

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**Dated: the 28<sup>th</sup> November, 2014**

**Present:**

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON**  
**HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**Appeal No. 267 of 2013**

**In the Matter of:**

**1. Reliance Infrastructure Ltd.**

'H' Block, 1st Floor,  
Dhirubhai Ambani Knowledge City  
Navi Mumbai 400710

**..... Appellant**

**Versus**

**1. Maharashtra Electricity Regulatory Commission**

World Trade Centre No. 1  
13th Floor, Cuffe Parade, Colaba  
Mumbai - 400001

**2. Maharashtra Energy Development Agency**

Phase-1, MHADA Commercial Complex  
2nd Floor, Opp. Tridal Nagar  
Yewada, Pune - 400006

**3. Ministry of New & Renewable Energy**

Block 14, CGO Complex  
Lodhi Road, New Delhi - 110003

**4. Ministry of Power**  
Shram Shakti Bhawan  
Rafi Marg, New Delhi - 110001

**...Respondent(s)**

Counsel for the Appellant(s) : Mr. J J. Bhatt  
Mr. Hasan Murtaza  
Ms. Anjali Chandurkar  
Mr. Aditya Panda

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan  
Mr. Raunak Jain  
Mr. Satyajit Sarna  
Ms. Deepali Dwivedi

**J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. Reliance Infrastructure Limited (Distribution) is the Appellant herein.
2. By the present Appeal, the Appellant challenges the impugned Order dated 06.08.2013 whereby the State Commission has not allowed inter-se adjustment of Renewable Purchase Obligation (RPO) targets within over all RPO target.
3. The short facts are as follows:-

(i) The Appellant is engaged in generation, transmission and distribution of electricity. It is also engaged in setting up and execution of various infrastructure projects on Erection, Procurement and Commissioning basis, such as power plants, roads, etc. All these activities, regulated and unregulated, are within the same company namely the Appellant. These are only operating segments within one company and not subsidiaries or associate companies.

(ii) In exercise of its powers under Section 181 of the Electricity Act, 2003, the State Commission framed the Regulations under Section 61, 66 and 86(1)(e) of the Electricity Act, 2003. Regulation 7.1 specifies minimum quantum of purchase from renewable energy sources for solar and non-solar energy separately every year and aggregating to a particular percentage for the period 2010-11 onwards up to 2015-16. Under Regulation 9.1, the State Commission is required to designate a State Agency for accreditation and recommending renewable energy projects for registration to undertake these functions. Accordingly, the Maharashtra Energy Development Agency, the Respondent No. 2 submitted all the required particulars before the State Commission.

In the light of the data submitted by the Agency, State Commission issued notice dated 20.09.2012 on the subject of verification and compliance of Renewable Purchase Obligations for the years 2010-11 and 2011-12 as specified in the Regulations. In the said notice, State Commission sought a reply from the Appellant for confirming their shortfall in Solar RPO compliance.

(iii) The Appellant filed a detailed Affidavit on 15.10.2012 praying for waiver of compliance of the solar RPO projects for the years 2010-11 and 2011-12 under Regulation 18 of the Regulations. The Appellant, insofar, as non-solar RPO target for 2011-12 was concerned, sought relaxation under Regulation 18 and in the alternative sought for carrying forward the shortfall to 2012-13.

(iv) The State Commission ultimately passed an order on 15.12.2012 holding that the Appellant had given adequate justification to demonstrate that it had undertaken all efforts in procuring renewable energy in order to meet its RPO targets. The State Commission decided under Regulation 18.1 that cumulative shortfall in procurement in Renewable Energy by the Appellant during 2010-11 and 2011-12 for fulfilment shall be

carried forward to 2012-13 and the provisions of Regulation 7 for the aforesaid years were waived. Thus, for the aforesaid years, the Appellant was directed to fulfil the shortfall in the RPO target cumulatively for the period by 31.03.2013

(v) The Appellant on 01.10.2012 filed Case No. 109 of 2012 under Section 86(1)(e) of the Electricity Act, 2003 and Regulation 92 of the Conduct of the Business Regulations, 2004 seeking for a clarification as to whether an Obligated Entity can be said to have complied with the provisions of Regulation 7.1, if the total quantum of RPO is met by the sources specified therein. The State Commission by the order dated 2.1.2013 held that the objective of RPO targets is not to prefer to promote one source over the other and the minimum percentage for procurement from non-solar Renewable Energy sources cannot be diluted by purchasing from solar in excess of the minimum percentage in view of its interpretation of the Tariff Policy. In Case No. 109 of 2012, the State Commission decided that the Obligated Entity has to comply with the minimum requirements under Regulation 7.1 of the Regulations.

(vi) However, in view of the constraints in purchasing wind power to meet non-solar RPO, the Appellant filed a fresh case in Cae No. 84 of 2013 before the State Commission on 27.06.2013 praying that the Appellant be allowed to purchase additional quantum of 250 MW of Solar Power to offset Non-Solar RPO or any other capacity, after considering the difficulties faced by Appellant in meeting non-solar RPO. The State Commission, however, after hearing the parties dismissed the said case No. 84 of 2013 by the Order dated 06.08.2013 since the earlier Order in case No. 109 of 2012 dated 02.01.2013 cannot be re-opened and the raising of the issue is barred by res-judicata.

(vii) Aggrieved by this Order, the Appellant filed this Appeal.

4. The main grievance of the Appellant is that the State Commission without considering the present prayer, praying for permission to set off its excessive purchase of solar power against RPO from non-solar sources, simply rejected the petition of the Appellant mainly on the ground that a similar issue had already been decided and hence this petition was barred by Res-Judicata.

5. The short grounds urged by the Appellant assailing in impugned Order are as follows:-

(i) The State Commission ought to have exercised its powers to relax under Regulation 18 and to remove difficulties under Regulation 20 to allow Appellant to purchase additional Solar Power to offset Non-Solar RPO in view of difficulties faced by the Appellant.

(ii) The State Commission did not at all consider the various difficulties faced by the Appellant to make its non-solar RPO merely held that the issue has already been decided in case No. 109 of 2012.

(iii) The two petitions namely the earlier case No. 109 of 2012 and the present case No. 84 of 2013 are totally different. Therefore, there is no question of application of principle of Res-judicata.

6. On the basis of these grounds, the Appellant has prayed this Tribunal for setting aside the impugned Order and for remanding the matter to State Commission for fresh consideration.

7. These grounds urged by the Appellant are vehemently opposed by the Learned Counsel for the Commission on the ground that prayer in the earlier Case No. 109 of 2012 and

present case No. 84 of 2013 are one and the same and that therefore the impugned order cannot be set aside. The questions that may arise for consideration is as follows:-

**(i) Whether the State Commission was justified in not relaxing the Regulations sought for in the Appellant for allowing inter-se adjustment of Renewable Purchase Obligation (RPO) targets for solar/non-solar energy within overall RPO target?**

**(ii) Whether the State Commission was justified in relying entirely upon its earlier decision which was on a petition filed by the Appellant seeking clarification of Regulation 7 of the said Regulations and not relaxation and remove of difficulties under Regulations 18 and 20 thereof?**

**(iii) Whether the principles of Res-judicata were applicable to the present proceedings before the State Commission?**

**(iv) Whether Case No. 84 of 2012 can be considered to be, in any event, barred by Res-judicata?**

**(v) Whether the views expressed by Forum of Regulators (FOR) in the matter of Inter-changeability**

**of RPO targets can be relied upon by the Regulatory Commission?**

8. Since, these issues are inter-related, we shall discuss the issues by taking them up together.
9. According to the Appellant, the impugned Order proceeds solely on the ground that the issue has already been decided and therefore, the same was rejected; the State Commission has not taken into consideration the fact that prayers in these two petitions i.e. Case No. 109 of 2012 and Case No. 84 of 2013 and the provisions under which petitions were filed were completely different and therefore, the principles of Res-Judicata cannot be applicable to the present case.
10. According to the State Commission, the prayer in case No. 109 of 2012 and the prayer in case No. 84 of 2013 are similar that therefore such petition was barred by Res-Judicata.
11. We will discuss about this aspect in following paragraphs. Let us see the findings in the Impugned Order:

***“7. DECISION WITH REASON:***

*Having heard the Petitioner and Consumer Representative, the Commission is of the view that the issue raised by the Petitioner with respect to purchase of additional solar power to offset its*

**non-solar RPO target, is the similar issue which was decided by the Commission in Case No. 109 of 2012 dated 2 January, 2013 pertaining to the interchangeability of non-solar power with solar power in order to fulfil the total RPO target.** The relevant portion of the Commission's ruling in Case No. 109 of 2012 is reproduced below:-

*Further, the contention raised by the petitioner with respect to non availability of biomass power, difficulties faced with tying up of wind power and unavailability of bagasse based power due to non extending the exemption of sugarcane purchase tax to other distribution licensees, were considered by the Commission in Case No. 109 of 2012. **In view of the decision already rendered by this Commission in Case No. 109 of 2012 by Order dated 2 January, 2013 the present petition is not maintainable as it is hit by Res Judicata. The petition is accordingly dismissed as not maintainable.***

12. Let us see the prayers in earlier petition 109 of 2012 and in current petition 84 of 2013.

**Prayer in Case No. 109 of 2012**

- “a. The Hon’ble Commission may be pleased to clarify that an Obligated Entity would comply with the provisions of Regulation 7.1 if the total quantum of RPO is met by sources specified under therein (Solar/Non-Solar) irrespective of percentage specified under the head “Solar/Non-Solar) irrespective of percentage specified under the head “Solar/Non-Solar, (other RE), so as to meet its total target of RE.**
- b. Pass any Order as may be appropriate under the circumstances.

- c. *The Hon'ble commission condone any inadvertent Omissions/errors/shortcomings.*
- d. *The Hon'ble Commission may be pleased to permit the Petitioner to add or modify this petition with additional information. If so required during the course of hearings."*

**Prayers in Case No. 84 of 2013:-**

- a. **"the Hon'ble Commission may be pleased to allow RInfra to purchase additional quantum of 250 MW of Solar Power to offset Non-Solar RPO or any other capacity as Hon'ble Commission may deem appropriate considering the difficulties faced by RInfra in meeting Non-Solar and in consumer interest;**
  - b. *pass any other Order as may be appropriate under the circumstances;*
  - c. *the Hon'ble Commission condone any inadvertent omissions/errors/shortcomings;*
  - d. *the Hon'ble Commission may be pleased to permit the Petitioner to add or modify this petition with additional information; if so required during the course of hearings."*
13. On perusal of these prayers, it is evident that the Appellant has sought the same relief in both the petitions before the State Commission. When the earlier Order in Case No. 109 of 2012 has not been appealed, it has attained the finality. Hence, the Appellant could not be permitted to raise the same issue again before the State Commission. By the present Appeal, the Appellant is virtually seeking to challenge the earlier Order dated 02.01.2013 in case No. 109 of 2012, which has attained the finality.

14. The Appellant has sought to contend that the principle of Res-Judicata does not apply in these matters. This contention is wrong in view of the settled law laid down by this Hon'ble Tribunal in the following judgements:

(i) Bihar Steel Manufacturers Association Vs Bihar Electricity Regulatory Commission - Judgement dated 18.05.2011 in Appeal No. 172 of 2010 on constructive res judicata. The relevant part of the said judgment is extracted hereunder:-

*“33. As regards the argument of the learned Counsel for respondent No. 2 that the instant Appeal is barred by the principle of constructive res judicata as provided in the Explanation iv to Section 11 of the CPC we are to observe that the submission is not without any merit. It is settled law that in every proceeding the whole of the claim which is a party is entitled to make should be made and where a party omits to sue in respect of any portion of the claim he cannot afterwards sue for the portion omitted. The decision in Forward Construction Co. (ibid) it has been held that adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might an ought to have had decided as incidental to the subject matter of litigation. Evidently in the earlier appeals formulation of the FPPCA formula as was made in the tariff order dated 26th August, 2008 was not challenged. In the impugned orders simply the formula has been applied for so as to find out the adjustment charges. The decision in Alka Gupta vs Narinder Kumar Gupta (ibid), Deva Ram & Anrs. Vs Ishwar Chand &*

*Anr. and direct recruit class II Engineers Association the principle was reiterated in different languages but essentially the matter is the same as we have reproduced above. Thus constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised. The principle of Order 2 Rule 2 CPC as has been invoked here by respondent No. 2 is not without absolute irrelevance because the said principle relates to reliefs which ought to have been claimed on the same cause of action what not claimed.. It was opened to the appellant to have challenged the provision of levy of FPCA charges and also the formula specified therein in the earlier appeals but the appellant did not do so.*

*“...g) Principle of constructive res judicata and the provision of Order 2 Rule 2 CPC are applicable vis-à-vis the earlier two appeals where FPPCA as formulated in the tariff order dated 26<sup>th</sup> August, 2008 was not challenged..”*

- (ii) Rlnfra Vs MERC - Judgment dated 14.11.2013 in Appeal No. 140 of 2011. The relevant part of the said judgment reads as under:-

*“..94. The Commission had changed the loss reduction target for FY 2007-08 and 2008-09 in its Order dated 4.6.2008 and kept at the same level in its Order dated 28.8.2009 truing up for FY 2007-08 and FY 2008-09. **The order dated 28.8.2009 has not been challenged by the Appellant and, therefore, the loss figures adopted in this order have attained finality. Accordingly, the same cannot be questioned now in this Appeal...**”*

15. The Appellant has contended that the factual situation between the earlier petition and the current petition has changed. In this connection, the Appellant has sought to contend that since in the earlier Order dated 2.1.2013, the Commission has held that *“...In view of the aforesaid discussions and analysis by Commission in earlier paragraphs and also in light of views expressed in the FOR meeting in the matter of Inter-changeability of RPO targets, the Commission is of the view that such inter-changeability of RPO may not be desirable till Solar power achieves grid parity...”*.
16. On account of such finding, the Appellant seeks to contend that since the market situation has now changed, the earlier Order would not operate as res-judicata. The said argument is wrong for the following reasons:-
- (i) The aforesaid finding was not the only finding in the earlier Order dated 2.1.2013. Let us quote the findings:-
- (a) *“Accordingly, if an Obligated Entity makes purchases of a lesser quantum of “Solar” or “Non-Solar (Other RE)” than the percentages specified in the second column and third column of the table under Regulation 7.1, **such an Obligated Entity will be said to be not in compliance with the RPO target.**”*

- (b) **“..Accordingly, an Obligated Entity cannot make purchase of “Solar” above the percentage specified in the second column and seek reduction of the RPO for “Non-Solar”, i.e. below the percentage specified in the third column. The objective of the RPO targets in percentage terms in the second and third column are to promote both “Solar” and “Non-Solar”. The objective is not to prefer to promote one source over the other...”**
- (c) *The above referred amendment to the Tariff Policy, furthermore states that within the “minimum percentage” for procurement from NCE and RE including Co-generation, the Regulatory Commissions should reserve a “minimum percentage” for procurement from “Solar”. The Commission has accordingly specified the total RPO in the last column of the table under Regulation 7.1 and within that RPO, the Commission has reserved the “minimum percentage” for procurement from “Solar” as provided in the second column. Further, the “minimum percentage” in the third column for procurement from NCE and RE including Co-generation cannot be diluted by purchasing from “Solar” in excess of the “minimum percentage” for procurement from “Solar” as provided in the second column. This is neither the intention of the amendment to the Tariff Policy dated 20 January, 2011, nor the intention of Section 86(1)(e) of the Electricity Act, 2003...”*
- (d) *“..However, the ‘minimum percentage’ in the third column for procurement from NCE and RE including Co-generation **cannot be diluted by purchasing from “Solar” in excess of the “minimum percentage” for procurement** from “Solar” as provided in the second column..”*
- (e) *Accordingly, the Petitioner seems to suggest that RPO targets (solar/non-solar) are interchangeable so long as*

overall RPO target are achieved on aggregate basis by way of purchase of either solar power or non-solar RE power. **However, the Commission is of the view that it is amply clear from Regulation 7.1 of the MERC RPO-REC Regulations, 2011 that the RPO target specified therein for ‘Solar’ has to be met through Solar power procurement and the RPO target specified for ‘Non-Solar’ has to be met through procurement of power from RE sources other than Solar Power sources.** Thus, in view of separate RPO targets specified for Solar and Non-Solar RE procurement, **each Obligated Entity will have to make purchases from respective sources, i.e. Solar power purchase for meeting Solar RPO and Non-Solar RE power purchase for meeting Non-Solar RPO.** The objective of specifying separate Solar and Non-Solar RPO targets was to facilitate promotion of power procurement from both Solar and Non-Solar RE sources, **and such specific requirement cannot be complied by meeting with RPO target on aggregate basis.** In fact under present market conditions, the cost of non-solar RE power being lower than that of solar power, allowing such inter-se adjustment of RPO targets (solar/non-solar) within overall RPO target would be detrimental to the cause of promoting solar power development...”

- (ii) Factually, the Appellant has not pleaded even in the present petition leading upto the impugned Order that the market conditions have changed. The following part of the petition is relevant in this connection:-

“... (vii) It would be more beneficial to procure more solar power especially in view of the fact that **it is likely to achieve grid parity in the near future** which is clearly

evident from the decline in the per unit price of solar power as given in the table below:...”

- (iii) Hence even the statement in the petition is that it is likely to achieve grid parity in the future and not that it has already achieved grid parity. On that ground alone, the contention of the Appellant is required to be rejected.
- (iv) Further, it is undisputable that the Appellant has already tied up its source of power. In point of fact the rate at which it has sourced such power is at the very least, constant over the period of the PPA or at even at an ascending rate. Therefore even on a demurrer, the assumption that the solar price is likely to achieve grid parity in the near future is totally irrelevant to the Appellants claim.
- (v) As a matter of fact, the Appellant has already claimed the cost of excess solar power purchase at a constant rate of Rs. 17.91 per unit as part of its RPO obligation for the Second Control Period of FY 2012-13 to 2015-16. Extracted hereunder is the table showing the solar power purchase in the MYT Order dated 22.8.2013 in Case No. 9 of 2013. The said Order is subject matter of

challenge in Appeal No. 274 of 2013 pending before the Tribunal.

<b>Table 34 : Solar Power Cost Summary as submitted by RInfra-D for the second Control Period Solar Power Cost</b>	<b>FY 2012-13</b>	<b>FY 2013-14</b>	<b>FY 2014-15</b>	<b>FY 2015-16</b>
Solar Purchase from DSPPL (MU)	60.00	60.00	60.00	60.16
Solar Tariff (Re. per k Wh)	17.91	17.91	17.91	17.91
<b>Solar Power purchase cost (Rs. Cr.)</b>	<b>107.46</b>	<b>107.46</b>	<b>107.46</b>	<b>107.75</b>
Solar Obligation including shortfall (MU)	58.22	38.51	39.49	40.80
Solar Shortfall in previous years (MU)				
<b>Deficit/(Surplus) (MU)</b>	<b>(1.78)</b>	<b>(21.49)</b>	<b>(20.51)</b>	<b>(19.36)</b>

In the said MYT Order, the Commission had held that the cost of solar power procurement from the aforesaid solar generator DSPPL (Dahanu Solar Power Pvt. Ltd.) over and above the minimum RPO would be treated and permitted only in the merit order of power purchase. The Appellant is in Appeal before this Tribunal in Appeal No. 274 of 2013 against such finding.

- (vi) Hence, it is clear that the Appellant, is seeking the excess solar power purchase to be treated as its RPO and is parallelly seeking the cost of such excess solar power purchase not in the merit order but at the preferential tariff for solar power.

17. For all the aforesaid reasons, the Appellant has not been able to establish any legal right to contend that the excessive purchase of solar power over and above the minimum RPO requirement ought to be treated as compliance of the non-solar RPO requirement.

**18. SUMMARY OF OUR FINDINGS**

(a) **The Appellant has sought the same relief in the Petition before the State Commission in the present case No.84 of 2013 as in the case No.109 of 2012. No Appeal was filed against the earlier order in case No.109 of 2012 and it has attained the finality. By the present Appeal, the Appellant is virtually seeking to challenge the earlier order dated 2.1.2013 in case No.109 of 2012 which has attained finality. Principle of Res-judicata will apply in the present case.**

(b) **It is undisputable that the Appellant has already tied up its source of power. In point of fact the rate at which it has sourced such power is at the very least, constant over the period of the PPA or at even at an ascending rate. Therefore even on a demurrer, the assumption that the solar price is**

likely to achieve grid parity in the near future is totally irrelevant to the Appellants claim.

(c) The Appellant has already claimed the cost of excess solar power purchase at the constant rate of Rs.17.91 per unit as part of RPO Obligation for the control period FY 2012-13 to 2015-16 in MYT order dated 22.8.2013 which is under challenge by the Appellant in appeal No.274 of 2013 which is pending before this Tribunal. Hence, the Appellant is seeking the excess solar power purchase to be treated as its RPO and is parallelly seeking the cost of such excess solar power at the preferential tariff for solar power and not as per the merit order.

(d) The Appellant has not been able to establish any legal right to contend that excessive purchase of solar power over and above the minimum RPO to be treated as compliance of the non-solar RPO.

19. In view of the above findings, there is no merit in the Appeal. Hence, the Appeal is dismissed. No order as to costs.

20. Pronounced on this **28th day of November, 2014** in the Open Court.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

**Dated : 28<sup>th</sup> November, 2014**

**✓ REPORTABLE / ~~NON-REPORTABLE~~**