

Part III:

Climate change litigation and enforcement:

Crosscutting issues

Climate change, public interest litigation and the development of renewable energy law in China – based on the analysis of *Friends of Nature v Ningxia Grid Company*

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Abstract

To alleviate the effects of climate change, grid companies in China are obliged to follow the full-purchase system under the country's Renewable Energy Law. Nevertheless, the abandonment of wind and solar resources is a significant problem among these grid companies. In the case of *Friends of Nature v State Grid Gansu Company*, the court's judgment did not extend to prosecution. Litigation and administration solutions are better ways to address this problem.

1 Introduction

The Paris Agreement set the stage for post-2020 global action on climate change, with the main goal of limiting the rise in global average temperatures to no more than 2 degrees Celsius this century and to no more than 1.5 degrees Celsius above pre-industrial levels. As a contracting party, China is obliged to adopt measures to mitigate climate change. One of the measures is to embrace renewable energy, which leads to a conflict between grid companies and acquisitions of renewable energy. We will demonstrate this first by presenting a case and then introducing China's environmental civil public interest litigation and Renewable Energy Law.

2 *Friends of Nature v State Grid Ningxia Company*

Friends of Nature v State Grid Ningxia Company is a famous environmental civil public interest litigation case in China dealing with State Grid Ningxia Company's default on renewable energy acquisitions.¹

Friends of Nature, a well-known non-governmental environmental organisation in China, which was registered in 1994, is the plaintiff in this case. It has over 20,000

1 'Friends of Nature (FoN) sued State grid for refusing to purchase clean energy in Ningxia, China' see <<https://ejatlas.org/print/friends-of-natures-sued-state-grid-unit-for-refusing-to-buy-clean-energy-in-ningxia-china>> accessed 18 January 2022.

members, with three working entities in Beijing and 22 member groups across China. It has traditionally focused on environmental education, publicity and public participation. However, after the new Civil Procedure Law and Environmental Protection Law came into force in 2013 and 2014, respectively, lawsuits are now also within its ambit.

As the defendant, State Grid Ningxia Company is a branch of the State Grid Company, which was founded in 2002. It is a wholly state-owned company, in charge of electricity transmission. In addition, it is one of the Global Fortune 500 companies.

It has been said that the Ningxia region has some of the most abundant wind and solar energy resources in the country. From Yinchuan Airport to the urban area, one can see striking billboards advertising photovoltaic power generation. In Ningdong Town, east of Lingwu City, large wind farms coexist with thermal power bases. However, the National Energy Administration data paint a different picture. From January 1, 2015 to June 30, 2016, Ningxia abandoned 2.79 billion kWh of wind power, amounting to 570 million kWh of electricity. The gap between the electricity that should have been acquired and the actual electricity purchased was filled with coal-fired power generation.

In August 2016, State Grid Ningxia Company did not make full purchases of wind power and photovoltaic power in the province, as it should have done in accordance with the provisions of the Renewable Energy Law. As a result, State Grid Ningxia Company was sued by Friends of Nature for the full purchase of the renewable energy power according to the law and was required to provide compensation for the cost of the ecological and environmental loss caused by the replacement of renewable energy power generation with coal power generation. As such, Friends of Nature claimed 310 million Yuan (about 39 million Euros).

The plaintiff believed that coal-fired power generation, compared with wind power and photovoltaic power generation, produced air pollutants, including sulphur dioxide, nitrogen oxide and a large amount of smoke, which can cause great harm to human health, crops, buildings, and so on. It is the main source of PM2.5 and PM10 in the atmosphere. In addition, coal-fired power generation produces large quantities of greenhouse gases, causing global climate change and negatively impacting the ecological environment. This has seriously damaged the well-being of people in society and thus the company should bear the legal responsibility for environmental tort. In a way, the case could be deemed a climate suit.

Liu Xiang, an attorney for Friends of Nature, told Pengpai News that the grid company was cooperating with the government. The government asked the grid company to acquire more thermal power, which the grid company would implement as directed. The purpose of the lawsuit was to pass on the information to the government through the grid company, so that it could achieve the full acquisition of renewable energy power generation.

Once the case is won, the interests of the grid company are damaged, they will take the initiative to find the government to find a solution. Solve the problem of renewable energy consumption.²

Friends of Nature v State Grid Ningxia Company is still in the trial phase. However, there is a judicial decision on another case. In *Friends of Nature v State Grid Gansu Company*, the Lanzhou Intermediate People's Court of Gansu made a ruling on August 14, 2018, applying environmental civil public interest litigation, in the case between the plaintiff, Friends of Nature, and State Grid Gansu Company. It is believed that the State Grid Gansu Electric Power Co. Ltd., a power grid enterprise that purchases and sells electricity and allocates electricity, is not a power generation enterprise. It does not induce pollution-related or ecological destruction, and therefore it disregarded the prosecution of Friends of Nature. In this case, there were four questions that needed to be considered:

- Is Friends of Nature qualified to embark on litigation?
- Is there a causal relationship between the behaviour of the grid company and the consequences of the damage?
- What kind of responsibility should the grid company take?
- Are there better ways of addressing the abandonment of the wind and solar resources?

To arrive at answers, we need to understand China's environmental civil public interest litigation.

3 The environmental civil public interest litigation of China

Firstly, we have to distinguish between three concepts: private interest litigation, public interest litigation and civil public interest litigation.

The purpose of private interest litigation is to resolve disputes between civil subjects and to safeguard individual interests. The plaintiff in this situation must have a direct interest in the subject matter of the litigation; otherwise, the court will not file a case or dismiss the indictment.

In contrast, the purpose of public interest litigation is to safeguard public interests. The plaintiff in environmental civil public interest litigation need not have a legal interest in the litigation. It is similar to a citizen suit.

Civil public interest litigation is a type of public interest litigation. According to Article 55 of the Civil Procedure Law (modified in 2013), for conduct that pollutes the environment, infringes upon the lawful rights and interests of consumers in gen-

2 Diao Fanchao, 'Environmental groups claim 300 million Yuan in damages for wind and light abandonment, Ningxia power grid: Unable to fully buy' *Pengpai News* (14 April 2018) <https://www.thepaper.cn/newsDetail_forward_2069105> accessed 24 May 2020.

eral or otherwise harms the public interest, an authority or relevant organisation (as prescribed by the law) may bring an action in a people's court. Where the people's procuratorate finds, in performing its functions, any conduct that undermines the protection of the ecological environment and resources, infringes upon consumers' lawful rights and interests in the field of food and drug safety or engages in any other conduct that is damaging to the social interest, it may file a lawsuit with the people's court if there is no authority or organisation (as described above) or the relevant authority or organisation does not file a lawsuit. If the authority or organisation does file a lawsuit, the people's procuratorate may support the filing of such a lawsuit.

Moreover, the environmental civil public interest litigation is specially stipulated in the Environmental Protection Law (modified in 2014). Article 58 shows that for an act that pollutes the environment or causes ecological damage in violation of the public interest, a social organisation that satisfies the following conditions may institute an action in a people's court: firstly, it has been legally registered with the civil affairs department of the people's government at or above the level of a district; secondly, it has specially engaged in environmental protection for the public good for five consecutive years or more without any recorded legal violation.

A people's court shall, according to the law, accept an action instituted by a social organisation that satisfies the provision outlined in the preceding paragraph. A social organisation may not seek any economic benefit from an action that it has instituted.

According to Article 58, Friends of Nature was qualified to bring the case to the court.

4 Renewable energy law in China

The full-purchase system was introduced in 2006 through the implementation of the Renewable Energy Law. Called the 'compulsory grid-connected' system, it requires all renewable energy power to be purchased by grid enterprises or to be connected to a grid. According to Article 14, the relevant electricity grid enterprise shall – by entering into a grid synchronisation agreement with the enterprise that has obtained an administrative licence for using renewable energy (or a report for archival purposes on electricity generation) – purchase the full amount of the synchronised electricity, as covered by its grid, of the project of synchronised electricity generation by using renewable energy, and also provide a synchronisation service for electricity generation by using renewable energy.

The 'full-purchase' system was modified to become the 'full-guarantee purchase' system in 2009. The Renewable Energy Law determines three 'guarantee' measures:

Firstly, relevant state departments determine the annual purchase target of generating capacity and allocate this to each grid enterprise, and also dispatch the minimum purchase target for each grid enterprise.

Secondly, for the access cost and other relevant costs that cannot be recovered in the selling price of electricity, the power grid enterprises may apply to the Renewable Energy Development Fund for subsidies. This article addresses the problem of how to recover the costs of grid connections.

Thirdly, the law requires that 'power grid enterprises shall strengthen the power grid construction, expand the scope of areas where electricity generated by using renewable energy resources is provided, develop and apply intelligent power grid and energy storage technologies, improve the operation and management of power grids, improve the ability for absorbing electricity generated by using renewable energy resources, and provide services for bringing electricity generated by using renewable energy resources on grid'.

However, wind and solar abandonment is a popular practice. According to the report of the National Energy Administration in February 2021, China's abandonment of wind power in 2020 amounted to 16.61 billion kWh, which could not meet the requirements of the Renewable Energy Law for a fully guaranteed acquisition system. For example, with reference to the 'three norths' with outstanding wind abandonment problems, the wind power disposal rates of the five provinces of Gansu, Xinjiang, Jilin, Inner Mongolia and Heilongjiang exceeded 10%. While the wind curtailment rate in Gansu decreased by 10%, it still reached 33%.

What causes this disjunction between perception and reality?

Firstly, the regions with abundant wind power are generally falling behind in terms of grid construction, with grid construction unable to keep up with the rapid development of wind power generation. Another reason is that the current technology in grid enterprises cannot guarantee secure grid connections using renewable energy power. Moreover, the investment cycle for grid-connected enterprises is longer, with fewer rewards. These factors cannot be fully attributed to grid companies.

If the grid company fails to guarantee the full purchase of the renewable power, it will compensate the renewable energy generator for any economic loss derived from power that it has not purchased. SERC (the electricity regulatory commission) shall order the grid companies to correct the harm done within a stipulated period. In the event of their refusal to make such a correction, they will be liable for a fine of no more than 200% of the economic loss sustained by the renewable power generation enterprises. However, as the grid company is in an advantageous and powerful position, it is hard to prove the harm that has allegedly been caused. In practice, since the promulgation of the Renewable Energy Law, it has been common for renewable energy power generators not to be able to connect to the grid. However, SERC has in practice not followed up on any case.

With reference again to the case, I support the verdict of the court. Friends of Nature was qualified to bring the suit. While there is no causality between the behaviour of the grid company and the consequences of the damage, the causal chain cannot be extended in the name of environmental public interest.

5 Better ways to address the abandonment of wind and solar resources

Are there any other ways to solve the problem? The abandonment of wind and solar resources can be addressed through litigation or through an administrative solution.

From a legal standpoint, a lawsuit relating to the abandonment of wind and solar resources is more suitable for private interest litigation than for public interest litigation. This is because it is not difficult for the power generation enterprise to prove its economic losses. However, it is not easy for Friends of Nature to prove damage to the environmental public interest. As a result, if Friends of Nature wants to bring a public interest case to the court, it should sue the fire company instead of the grid company. In addition, environmental public administrative interest litigation can be conducted to urge the government to perform its duties. China revised its Organic Law of the People's Procuratorates in 2018 and, according to Article 20(4), people's procuratorates shall execute the powers and functions to file public interest litigation in accordance with the law.

The administrative solution relies on four aspects: reasonable planning, which should not develop too rapidly since the grid network cannot keep pace with the expansion of the renewable energy generation company; the central government's macroeconomic regulation; the regulatory agency's coordination; and financial support and tax incentives. In the case of climate change, the court and common law approach is not always the best choice; an administrative approach might be more suitable for addressing broad-based policy issues.

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