



Korean Court Recognises Private Law Nature of Curtailment Measures in the Electricity Market

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1. Background

All electricity generated by non-centralised power generators, such as solar power facilities, has traditionally been purchased at the System Marginal Price (SMP) regardless of individual production costs. However, the rapid expansion of renewable energy facilities and purchase of all the electricity generated therefrom has created challenges in maintaining grid reliability, particularly during periods of low electricity demand in Spring and Autumn.

As a result, to maintain grid stability, curtailment measures in relation to generation have also been taken for renewable energy facilities in certain regions. Solar power producers filed administrative lawsuits against the system operator and the transmission and distribution operators to seek invalidation or cancellation of the curtailment measures, based on the principle that such curtailment measures constituted an administrative measure in nature.

We acted for a transmission and distribution operator in the lawsuits and submitted that they should be dismissed on the basis that curtailment measures cannot be the subject of an administrative lawsuit as they are private law matters arising under private contracts with power generators.

2. Judgment

The Court accepted our arguments and dismissed the lawsuits filed by the solar power producers citing a Supreme Court precedent that (i) only an administrative measure can be subject to an administrative lawsuit, (ii) an administrative measure is an exercise of administrative power made unilaterally by an administrative agency from its superior position, and (iii) a declaration of will made by a party to a contract based on such contract in which the parties stand on an equal footing does not constitute an administrative measure. The Court held that:

- 1) Transactions involving electricity supply or use of transmission and distribution facilities between generation companies and electricity sales or transmission and distribution companies are contractual in nature;

- 2) Transmission and distribution facility usage agreements contain provisions forming the contractual basis for curtailment; and
- 3) Curtailment measures effectively constitute refusals to purchase electricity or to provide access to distribution facilities, which fall within the scope of contractual rights.

The Court further clarified that, while the Electric Utility Act and the Ministry of Trade, Industry and Energy's Notice titled "Standards for Maintaining Power System Reliability and Power Quality" impose obligations on all electricity business participants, including transmission and distribution operators and power generators, to maintain grid reliability and to take curtailment measures for that purpose, such provisions should be understood as directly regulating matters necessary for maintaining power system reliability within the framework of private law relationships between the relevant parties and that in terms of their private law nature issues such as breach of contract, tort or unfair trade practice, etc. may arise in relation to curtailment measures.

3. Key takeaways

A. Relationship with Grid Connection Disputes

As the adoption of renewable energy continues to expand, increasing numbers of private operators are entering the electricity market. With transmission infrastructure approaching capacity limits, securing grid connection rights has become a central issue, and disputes concerning connection priority have increased significantly.

This ruling confirms that curtailment measures taken to maintain grid reliability are private law matters, not public law matters.

B. Other Precedent

To date, no Supreme Court precedent clearly establish the legal nature of relationships among generation companies, system operators and transmission and distribution operators. While there are some lower court cases including this case where the court characterized the power system operations and electricity transactions as private law matters, there are other lower court cases where the court held that the Electricity Market Operation Rules – which provides the basis for the operation of the power system – is an administrative legislative rule.

If the Market Operation Rules are treated as administrative legislative rule, measures taken by the Korea Power Exchange could be regarded as administrative measures subject to the administrative lawsuits where administrative law principles such as equality and proportionality shall apply.

Accordingly, this issue cannot yet be regarded as conclusively resolved, and further clarification by higher courts is required.

C. Looking ahead

Many legal issues concerning power system operation and electricity transactions remain unresolved. In particular, disputes are likely to arise mainly in relation to measures taken by system operators and transmission and distribution operators against generation companies; however, it would be difficult to conclude that all such matters fall exclusively within private law relationships, and vice versa.

Should you have any queries regarding the above or require assistance, please do not hesitate to contact us at the details below for a more detailed consultation. Our Litigation Group and Project & Energy Group at Sejong Law Firm are recognised as Band 1 teams in their respective fields by Chambers, providing comprehensive legal advice based on the highest level of expertise.

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