

COURT-I

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

IA No. 1066 of 2021 in DFR No. 240 of 2021

Dated: 19th July, 2021

**Present: Hon`ble Mrs. Justice Manjula Chellur, Chairperson
Hon`ble Mr. Ravindra Kumar Verma, Technical Member**

In the matter of:

Wind Independent Power Producers Association

Through Secretary,
6th floor tower 4A, DLF corporate park,
Mehrauli Gurgaon Road,
Gurgaon-122002
Email:mahesh.vipradas@sembcorp.com

... PETITIONER

Versus

- 1. Maharashtra Electricity Regulatory Commission**
Through Its Secretary,
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Colaba, Mumbai - 400005
Email: mercindia@merc.gov.in
- 2. Maharashtra State Electricity Distribution Company Limited**
Through Superintendent Engineer
Plot No G-9, Prakashgad, 5th Floor,
Station Road,
Bandra (East), Mumbai - 400 051

E-mail: ceremsedcl@gmail.com

3. **Maharashtra Energy Development Authority**

Through its,
General Manager (Co-ordination)
MHADA Commercial Complex, II Floor,
Opp. Tridal Nagar, Yerwada,
Pune – 411006
E-mail: nodalofficer@mahaurja.com

...RESPONDENTS

Counsel for the Petitioner(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Sakya Singha Chaudhuri
Mr. Avijeet Lala
Ms. Astha Sharma
Ms. Nameeta Singh
Ms. Meha Chandra
Ms. Nithya Balaji

Counsel for the Respondent(s) : Mr. Buddy A. Rangandhan
Ms. Pratiti Rungta for R-1

Mr. Basava Prabhu Patil, Sr. Adv.
Mr. G. Sai Kumar For R-2

ORDER

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. The present petition is being filed under Section 121 of the Electricity Act, 2003 challenging the process by which e-public hearing is being conducted by the Maharashtra Electricity Regulatory Commission

(“**MERC / Respondent No. 1**”) on 16.07.2021 - in respect of the petition being Case No. 338 of 2019 which has been filed by Maharashtra State Electricity Distribution Company Limited (“**MSEDCL / Respondent No. 2**”) seeking the Respondent No. 1 to assess and alter the criteria, methodology, mode and manner of wind zone classification of wind projects for purposes of applicability of feed-in tariff (“**MSEDCL Petition**”) – pursuant to public notice dated 19.06.2021 issued in Case No. 338 of 2019 (“**Public Notice**”). The MSEDCL Petition also seeks alteration and / or modification of existing energy purchase agreements (“**EPAs**”). The Petitioner is aggrieved since the Respondent No. 1 is proceeding with the matter without following the procedure laid down in its own regulations and without adhering to the principles of natural justice that is causing severe prejudice to several of the members of the Petitioner.

Vide the Public Notice, the Respondent No. 2 has invited suggestions / objections from the public / stakeholders on the MSEDCL Petition by 12.07.2021, and the e-public hearing on the MSEDCL Petition is scheduled to be held by the Respondent No. 1 on 16.07.2021. The present application seeks stay of e-public hearing to be conducted by the

Respondent No. 1 on 16.07.2021 and any further proceedings or steps or further steps by the Respondent No. 1 pursuant to Public Notice inasmuch as the MSEDCL Petition has been purportedly admitted without issuing notice to the affected parties and without any formal admission hearing. This is of significance because: (i) admission hearing is provided in the MERC (Conduct of Business) Regulations, 2004 (“**COB Regulations**”); (ii) the matter is a highly contested matter on earlier occasions wherein Hon’ble Bombay High Court has specifically observed that the principles of natural justice need to be adhered with; (iii) the issues raised and relief sought are barred by *res judicata*; (iv) reliefs have been sought against generators without making them parties; (v) existing contracts with generators have been sought to be interfered / altered through Respondent No. 1; and (vi) the MSEDCL Petition fails to disclose any cause of action for seeking relief against existing EPAs.

Learned counsel submitted that the public hearing will ensure that the members of the Petitioner will have to *per force* participate in the proceedings even though the MSEDCL Petition is *per se* not maintainable in law and could not have been admitted in its present form.

It is respectfully submitted that the MSEDCL Petition is not maintainable in law and the present proceedings are beyond the scope and jurisdiction exercised by the Respondent No. 1 under the provisions of the EA 2003. Moreover, the Public Notice issued by the Respondent No. 2 is not as per procedure of law and is liable to be quashed. No public hearing is maintainable in law to the extent the MSEDCL Petition seeks to interfere with and alter/modify/amend existing EPAs of members of the Petitioner herein or the tariff fixed thereunder.

Having members with projects in the State of Maharashtra who will be gravely affected, the Petitioner has filed the present application seeking stay of e-public hearing to be conducted by the Respondent No. 1 on 16.07.2021 and any further proceedings or steps or further steps by the Respondent No. 1 pursuant to Public Notice as an interested party and submits that the Public Notice cannot be given effect to or proceeded with to the extent it directly affects the contractual rights of the members of Petitioner under the EPAs.

Learned counsel further submitted that in spite of the Respondent No. 2 making claims and seeking relief against various existing wind

developers, none of such developers have been made parties to the present proceedings. Such procedure has been entirely bypassed by the issuance of the Public Notice inviting suggestions / comments on the MSEDCL Petition from the public at large.

Learned counsel submitted that the Respondent No. 1 lacks jurisdiction to carry out process of reduction/adjustment in tariff for existing EPAs and existing projects in a retrospective manner. This would amount to interfering in bilateral contracts between two parties – i.e., the wind developers and Respondent No. 2 in the present case - by a regulatory authority, which is impermissible in law. It is established law that a regulatory commission, in the exercise of its inherent jurisdiction, cannot alter the terms of the contract at the instance of one party.

The conduct of the Respondent No. 1 in proceeding to admit the MSEDCL Petition and putting it up for public hearing is against the principles of *res judicata* as clearly set out by courts.

Some of the generators who have filed their objections on the maintainability of the MSEDCL Petition mentioned the matter before the

Respondent No. 1 on 09.07.2021 to hear the preliminary objections before 16.07.2021. The Respondent No. 1 refused to hear the applications before 16.07.2021.

The Petitioner herein is aggrieved by the aforesaid actions of the Respondent No. 1 inasmuch as the same have been taken in clear derogation of its statutory functions under the EA 2003 and settled principles of law, and since its conduct suffers from procedural irregularity on several fronts.

The Petitioner humbly prays before this Tribunal to stay the e-public hearing on 16.07.2021 and any further proceedings or steps or further steps by the Respondent No. 1 pursuant to Public Notice dated 19.06.2021 issued in Case No. 338 of 2019 based on the averments made hereinabove and in the accompanying petition.

Given the current circumstances, the Petitioner has a strong *prima facie* case as the present proceedings being conducted by the Respondent No. 1 pursuant to the Public Notice are *ex facie* illegal and de-hors the process of law. The Petitioner has a good chance in succeeding in the captioned petition.

Grave injustice will be caused to the Petitioner if the stay is not granted and the Respondent No. 1 undertakes re-classification of wind zones and direct amendment of existing EPAs on that basis, since the members of the Petitioner which are wind project developers will be required to participate in the proceedings to defend themselves even though the issue is not only *res judicata*, but the relief sought is clearly barred by settled law.

MEMO FILED ON BEHALF OF THE PETITIONER PLACING ON RECORD MENTIONING ORDER DATED 09.07.2021 PASSED IN CASE NO. 338 OF 2019 BY MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

The present original petition was heard by the Tribunal today, i.e., 14.07.2021. The Tribunal has directed for filing of the order on mentioning dated 09.07.2021 passed by MERC, which was supplied to the petitioners counsel by the MERC on 13.07.2021.

To briefly recapitulate, the present matter involves the reopening of the MERC Renewable Energy Tariff Regulations, 2010 and tariff orders issued thereunder (3 in total) that have become final. For the purposes of

identifying different wind zones for the wind generators, the 2010 Tariff Regulations provided for measurement of wind density at 50 meter hub height. Subsequently, the MERC RE Tariff Regulation 2015 were issued whereunder, MSEDCL sought review before MERC (Case no. 41/2017) of the Tariff Orders passed under the 2010 Tariff Regulations by measuring wind density at 80 meter hub height by reclassifying the wind zones. The case no. 41/2017 was dismissed by the MERC on the ground that MSEDCL could not point out any fault with the approach adopted by MEDA.

Subsequently, a review by MSEDCL was filed against the order in case No. 41/2017, which was initially allowed by the MERC. This was challenged by some of the wind generators before the Hon'ble Bombay High Court, which disposed of the matter upholding the right of representation by the generators. The relevant portions of the order read out before the Tribunal are extracted below:

“26.In fact, the records would indicate that the Commission itself is aware of the decision in the Case No. 41 of 2017, yet it has filed the review petition No. 152 of 2018. When extensive arguments and contentions are raised by the second respondent before the Commission, in para 12 it says that it has analysed the issues. It has also perused the Regulation

No. 85 clause (a) of the Conduct of Business Regulations and it deems it fit to hold that the order passed in Case No. 41 of 2017 does merit a review. We do not think that this is an innocuous observation as is now projected.

27. Even for this conclusion to be recorded, the affected parties would have to be given an opportunity and needless to say a prior one. Thus, the expectation of the Hon'ble Supreme Court from a Commission like MERC is that it should not act unmindful of the principles of natural justice and they should be followed and should not throw the rule of law to the wind. It should go by the basic tenets of fair play. Every adjudication and all the things contemplated by law in this case would involve, on occasion, a *lis*. Once it is adjudicated as a *lis* and fairly and properly so also completely, that would require the presence of the affected parties. It would necessitate a minimal opportunity to them to meet any adverse material. It would also take within its import a further opportunity to place such material as deemed fit and proper by these affected parties. On a careful consideration of such material, rival pleadings and contentions, the Commission must pass a reasoned order. When it holds in the instant case that the orders passed earlier in Case No. 41 of 2017 merit a review, it has not adhered to these principles, but has completely ignored them.

28. Then in para 13 and 14, it may have issued certain directions to the third respondent, but we accept the statements made by learned Advocate General and Mr. Bhatt on instructions that there is no finality attached to them and though the order says that Case No. 152 of 2018 stands disposed of, it would not mean that sweeping alterations or changes would be brought and as apprehended by the petitioners. They are not going to be brought about instantly. All that the Commission has done is to direct an exercise to be carried out and has issued some guidelines in that regard....

Presently, there is no apprehension that either the terms and conditions of the existing contracts would be altered or some new terms and conditions will be imposed, much less any adverse consequences would be visited insofar as the

charges levied and collected by the generators. Therefore, we do not think that we should enter into any wider question or a larger controversy, at this stage. Advisedly, once the Commission carries out the exercise at the instance of the second respondent, if at all it is approached again and that exercise results in an adverse order, the petitioners are free to challenge such final orders in accordance with law.”

Pursuant to the order of the Hon'ble High Court, a direction was passed by the MERC on MEDA to submit a report on wind zone classification and the review proceedings were closed. The MEDA report was filed before the Commission on 28.02.2019. Based on the MEDA report, MSEDCL filed a fresh petition on 13.12.2019, wherein it sought inter-alia to interfere with the existing contracts. Prayer (vii) of the Petition is extracted here-in-under:

“(vii) Pass appropriate consequential, incidental and miscellaneous orders and directions in relation to the existing PPAs to ensure conformity with the modified / altered / amended wind zone classification.”

Subsequently, a further affidavit was filed on 24.03.2021 inter-alia with the following prayer:

“III. To allow recovery of excess amount paid to such generators with interest for past period based on their reclassification of wind zones as per actual generation.”

Once the Public Notice was issued by MSEDCL for public hearing on 19.06.2021, without any order on admission of MSEDCL petition, some generators have filed application before MERC challenging maintainability of the Petition. Some of these were also mentioned before MERC on 09.07.2021. MERC has forwarded an order on mentioning to the Counsel for petitioner yesterday, i.e., 13.07.2021, whereby MERC has decided that it will hear the preliminary objection on admissibility and the main matter in the Public Hearing on 16.07.2021, and pass a common order. The mentioning order is therefore filed herewith for perusal of the Hon'ble Court. It is pertinent to mention that the Petitioner herein was not a party to the mentioning held on 09.07.2021.

Analysis & Decision

The admitted facts are that Case No. 338 of 2019 was filed by MSEDCL to assess and alter the methodology, mode, criteria and manner of wind zone classification of wind projects for purposes of applicability of feed-in tariff. In this Petition, MSEDCL has apparently sought for alteration/modification of existing energy purchase agreements.

According to Applicant, there is likelihood of Respondent Commission allowing the claim of MSEDCL seeking re-classification of wind zoning. They further contend that if it is decided as such, the members of the Appellant Association would suffer.

According to Petitioner, the Respondent Commission is proceeding with the matter without complying with the procedure laid down by it in its Regulations totally ignoring principles of natural justice, since it causes severe prejudice to several members of the Petitioner Association. The Respondent No. 2 issued public notice scheduled to be held on 16.07.2021 without considering issuance of notice to affected parties they brought into the proceedings of High Court of Bombay.

There is a provision for hearing at the stage of admission in terms of MERC (Conduct of business) Regulations of 2014. Further it is a highly contested matter earlier in the earlier round of litigation. According to applicant, in the matter before the Hon'ble High Court, the High Court specifically directed to comply with the principles of natural justice.

The contention of the Appellant seems to be that the issues raised and the relief sought are barred by principles of *res judicata* by virtue of the present proceedings at the instance of the MSEDCL, since the existing contracts are likely to be interfered with. It is also seen that the applicant contends that no cause of action whatsoever is forthcoming for seeking relief against the existing projects.

The Respondent MSEDCL contends that there was a direction to dispose of the Petition by the Hon'ble High Court of Bombay, therefore question of maintainability would not arise.

On going through, we note from the orders of the Hon'ble High Court, at the time of disposal of the said Petition before the High Court, the present Petitioner was neither a party to the proceedings nor was a party to the Petition filed before the 1st Respondent. We are of the opinion that since the tariff for existing project was already determined earlier, if the question of re-determination of the desired tariff is raised in the present proceedings, it may amount to *res judicata*. Therefore, we are of the opinion that maintainability of the present public hearing needs to be heard as preliminary issue.

Till maintainability of the present proceedings is decided, the Respondent Commission shall not proceed further in the matter pending before it.

List the matter on **06.09.2021**.

Pronounced in the Virtual Court on this the 19th day of July, 2021.

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

pr/tpd