appropriate provisions under the Open Access Rules.

RENEWABLE PURCHASE OBLIGATIONS

Further, the Open Access Rules stipulate a uniform regime of ‘Renewable Purchase Obligations’ (“RPOs”) for obligated entities in respect of a particular distribution area. Such purchase obligations apply across multiple categories of obligated entities – which include open access customers, along with discoms and captive power producers. All of such entities¹¹ are obligated to purchase a minimum share of their electricity from RE sources as per RPO targets. Thus, both the avenues and reasons for entering into a corporate PPA have burgeoned.

A FEW THINGS TO LOOK OUT FOR IN CORPORATE PPAS

There has been substantial litigation around ‘change in law’ (“CIL”) provisions in Indian PPAs. Corporate buyers are likely to resist bearing a CIL risk. Where a PPA has been signed on a long-term and fixed price basis, a corporate buyer may feel that the benefit provided to the genco pursuant to such arrangement (*i.e.*, by fixing both price and tenor upfront) is adequate reason for the project to bear potential CIL risks on its own. Gencos, on the other hand, will want a CIL risk to be well-defined.

Indeed, corporate buyers tend to make economic assumptions based on the expected performance of an RE technology and/or in respect of the project itself. Reflecting this expectation in the corporate PPA can provide comfort as well as a potential exit route with regard to a suboptimal asset. On the other hand, gencos may consider performance guarantees unnecessary in light of their own economic incentive to maximize output. If and when agreed upon, however, a genco might want to ensure that the performance requirements are realistic, achievable, and aggregated over time (this is especially relevant in case of intermittent sources of power, such as with respect to RE).

Further, certain extraneous events may occur which neither the genco nor the corporate buyer can address or control. Such extraneous events may delay the completion of the project and/or compromise its performance. A PPA will thus need to provide a mechanism to allocate responsibility for such risks. For example:

- The corporate buyer may want to retain a choice to purchase RE from an alternative source upon the occurrence of such events. Further, if such events are prolonged, the corporate buyer may want to retain the right to unilaterally terminate the PPA.

¹¹ An ‘entity’ (as defined under section 2(b) of the Open Access Rules) may set up a power plant from RE sources of whatever capacity for its own consumption anywhere in India. In such cases, the generating plant may be installed by the entity itself or by a genco with which such entity enters into a PPA. In addition, an entity may procure RE through open access from any genco either directly or indirectly.

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- The genco, on the other hand, might seek to ensure that suitable protections are available in situations of construction delay or underperformance. Where there are termination rights in favor of a corporate buyer for a prolonged ‘force majeure’ event, a genco may insist on a reasonable notice period before such termination rights can be exercised.
 - Lenders may wish to ensure that the responsibility and risk of extraneous events are fairly shared between the parties. Lenders may also have step-in rights that can be exercised prior to such termination.

CONCLUSION

While the growth in corporate PPAs is expected to continue, such agreements are bound to become complex, customized, as well as sites of potential dispute. Accordingly, lawyers need to account for nuances in RE technology and related policy while negotiating renewable PPAs. In particular, judicial and regulatory trends might inform the future interpretation of commercial understandings in this regard.

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