

NEW MODEL WIND PPA^{*}

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^{*}Wind PPA means the new model power purchase agreement under the Circular 2 of the Ministry of Industry and Trade (MOIT) on wind power projects dated 15 January 2019 (Circular 2/2019).

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WIND PPA COMMENTS

LIMITED ABILITY TO AMEND THE WIND PPA

Under Circular 2/2019, the use of the Wind PPA is mandatory, and the parties are only allowed to supplement the Wind PPA to clarify the parties' rights and obligations and not to change the main contents of the Wind PPA. Under the Wind PPA, the parties can agree on the following additional information:

- (i) Schedule B which provides for, among other things, technical specifications of the wind power plant and estimated construction completion date and commercial operation date (**COD**);
- (ii) Schedule D which provides for the determination of COD; and
- (iii) Schedule G which provides for "other agreements."

LIMITED CREDIT ENHANCEMENT INCENTIVES

Unlike large scale coal-fired or gas-fired power projects, the Wind PPA does not enjoy certain credit enhancement incentives. In particular,

The Wind PPA does not provide a government guarantee for the buyer or any other buyer credit enhancement. This is in line with the current law on government guarantee which is only available for an investment project which is approved in-principle by the National Assembly or the Government or decided by the Prime Minister or which is otherwise an important infrastructure project. Presumably, the availability of a Government guarantee will be decided on a case-by-case basis depending on various factors including the capacity of the wind farm and its importance to the national system;

The Wind PPA does not provide for any guarantee of foreign currency available to convert VND payments under the Wind PPA into other currencies, or the remittance of funds outside of Vietnam. This is because, under the Law on Investment 2014, only certain important investment projects (e.g., investment projects that are subject to the in-principle investment decision of the National Assembly or the Prime Minister) could receive guarantee on satisfaction of foreign currency needs from the Government; and

There is no inflation or other price escalation adjustment mechanism for the tariff under the Wind PPA. Nonetheless, the tariff is adjusted in line with the VND/USD central exchange rate quoted by the State Bank of Vietnam.

CAPACITY

The Wind PPA does not have clear provisions dealing with the scenario where the as-built capacity of the power plant is higher or less than the designed capacity of the power plant as recorded in the Wind PPA. It is therefore not clear if the buyer:

- (i) can reject the power plant if the as-built capacity of the power plant is below the designed capacity; or
- (ii) can reject to purchase the excess capacity if the as-built capacity of the power plant is higher the designed capacity.

The Wind PPA requires the power plant to provide the buyer with an annual forecast of the output capacity for each month during a contract year. The Wind PPA seems to suggest that the power plant will be responsible for paying damages to the buyer if the power plant does not supply enough power due to the fault of the power seller. It is not clear if this means that the power plant must provide enough power in accordance with the forecast submitted to the buyer.

NO SALE TO THIRD PARTY

Under the Wind PPA, the power plant cannot sell its electricity to a third party or use the output electricity for another purpose other than for sale to the buyer. This restriction applies even in case the buyer cannot take delivery of the output electricity of the power plant.

DISPATCH AND CURTAILMENT RISKS

Under Decision 37 of the Prime Minister dated 29 June 2011 on development policies of wind power projects (as amended) the buyer must purchase all output electricity generated by the power plant. Article 2.2.1(a) of the Wind PPA includes this "take and pay" requirement. That said, under the Wind PPA, the buyer may suspend its purchase of output electricity from the power plant in the following situation:

- (iii) the power plant is not maintained and operated in accordance with applicable standards and regulations;
- (iv) when the buyer installs, repairs or tests the grid which directly relates to the connection of the power plant;
- (v) when the regional transmission or distribution grid breaks down, or grid equipment directly connected to the regional transmission or distribution grid breaks down, or the operational regime breaches the regulations; or
- (vi) when the grid of the power buyer needs support to recover after a breakdown; or
- (vii) when the power plant receives an instruction from the relevant dispatch authority except in case compliance with such instruction causes changes to the power plant's electricity generation method. Under Circular 40 of the MOIT dated 5 November 2014 stipulating the procedure for dispatching of the national power system, the dispatch authority can curtail the power generation of the power plant for various technical reasons. That said, the dispatch authority is required by law to give priority to utilizing the maximum capacity of the power plant.

Regarding the scenarios mentioned above, there is no time limit on the buyer's suspension. Additionally, the PPA does not contain any provision for any deemed commissioning or dispatch payments or other compensation in cases of the buyer's suspension.

TRANSMISSION RISKS

Under the Wind PPA, the buyer is not obliged to purchase electricity from the power plant during times when the buyer installs equipment or repairs the grid directly related to its connection to the power plant. Accordingly, there is no remedy for the power plant (e.g., deemed commissioning or payment of liquidated damages) if the buyer fails to develop the transmission line in order to take delivery of the power plant's electricity.

In addition, the power plant will be required to develop and invest the equipment and facilities for the transmission and delivery of electricity to the buyer up to the connection point. On the other hand, at law, either the power distribution unit or the power transmission unit would be responsible for investing in the power transmission line from the connection point to the national power grid. By law, the power distribution unit and the power transmission unit are responsible for maintaining their equipment and facilities. However, these responsibilities are not reflected in the Wind PPA. Accordingly, it is not clear if the power distribution unit or the power transmission unit fails to construct the relevant transmission line then the power plant could make a claim against the power distribution unit or the power transmission unit.

PAYMENT RISK

Under the Wind PPA, payment should occur within 25 business days after the buyer receives a proper and accurate invoice. If the buyer does not pay on time, it has to pay interest at the average inter-bank lending rate. There does not appear to be any special default interest rate. Indeed, the inter-bank lending rate is usually lower than the savings rate paid to retail depositors. The incentive for the buyer to pay on time, therefore, appears low.

With that being said, if the buyer fails to pay the amount not in dispute within 90 days without any “justified” reason, the power plant can:

- (i) terminate the Wind PPA by sending a notice to the buyer; and
- (ii) request for compensation from the buyer for any actual and direct losses caused by buyer’s violation and any direct benefit that the power plant would have enjoyed if not for the buyer’s violation.

NO LIQUIDATED DAMAGES

Under the Wind PPA, there are no liquidated damages available to the power plant if there is a default by the buyer. The power plant can only claim for actual losses, being direct losses which the party affected must bear and caused by the party in breach, and the value of direct benefits which the party affected would have received except for the breach. It is not clear if this could cover, for example:

- (i) the projected revenue for the remainder of the PPA term; or
- (ii) late payment interest requested by the creditor of the power plant if such late payment is due to the buyer’s fault.

FORCE MAJEURE

Under the Wind PPA, the buyer does not have to pay the power plant if there is a force majeure. This, however, does not excuse the buyer from any payable amount accrued prior to the occurrence of the force majeure event.

The term of the Wind PPA is also not extended due to force majeure. The definition of force majeure in the Wind PPA does not distinguish between natural force majeure and political or governmental influenced force majeure.

TERMINATION RISKS

Under the Wind PPA, the buyer may terminate the Wind PPA in the following cases:

- (i) a prolonged force majeure of one year or more. However, the Wind PPA is unclear about whether such period is calculated on a consecutive or cumulative basis. If possible, the power plant could have this point clarified in Schedule G of the Wind PPA.
- (ii) The power plant fails to achieve COD within three months of the scheduled COD except:
 - in the case of a force majeure;
 - in case the buyer agrees to change the scheduled COD to another date as suggested by the power plant within the period of 12 months to 6 months prior to the scheduled COD. Such approval is not to be unreasonably withheld by the buyer; or
 - in the case of the investment schedule extension is approved by competent authority: Under the current law, the power plant can extend the investment schedule of the project if approved by competent authority. It should be noted that the maximum total extension period is 24 months;
- (iii) the power plant fails to remedy a breach within 60 days after receipt of notice from the buyer or, if the power plant has taken steps to remedy the breach, one year;
- (iv) the power plant repudiates the Wind PPA; or
- (v) any breach of the following representations:
 - the power plant is duly incorporated in order to conduct business in Vietnam;
 - the signing and performance of the Wind PPA by the power plant is correctly implemented in accordance with the conditions and contents of an electricity licence held by the power plant and in accordance with relevant provisions of law;
 - the power plant has not and shall not take any legal or administrative action to prevent or adversely affect the other party's performance of this Contract; and
 - the signing and performance of the Wind PPA by the power plant does not breach any provision of another contract or any part of another contract to which such party is a participant.

Among these termination events, the last event seems not reasonable for the power plant since there is no cure period for such breach. On the other hand, the buyer is only considered to be in breach of this clause if there is "material breach" of the buyer's representations.

The Wind PPA also does not provide for any fixed termination payment for the power plant, whether due to a breach of the buyer, breach of the power plant or prolonged force majeure. Nonetheless, the defaulting party in a termination must compensate the other party in accordance with the Wind PPA as discussed above.

LIMITED ABILITY TO ASSIGN THE WIND PPA

The rights and obligations of the power plant can only be assigned with consents of the buyer. This may limit the ability of the lenders of the power plant to step-in if there is a default by the power plant under the Wind PPA. On the other hand, the buyer may assign its rights and obligations under the Wind PPA if there is a “restructuring” of the electricity sector. It is not clear what constitutes a “restructuring” of the electricity sector.

CHANGE IN LAW RISKS

There is no change in law protection for the power plant during the term of the Wind PPA. On the other hand, the power plant is required to operate in accordance with the “Regulations on the operation of the national power system”. And Regulations on the operation of the national power system are defined to include legal instruments. Accordingly, the power plant will bear all the risks (or benefits) of potential change in law during the contract term.

DISPUTE RESOLUTION

The Wind PPA’s dispute resolution procedures are complicated. And without an express arbitration clause in the Wind PPA, disputes under the Wind PPA will be resolved by local courts who will likely be in favour of the buyer. To be specific, the procedure for dispute resolution under the Wind PPA is as follow:

- (i) In case of a dispute between the parties to the PPA, the party who raises a dispute must notify the other party in writing of the dispute and its demands.
- (ii) The parties will negotiate to settle the dispute within 60 days from the date of receipt of the notice of the party who raises the dispute;
- (iii) The dispute resolution process related to the payment of electricity will be conducted within fifteen (15) days from the date of receipt of a notice of the claiming party;
- (iv) If the parties fail to reach an agreement, the parties may send a request to the Electricity and Renewable Energy Authority for support in the parties' dispute resolution process;
- (v) If the parties still fail to resolve their dispute, they can bring the case to the Electricity Regulatory Authority Vietnam (**ERAV**) to be resolved in accordance with the procedure under Circular 40 of the MOIT dated 13 December 2010 on the procedures for dispute resolution in the power market. At the end of the process, if a party is not satisfied with the decision of the ERAV, it could still bring the case to court or arbitration.
- (vi) In addition to resolution of disputes by the ERAV, the Wind PPA provides that the parties can resolve their dispute in accordance with relevant law. This arguably allows the parties to bring the case straight to the court (or arbitration if there is an arbitration agreement) from the beginning. This view seems to be supported by Circular 27 of the MOIT dated 31 October 2013.

WIND PPA SUMMARIES

No.	Issues	Contents
1.	Parties	Power Seller and Power Buyer
2.	Definition	<p>Electrical energy purchased and sold: Electrical energy expressed in kWh generated by the plant less the quantities of electrical energy necessary for the plant to use itself and less losses at the power delivery point, and which the Power Seller agrees to sell and deliver to the Power Buyer annually.</p> <p>Contract Year: The first Contract Year starts on the commercial operation date and ends on the last day of December of such year. The last Contract Year starts on the first day of January and ends on the last day of the term of the Agreement.</p> <p>Payment Due Date: means the last day of the payment cycle from the date the Power Buyer received the valid and accurate Invoice of the Power Seller.</p> <p>Commercial Operation Date means the date a part or the whole of the wind farm connected to the grid and ready to sell the power to the Power Buyer and satisfies following conditions: (i) initial tests on a part or the whole of the wind farm and connecting facilities has been completed; (ii) the wind farm connected to the grid has been issued with electrical operation license in the field of power generation and (iii) the parties have set the meter readings to commence payment. Initial tests include: (i) Test on the ability to generate/receive reactive power capacity; (ii) Test on the AGC connection; (iii) Test on the reliability.</p>
3.	Term	From the signing date to the expiry date of 20 years from the COD.
4.	Sale and purchase	<p>Power Seller sells electrical power to Power Buyer.</p> <p>The Power Buyer does not have to buy or receive the power in the following cases:</p> <ul style="list-style-type: none"> the operation and maintenance of the plant is not in accordance with the regulations; during the time the Power Buyer installing, fixing or testing the grid which directly relating to the connection of the plant; when the regional transmission or distribution grid breaks down, or grid equipment directly connected to the regional transmission or distribution grid breaks down, or the operational regime breaches the regulations; or

No.	Issues	Contents
		<ul style="list-style-type: none"> when the grid of the Power Buyer needs support to recover after a breakdown.
5.	Monthly payment	<p>Each month, the Power Buyer shall pay the Power Seller for the entire quantity of electrical energy sold in the month at the power price tariff in accordance with the following formula:</p> $Q = k * F * A_g * (1 + t)$ <p>In which:</p> <ul style="list-style-type: none"> - Q is the total power payment to be made by the Power Buyer to the Power Seller (VND); - F is the exchange rate applicable namely the central exchange rate between VND/USD announced by the State Bank of Vietnam on the day on which the Power Seller issues its payment invoice. - t is the value-added tax rate (%). - k is 0.085 (in the case of onshore wind power projects) or 0.098 (in the case of offshore wind power projects), being the co-efficient to adjust the power purchase price in accordance with VND/USD exchange rate fluctuations equivalent to 8.5 US cents/kWh or 9.8 US cents/kWh. <p>A_g is the electrical energy sold each month (kWh), in which, if the power plant does not have a test/trial turbine, then such electrical energy sold per month is determined as being the volume of electrical energy put onto the grid at the delivery point in the month of payment. If the power plant does have a test/trial turbine, then such monthly volume is determined as follows:</p> $A_g = A_G - A_{TN}$ <ul style="list-style-type: none"> + A_G: Volume of electrical energy put onto the grid at the delivery point in the payment month. + A_{TN}: Volume of trial/tested electrical energy of the turbine in the payment month, determined as follows: $A_{TN} = P_{dm} * C * T_h * G$ <ul style="list-style-type: none"> + P_{dm}: Standard/normal output of one (1) turbine. + C: Number of test/trial turbines in the month. + T_h: Number of test/trial hours in the month of one (1) turbine. + G: Turbine power factors in the payment month, calculated on the basis of the average of all of the turbines generating tests/trials during the month.
6.	Seller's responsibility	<ul style="list-style-type: none"> To operate the power plant at the available capacity of the equipment and in accordance with standards and technical regulation of electric sector. To invest and install facilities to transmit and deliver the power to the Power Buyer at the power delivery point.

No.	Issues	Contents
		<ul style="list-style-type: none"> Not permitted to sell power to a third party without written consent of the Power Buyer or to use such power for any purpose other than to produce the power to be sold to the Power Buyer. To be responsible for the Power Buyer if the Power Seller does not supply enough power due to the fault of the Power Seller.
7.	Metering	<ul style="list-style-type: none"> Parties to negotiate a separate schedule for metering; Power Seller is responsible for the main and backup Metering System; and Annual test for electrical meter, every 5 years for current transformer and voltage measurement transformer.
8.	Forecast	<p>The Power Seller must provide to the Power Buyer the chart of annual average electricity generating capacity at the busbars of the plant for each month in accordance with the basic design of the plant.</p> <p>Before the November 30 of each year, the Power Seller must provide the Power Buyer the power production plan of the next year, which includes operation plan (power output and available capacity) of each month and the maintenance schedule, if any.</p> <p>The Power Seller must provide the information of the maintenance plan and the mobilization plan of generating sets for the load dispatch unit under the regulation on the operation of national electrical system.</p>
9.	Determination of COD	<p>90 days before the proposed COD, the Power Seller must send a draft procedure for trial testing of the plant in compliance with current regulations and technology standards of wind farm for the parties to determine the COD and calculate the volume of power for trial testing of the plant.</p> <p>The Power Seller must confirm the change to the COD within 6 to 12 months before the proposed COD. The Power Buyer cannot refuse such change without a legitimate reason.</p>
10.	Force majeure definition and required actions	<p>Force majeure means any unforeseeable and objective event which is non-remediable despite all reasonable and permissible preventive measures having been taken.</p> <p>To be released from the responsibility due to the non-implementation of its obligations (other than obligation to pay), the party claiming force majeure must undertake several actions including notifying, providing information and mitigating the effect of the force majeure.</p> <p>The other party may unilaterally terminate the PPA with a 60-day prior written notice if the force majeure is prolonged for 1 year, unless the party claiming force majeure completed its obligations within such 60 days.</p>

No.	Issues	Contents
11.	Breaches of the Power Seller	<ul style="list-style-type: none"> • The Power Seller fails to achieve the COD within 3 months unless there is a force majeure, under permitted change or the competent authority permits it to extend the investment schedule; • the Power Seller does not implement or comply with the PPA within 60 days (such period may be extended to 1 year and if the competent authority permits it to extend the investment schedule, longer period) after receipt of written notice from the Power Buyer; • the Power Seller negates the effect of one part or the entire PPA; or • the Power Seller breaches its undertaking under clause 12 of the PPA.
12.	Breaches of the Power Buyer	<ul style="list-style-type: none"> • the Power Buyer does not implement or comply with the PPA within 60 days (such period may be extended to 1 year) after receipt of written notice from the Power Seller; • the Power Buyer fails to pay any due payment items not in dispute and such non-payment continues for 90 days without a legitimate reason; • the Power Buyer negates the effect of a part of or the entire PPA; or • the Power Buyer seriously breaches its undertaking under clause 12 of the PPA.
13.	Damage compensation	The breaching party must compensate for the actual direct damage the affected party must bear and the direct benefit the affected party would have received if there is no breach. The affected party must prove the damage, the damage caused by the breach and the lost direct benefit
14.	Dispute resolution	A dispute which is unable to be resolved by negotiation may be resolved according to the regime under Circular 40/2011/TT-BCT, in which the dispute resolution agency is a state agency.
15.	Assignment	The written consent of the Power Buyer is required for the Power Seller to transfer its rights under the PPA.
16.	Governing law	Vietnamese laws.