

COURT-II
IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

ORDER IN APPEAL NO. 110 OF 2015 &
IA NOS. 176 OF 2015 & 177 OF 2015 ON THE FILE OF THE
APPELLATE TRIBUNAL FOR ELECTRICITY, NEW DELHI

Dated: 24th January, 2018

Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

1. Indian Wind Energy Association (InWEA)

1st Floor, A-Wing, AMDA Building,
7/6, Siri Fort Institutional Area,
August Kranti Marg,
New Delhi-110049

2. Indian Wind Turbine Manufacturer's Association (IWTMA)

4th Floor, Samson Towers,
403L, Pantheon Road, Egmore,
Chennai-600008

..... Appellants

VERSUS

1. Gujarat Electricity Regulatory Commission

Through its Secretary,
6th Floor, GIFT ONE,
Road 5C, Zone 5, GIFT City,
Gandhinagar – 382355

2. Torrent Power Ltd.

Torrent House,
Off Ashram Road,
Ahmedabad – 380009

3. Consumer Protection Action Committee

132, 318, Spectrum Comm. Centre,
Near Relief Cinema, Relief Road,
Ahmedabad – 380 001

4. Consumer Education and Research Centre

Suraksha Sankool,
Sarkhej Gandhinagar Highway,
Thaltej, Ahmedabad-380054, Gujarat

5. RGE Surat Pvt. Ltd.

513/A, 5th Floor, Kohinoor City, Kirol Road,
L.B.S. Marg, Kurla (W)
Mumbai- 400 070

6. Indian Wind Power Association

801, Kaivanna, Opp., Saffron, Panchvati,
Ambawadi, Ahmedabad – 380 006

7. Utility Users Welfare Association

Laxmi Ginning Compound,
Opp. The Union Co. – Op. Bank, Naroda,
Ahmedabad – 382 330, Gujarat

8. Mahila Grahak Jagruti Abhiyan

Dariyapur,
Ahmedabad – 380 001

9. Gujarat Wind Farm Limited

Regd. Office – 34, City Centre,
Swastik Cross Road, Navrangpura,
Ahmedabad – 380 009

10. Hi Tech Solar

10, Navrangpura, Mavdi Plot,
Opp. Prima Products,
Above Tumo Tech Metal Corporation,
Rajkot – 360 004, Gujarat

..... Respondents

Counsel for the Appellant (s) : Mr. Hemant Singh
Ms. Ankita B.

Counsel for the Respondent(s) : Ms. Suparna Srivastava
Ms. Sanjana Dua for R-1

Mr. Anand K Ganesan
Ms. Swapna Seshadri
Mr. Ashwin for R-2

The Appellant has sought the following reliefs in Appeal No. 110 of 2015:

- (i) to set aside the impugned order dated 16.01.2015 passed by the Hon'ble Gujarat Electricity Regulatory Commission in Petition No. 1437 of 2014;
- (ii) direct creation, and utilisation, of a fund as envisaged in Regulation 9 of the GERC RPO Regulations as a result of the failure of the Respondent No. 2 to fulfil RPO norms in the FY 2013-14;
- (iii) direct that the Renewable Purchase Obligation (RPO norms) cannot be carried forward to the next financial year in the event the Renewable Energy Certificates (RECs) are available;
- (iv) direct the Respondent No.1 Commission as well as the Respondent No.2 to strictly implement the GERC RPO Regulations; and
- (v) to pass such other or further orders as this Hon'ble Tribunal may deem appropriate.

The Appellant has presented this Appeal for considering the following Question of Law:

- A. Whether the impugned order has been passed in violation of the provisions of the Electricity Act, 2003 and the GERC RPO Regulations?
- B. Whether the impugned order has been passed by the Respondent Commission ignoring the fact that the GERC RPO Regulations do not

permit any waiver of RPO norms, except as provided in Regulation 4.2?

- C. Whether the impugned order has been passed by the Respondent Commission in contravention of the object and purpose of the GERC RPO Regulations, which is to promote generation from renewable energy sources?
- D. Whether any revision in the RPO norms/targets could not be done without imposing regulatory charges as contemplated in Regulation 9 of the GERC RPO Regulations 2010?
- E. Whether the Respondent Commission erred in passing a non-speaking order in terms of the fact that it did not provide any reasons or basis for condoning the RPO of the Respondent No.2?
- F. Whether the Hon'ble Commission erred in passing the impugned order without checking the availability of RECs in the market for the relevant period?
- G. Whether the Respondent Commission was justified in relying upon the submissions of the Respondent No.2 licensee with regard to the non-fulfilment of the RPO norms/targets, when the RPO Regulations do not provide any escape route from the liability of fulfilling RPO norms, except on account of Regulation 4.2 read with Regulations 7.2 and 9?
- H. Whether the Respondent Commission has exercised its power in a manner de-hors the provisions of Electricity Act and GERC RPO Regulations?

- I. Whether the impugned order deserves to be set aside for want of factual and legal analysis before arriving at the impugned conclusion?

- J. Whether the impugned order unless set aside would perpetuate an illegality thereby frustrating the objective and policy behind RPO mechanism?

ORDER

1. We have heard the learned counsel, Mr. Hemant Singh, appearing for the Appellant and the learned counsel, Ms. Suparna Srivastava appearing for the first Respondent and the learned counsel, Mr. Anand K. Ganesan appearing for the second Respondent for quite some time.

2. The learned counsel for the second Respondent (Torrent Power Limited) submitted that, he has filed a detailed Memo dated 15.01.2018 along with supporting affidavit after duly serving copy to the learned counsel for the Appellant. Further, he submitted that, the instant Appeal filed by the Appellant, may be disposed of in terms of the statement made in the Memo dated 15.01.2018 in the interest of justice and equity.

3. *Per-contra*, the learned counsel appearing for the Appellant, *inter-alia*, contended and fairly submitted that, the statement made in the Memo dated 15.01.2018 may kindly be placed on record and the instant Appeal, being Appeal No. 110 of 2015, filed by the Appellant may be disposed of in terms of

the statement made in the Memo filed on behalf of the second Respondent in the interest of justice and equity.

4. The submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent Nos. 1 & 2, as stated above, are placed on record.

5. The statement made in the Memo dated 15.01.2018 read thus:

“1. The present appeal has been filed challenging the Order dated 16/01/2015 passed by the Gujarat Electricity Regulatory Commission (hereinafter called the ‘State Commission’) wherein the State Commission has revised the Renewable Purchase Obligation (RPO) of the Respondent No.2 – Torrent Power Limited (hereinafter called the ‘Answering Respondent’) for the year 2013-14.

2. The State Commission has revised the RPO in exercise of its powers under Regulation 4.2 of the Gujarat Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations, 2010 (hereinafter called the ‘RPO Regulations’).

3. While the present appeal pertains to the year 2013-14, the State Commission had passed the Order dated 08/08/2013 with respect to the RPO Obligations for FY 2012-13. The said Order had been challenged before this Hon’ble Tribunal in Appeal Nos. 258 of 2013 & 21 of 2014.

4. Vide Judgment dated 16/04/2015, the matters were remanded to the State Commission to reconsider the whole issue afresh in light of findings in the judgment within three months from the date of the judgment. Following is the summary of the Hon’ble Tribunals findings and directions –

“71. Summary of our findings: “

(i) The National Tariff Policy and the Regulation of the Central Commission and the State Commission recognize REC as valid instrument for fulfilling Renewable Purchase Obligation cast upon the obligated entities under Section 86(1)(e) of the Electricity Act, 2003. Purchase of REC would be deemed as purchase of energy from renewable energy source for fulfilling RPO obligation. When a legal

fiction has been created by a statute, the same should be given full effect.

(ii) An obligated entity has option to fulfill its RPO either by procuring renewable energy in physical form or by REC or partly by REC and partly by physical renewable energy. However, a distribution licensee has to exercise the option based on economic principles. An obligated entity other than the distribution licensee may also opt for purchase of REC for fulfilling its RPO obligation to avoid the issues involved in banking, open access, sale of surplus power, etc., or if the RPO requirement is too small.

(iii) Renewable energy generators like conventional generators have been given freedom under the Electricity Act in respect of choice of site, choice of counter-party buyer, freedom from tariff regulation when the generating company supplies to a trader or directly to a consumer. So far, the renewable energy generators were not able to exercise this freedom due to various constraints. The REC mechanism has opened up the market for renewable energy generators helping in expeditious exploitation of renewable energy potential in the country thus, serving the object of the Electricity Act, 2003. Thus, REC mechanism has to be encouraged. By treating REC as a valid instrument for discharge of mandatory RPO as set out in the Regulations, the State commission has only followed the mandate of the Electricity Act, 2003 under Section 86(1)(e) for promotion of renewable sources of energy in the State.

(iv) The State Commission can revise the RPO before or during a year or after passing of year under Regulation 4.2 of RE Regulation 2010 as explained under paragraphs 47 to 51 above. If the distribution licensee has not made efforts to procure requisite renewable energy to fulfill the RPO and also has not procured REC, the State Commission should not revise RPO under Regulation 4.2. However, while revising the RPO targets, the State commission has to ensure that such revision should not defeat the object of the Electricity Act and the Regulations.

(v) If the RPO targets are revised under Regulation 4.2 due to inadequate capacity addition in a resource rich State, such reduction has to be uniform for all the entities.

(vi) Under 5th proviso to Regulation 9, if the Commission is convinced that the obligated entity has faced genuine difficulty in meeting the RPO due to non-availability of power from renewable sources or the REC, it may allow carry forward the compliance requirement to the next year. However, before exercising power order Regulation 9, the State Commission has to satisfy itself that there was difficulty in meeting the RPO from purchase of REC. Therefore, non-availability of REC is a pre-condition for carry forward under Regulation 9.

(vii) Admittedly there was substantial reduction in capacity addition of wind energy and other sources of renewable energy in the State during FY 2012-13 due to reasons beyond the control of the distribution licensee. Under such a condition the State Commission can reduce RPO targets for the wind energy and other energy. However, such reduction due to capacity constraints has to be uniform for all the obligated entities in the State.

(viii) In the present case, the State Commission has revised the RPO targets for various distribution licensees as per the actual. This way the State Commission has set up different RPO targets for four States owned distribution license, Torrent Power Surat and Ahmedabad at different levels for the same reason of inadequate capacity addition. This is not permissible. The State Commission has incorrectly revised the RPO for the deemed distribution licensees to zero or nearly negligible amount due to financial impact, low energy consumption, nascent stage of operation etc., in contravention to the Regulations.

(ix) We find that RPO compliance of GUVNL for wind energy was satisfactory but compliance of biomass and other non-solar energy was quite low due to which there was default in fulfilling the nonsolar RPO. Thus, during FY 2012-13 there appeared to be inadequate generation of biomass and other non-solar energy sources in the State. The State Commission has to examine the reasons for the same and take necessary measures for accelerating capacity addition of biomass and other sources of renewable energy in the State.

(x) We remand the matter to the State Commission to reconsider the whole issue afresh in light of our findings in this judgment. The State Commission is empowered to reduce the RPO targets for all the entities uniformly in view of reduction in capacity addition of wind energy and other sources in the State during the FY 2012-13. However, the consequences of shortfall with respect to the revised RPO for different distribution licensees/deemed distribution licensees has to be decided by the State Commission according to Regulation 9.

(xi) We do not find any infirmity in the State Commission relaxing the RPO for those deemed distribution licensees who purchase energy from GUVNL/distribution licensees at retail supply tariff and their consumption is included in determining the RPO of the supplying distribution licensee.

(xii) In the circumstances of the case, we do not want to interfere with the decision of the State Commission to set off the shortfall in non-solar energy purchase with excessive solar energy procured during FY 2012-13. However, we have given certain directions in this regard for future in paragraph 68 above.

(xiii) As regards public hearing for review of RPO, we have already given the necessary directions in our judgment in Appeal No. 24 of 20013 which have been reproduced under paragraph 27.

71. In view of the above, the Appeal is allowed in part as indicated above and the State Commission's order is set aside to that extent. The State commission is directed to pass consequential order as per the findings in this judgment within three months of the date of this judgment. No order as to costs."

5. Thereafter, an application being IA No. 187/2015 was filed by Torrent Power Limited, Respondent No.2 for clarification of the direction contained in the judgment dated 16/04/2015 to the extent it refers to uniform reduction for all the entities in view of reduction in capacity addition of wind energy and other sources in the State.

6. The Hon'ble Tribunal disposed off the IA No. 187/2015 vide its Order dated 14/05/2015 holding as under –

"3. Once the court gives a judgment, it becomes functus officio. Therefore, we do not want to change or in any way dilute the judgment dated 16.04.2015. However, in the present case the Tribunal while interpreting the regulations has also discussed the various conditions under which the State Commission may revise the RPO targets after the completion of the financial year under Regulation 4.2 due to supply constraints or factors beyond the control of the licensee. The Tribunal has held that if RPOs are revised due to the inadequate capacity addition in the State, the same percentage will be applicable to all the obligated entities.

4. We feel that in the present case where we have described various conditions under which the Commission may revise RPOs targets, it is necessary for us to give the clarification regarding implementation of the judgment without any way changing the findings in the judgment. We, therefore, clarify that in case the State Commission decides to revise targets due to inadequate capacity addition in the State the same may be done keeping in view overall availability of renewable energy resources in the State and other relevant factors and after hearing all concerned and not merely on the basis of actual RPO achievement by the various entities. With this clarification the application is disposed off."

7. The Indian Wind Energy Association, the Appellant in the present appeal, sought a review of the above Order (i.e. IA No. 187/2015) by filing

R.P. No. 18 of 2015. The Hon'ble Tribunal has dismissed the Review Petition vide Order dated 21/11/2017 holding as under -

“18. The Review Petitioners are in our opinion trying to re-agitate the issues which are already settled. The review petition is in fact an appeal in disguise. It is therefore not necessary for us to deal with the rival contentions as if we are dealing with an appeal as that would amount to rewriting the original judgment. Suffice it to conclude that in this case there is no error apparent on the face of record warranting exercise of review jurisdiction. There is no substance in the contention that the clarificatory order dated 14/05/2015 is per incuriam. The review petition is therefore dismissed. Needless to say that all pending applications stand disposed of.”

8. *In view of the above, this Hon'ble Tribunal has already laid down the framework for interpretation of Regulation 4.2 of the RPO Regulations by way of the above Judgment & Orders.*

9. *It is reiterated that the present matter impugns the order dated 16.01.2015 which has been passed prior to the dispensation of this Hon'ble Tribunal in respect of the subject Regulations as contained in the Orders dated 16.04.2015 & 14.05.2015 read with 21.11.2017. Ergo, , the present Appeal would have to be considered in the light of the fact that the State Commission did not have the dispensation of this Hon'ble Tribunal before it when the impugned order was passed. This Respondent has brought the aforesaid fact to the notice of the Appellants and other Respondents so that the said issue can be addressed as a preliminary issue before consideration of the matter on merits. The State Commission may be required to consider the matter in terms of the ratio decided by the Hon'ble Tribunal in the Judgment dated 16.04.2015 & 14.05.2015 read with 21.11.2017.*

10. *All contentions of all parties can be kept open and the matter can be reconsidered by the State Commission.*

6. In the light of the submissions made by the learned counsel appearing for the Appellant as well as the Respondents and the statement made in the Memo dated 15.01.2018, as stated above, the instant Appeal, being Appeal No. 110 of 2015, filed by the Appellant on the file of the Appellate Tribunal for Electricity, New Delhi is disposed of with the following directions:

- a. In terms of the statement made in the Memo dated 15.01.2018 and on the basis of submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents, the Appeal, being Appeal No. 110 of 2015, is allowed in part.
 - b. The impugned Order dated 16.01.2015 passed in Petition No. 1437 of 2014 on the file of the Gujarat Electricity Regulatory Commission, Gujarat is hereby set-aside.
 - c. The matter stands remitted back to the State Commission to dispose of the matter afresh in accordance with law without being influenced by the observations made in the earlier order dated 16.01.2015 passed in Petition No. 1437 of 2014 after offering reasonable opportunity of hearing to the Appellant and the Respondents as expeditiously as possible at any rate within a period of six months from the date of the receipt of this Order.
 - d. All the contentions of the Appellant and the Respondents are left open.
7. With these observations, the instant Appeal, being Appeal No. 110 of 2015 on the file of this Appellate Tribunal for Electricity, New Delhi stands disposed of.

IA NO. 176 OF 2015 & IA NO. 177 of 2015

8. In view of the Appeal No. 110 of 2015 on the file of the Appellate Tribunal for Electricity, New Delhi being disposed of, on account of which, the reliefs sought in IA No. 176 of 2015 and IA No. 177 of 2015 do not survive for consideration and, hence, stand disposed of.

9. Order accordingly.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

js/vt