COURT-I

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA NO. 1001 OF 2021
IN APPEAL NO. 113 OF 2020

Dated: 26th July, 2021

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

In the matter of:

Indian Wind Power Association **… Applicant/Appellant(s)**

Versus

Central Electricity Regulatory Commission & Ors.**…. Respondent(s)**

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Vishal Gupta
Mr. Avinash Menon
Mr. Sumeet Sharma
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Mr. Paras Choudhary For App1

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Mr. Vikas Singh, Sr. Adv. for R-4

Mr. Hemant Singh
Mr. Lakshyajit Singh Bagdwal
Mr. karan Govel
Mr. Anirban Mondal
Mr. Mridul Chakravarty **for R-2 to 4**

Mr. R.S. Prabhu **for R-5**

Mr. Apoorva Misra
Mr. Aditya K. Singh
Mr. Soumya Prakash
Mr. Samart Kashyap for R-6 & 7

Mr. Anand K. Ganesan
Ms. Swapna Seshadri **for R-7**

ORDER

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

IA No. 1001 of 2021
(Application for impleadment)

This Application came to be filed by Respondent No. 4 - Indian Captive Power Producers Association seeking impleadment of Ministry of Power (MoP) and Ministry of New and Renewable Energy (MNRE), Government of India (GoI) as a party Respondent to the above Appeal.

The Appeal is filed against the impugned order dated 17.06.2020 passed in suo motu Petition No. 05/SM/2020 on the file of Central Electricity Regulatory Commission (for short **"CERC"/"Central Commission**"), whereby there was a downward revision of the Floor price and Forbearance price of Renewable Energy Certificates (RECs) in accordance with the prevailing tariff of Renewable Energy in the country.

In its application, the applicant/R-4 submits that the basis for impleadment of MoP and MNRE is on account of the fact that it is a major and necessary stakeholder with respect to the protocol to be followed qua

pricing of the Renewable Energy Certificates (RECs), as such RECs were conceptualized by the MoP before the same were implemented by the Respondent Commission as well as all other State Commissions.

On 30.06.2008, India's first National Action Plan on Climate Change (NAPCC) was released by the Government of India and this plan outlined the existing and according to the applicant/R-4, future policies and programs addressing climate mitigation and adaptation, and identified eight core "national missions" running through 2017. This plan provided for the certain measures to be adopted in the regulatory/tariffs regime to help mainstream renewable energy sources in the national power system. Further, the said plan recognized the REC framework for the first time. The relevant extract of NAPCC is at Clause 4.2.2 (ii).

According to applicant/R-4, the concept of REC was introduced solely on the basis of the policies, schemes of the Government of India (i.e., MoP and MNRE).

Applicant/R-4 further submits that the MNRE also participated in the proceedings which resulted in passage of the impugned order. In this context, Para D 25 of the impugned order is relevant.

According to applicant/R-4, the following facts are relevant:

a) The MoP in its discussion paper has categorically acknowledged that over the years there has been a decline in the prices of renewable energy sources, such as wind, solar etc.;

b) The said decline has been witnessed on account of the competitiveness in the market for sale of power by such renewable energy sources;

c) The MoP has further acknowledged that on account of downward trend of prices of renewable energy sources, the CERC over the years has reduced the floor and forbearance prices of RECs, which are in line with the physical price of renewable energy sources;

d) Accordingly, based on such downward trend, the MoP has proposed to re-design the REC mechanism in the following manner:

i. The valid period of RECs may be removed, so that such validity is perpetual till the said RECs are sold; and

ii. There is no requirement for specifying the floor and forbearance prices of such REC, and the RECs holders would have the complete freedom to decide the timings to sell.

Applicant submits that therefore, it is evident that the MoP is seeking to bring in a paradigm shift in the REC mechanism having a direct bearing on the subject matter on the present proceedings in as much the same

proposes to do away with the floor and forbearance prices in trading of RECs.

On account of the aforesaid, the applicant submits that MoP and MNRE, being the Ministries/ Departments of the Government of India dealing with energy sector, including renewable energy and RECs, are necessary and proper parties to the present proceedings.

Applicant/R-4 further submits that if the present Appeal is decided without making MNRE and MoP as party Respondents, and without hearing them, the same would lead to a travesty of justice as the issue in the present Appeal is a regulatory issue which has a Pan India effect in terms of adversely affecting each and every consumer of electricity in the country (as distribution licensees have to purchase RECs which cost is passed on to the end consumers, along with the fact that open access and captive consumers/users are also required to procure RECs for fulfilling their respective Renewable Purchase Obligation). Post the issuance of the impugned order and the appeals being preferred before this Tribunal (including the present appeal), it becomes necessary to implead MoP in the present proceedings, to seek its views qua the re-designing of the REC framework. Further, on account of the fact that if the discussion paper is

implemented by the MoP, then all the RECs available in the power exchanged (both solar and non-solar) will be traded without any floor and forbearance price.

Applicant/R-4 further submits that it is a settled principle of law that a proceeding cannot be decided without arraying necessary and proper parties as Respondents. In the absence of necessary and proper parties, the proceedings will suffer from non-joinder of parties, thereby leading to any order which is passed as null and void. In this context, the applicant placed reliance on the following judgments of the Hon'ble Supreme Court:

a. In *Vidur Impex and Trader Private Limited and Ors. v. Tosh* Apartments *Private Limited and Ors.* reported in *(2012) 8 SCC 384* (Para 41, 41.1, 41.2, 41.3, 41.4,41.5 & 41.6).

b. In *Chief Conservator of Forests v. Collector,* reported in *(2003) 3 SCC 472* (Para 12).

c. In *Khetrabasi Biswal v. Ajaya Kumar Baral,* reported in *(2004) 1 SCC 317* (Para 6).

Per contra, **the Appellant – Indian Wind Power Association (for short "IWPA") filed reply to the application, which in brief, is as under:**

Appellant – IWPA submits that it is a mere delaying tactic adopted by the Respondent No.4/applicant for delaying the hearing in the present Appeal. Appellant further submits that MOP did not participate in the proceedings therefore, cannot be impleaded as a party Respondent. A perusal of the Impugned Order, more particularly paragraph 26 thereof, would make it evident that the MOP did not participate in the Proceedings before the CERC. A person who was not a party before the CERC cannot be made parry at an appellate stage. Reference is made to the principle enshrined in Order XLI Rule 20 oĺ the Code of Civil Procedure, 1908 that a person who was not party to the suit, cannot be arrayed as party respondent to the appeal.

Appellant further submits that MOP is not even a proper party to the present Appeal, much less a necessary party. The Constitution of India envisages separation of powers between three wings of the state viz. the Legislature, the Executive and the Judiciary. By way of the Application, the Respondent No.4 seeks impleadment of the MOP on the basis of a

discussion paper dated 04.06.2021 issued by the MOP on re-designing the REC mechanism in the country. As the MOP did not participate in the proceedings before the CERC, the only ground on which the impleadment is being sought is the discussion paper dated 04.06.2021.

According to Appellant, a perusal of the said discussion paper dated 04.06.2021 would show that the same contemplates an executive policy decision by the MOP. Such a policy decision is in exercise of the xecutive/legislative power vested in the state. It cannot have any bearing on the present judicial proceedings. Such a contemplated policy decision, which has not even crystalized/attained finality, cannot be permitted to hamper the ongoing judicial proceedings which are due for final hearing at its appellate stage.

According to Appellant, the Impugned Order under challenge, was passed on 17.06.2020 i.e. much before the aforesaid discussion Paper dated 04.06.2021 was published. Further, the Impugned Order was passed under the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 dated 14.01.2010. The said discussion paper cannot have any bearing on any proceedings

calling into question the validity of the Impugned Order. Also, the discussion paper dated 04.06.2021 cannot, by any stretch of imagination render the MOP as a proper party, much less a necessary party, to the present Appeal when admittedly it was not so, prior to the issuance of the discussion paper dated 04.06.2021.

it is further brought to the attention of this Tribunal that the aforesaid discussion paper dated 04.06.2021 at paragraph 5.1 reads as under:-

> *"The latest order of the CERC notifying the floor and forbearance price, effective from 1st July 2020, is sub-judice and no trading session of RECs has been held from July 2020 onwards."*

The said latest order of the CERC being referred to is the Impugned Order. Therefore, the MOP is conscious about the present proceedings and itself has opted to not get itself impleaded as a party respondent herein. Yet, the MOP has issued the discussion paper dated 04.06.2021. In case, the said discussion paper dated 04.06.2021 had any bearing on the present proceedings or vice versa, the MOP would have moved this Tribunal for its impleadment. The MOP being conscious of the fact that the policy decision contemplated by discussion paper dated 04.06.2021 and the present proceedings are independent proceedings, opted to not to get itself impleaded as a Party respondent.

According to Appellant, the submissions being made in the Application are meritless for the following reasons:-

a) There is not a single whisper in the said discussion Paper dated 04.06.202, which indicates the same would be applicable retrospectively. Per contra, an inference may be drawn that since the MOP, despite being conscious about the pendency of the present Appeal, did not get itself impleaded as a party respondent that the contemplated policy decision would be applied prospectively.

b) That the discussion paper dated 04.06.2021 has invited objections from all the concerned stakeholders (as would be evident from the communication dated 04.06.2021 being No. 23/6 /2021-ReR Part-l). Therefore, there is a decision making process involved herein and the MOP would be bound to take into consideration any observations made in the final Judgment passed by this Tribunal in the present case, if the same have any bearing on such policy decision.

c) That the plea qua pan India ramifications is also devoid of any merit. It is submitted that the CERC is an adjudicatory body which, while passing Impugned Order, is statutorily bound to take into consideration such ramifications. Necessarily an Appeal arising therefrom, similar considerations would be in place. Therefore, there

is no question of inviting the views of the MOP while adjudging the legality of the Impugned Order.

d) That the outcome of the present proceedings does not directly affect the MOP in exercising its lawful right to bring about the policy decision contemplated in the discussion paper dated 04.06.2021.

e) That it settled law that a party is not rendered as a necessary or a proper party merely because it has some relevant evidence to advance or some arguments to make, the test for determination thereof is that such a party must be directly and legally interested in the outcome of the proceedings i.e. such an outcome would directly affect such a party legally. Reliance is placed on the Judgment of the Supreme Court in ***Ramesh Hirachand Kundanmal V. Municipal Corporationof Greater Bombay and Ors.*** reported as (1992) 2 SCC 524, **Para 14 & 15**.

The Appellant reiterate that the present Application is nothing but delay tactics on the part of the Respondent No.4. The final arguments in the Appeal were heard on 25.09.2020 and the Judgment was reserved. Thereafter, due to the retirement of the Hon'ble Technical Member of the Hon ble Bench which had reserved the matter, the same was re-listed for

final hearing. The discussion paper was published on 04.06.2021 and the Appeal was again listed on 07.06.2021. The Respondent No.4, instead of filing the Application between the period from 04.06.2021 till 07.06.2021, filed the same at a belated stage on 02.07.2021 knowing very well that the matter was listed on 05.06.2021. It is therefore, evident that the present Application under reply is meritless and a mere delay tactic of the Respondent No.4, who is directly interested in delaying the final outcome of the present Appeal.

With these averments, the Appellant submits that the Application is meritless and deserves to be dismissed.

***Per contra,* the applicant/Respondent No.4 filed rejoinder to the reply of the appellant - IWPA, which in brief, is as under:**

RE: Averment of the Appellant that there is no whisper in the Discussion Paper dated 04.06.2021 issued by the Ministry of Power (MoP), Government of India, that the same would be implemented retrospectively

The applicant submits that the effect of the discussion paper, once notified, would have a retrospective effect in the sense that all existing RECs, whether issued in the previous financial years or in the present financial year, will have their floor and forbearance prices removed. In this

context, reference is made to the relevant extract of the discussion paper, which is set out as under:

> *"Discussion paper on redesigning the Renewable Energy Certificate (REC) Mechanism*
>
> *…*
>
> *Following is proposed*
>
> *….*
>
> *(ii) As RECs are perpetually valid then the floor and forbearance prices are not required to be specified as RECs holders would have the complete freedom to decide the timings to sell."*

The applicant submits that from a perusal of the above, it is clearly evident that the MoP has proposed to completely do away with the floor and forbearance price on all the RECs, since there would be no validity period of such RECs. Therefore, it is clear that the MoP proposes to remove the floor price of all the "existing" RECs which are presently available for trading at the power exchanges i.e., their prices determined previously would be interfered with, thereby giving the same a retrospective effect.

The applicant further submits that if the floor and forbearance prices of RECs which are presently available in the power exchanges, are done away by the MoP, then there would remain no basis in the present appeal,

which challenges the impugned order of the Ld. CERC wherein the revised rates of RECs (floor and forbearance price) have been devised. Therefore, it is very much required that notice ought to be issued to MoP and it ought to be heard in the present appeal as it is the concept creator of RECs, as well as it controls and decides the renewable purchase obligations (RPOs) of all the electricity consumers in the country which entails purchase of such RECs. As such, there is no merit in the aforesaid averment of the Appellant.

RE: Averment of the Appellant that MoP did not participate in the proceedings before the Ld. CERC, therefore it cannot be impleaded as a Party Respondent to the present appeal

&

RE: Averment of the Appellant that MoP is not a proper party to the present appeal, much less a necessary party

According to the applicant/R-4, with respect to the aforesaid averments of the Appellant, it is stated that in a first appellate proceeding, especially of a regulatory nature, arraying a necessary/proper party is not at all dependent upon whether such party participated in the proceedings before the lower forum or not. Hence, the argument of the Appellant is not only fundamentally flawed but is completely misplaced.

It is further submitted that the CERC conducted a “public” proceeding while passing the impugned order, knowing very well the gravity of the issue as any change in the price of RECs has an impact upon all the consumers of electricity in the country. Thereafter, the present appeal was filed challenging the impugned order in a surreptitious/sneaky manner by the Appellant, in terms of the fact that the said Appellant did not at all make any other stakeholder a party Respondent, except the CERC despite the fact that the proceedings before the said Commission were public in nature and numerous entities participated, including the Union of India (though MNRE).

Applicant further submits that in fact, the Respondents in the present appeal had to file applications seeking impleadment, and in the said applications, there was vehement opposition from the Appellant and it took 3 hearings on 23.07.2020, 24.07.2020 and 27.07.2020 to implead the Respondents, except CERC. Looking at the conduct of the Appellant in attempting to sneak orders in the present appeal, the said Appellant would not have even made the CERC as a Respondent but was forced to do so as the said Commission passed the impugned order.

In view of the aforesaid, the applicant submits that the present appeal required issuance of a public notice, when the impugned order was also

passed pursuant to such notice. This Tribunal being the first Appellate forum, it is a court of law, as well as a court of fact, and hence, it has to issue notice for hearing all the stakeholders in a matter of such public importance which affects all consumers of electricity in the country.

It is further stated that issuance of notice to the MoP does not depend upon the fact that whether it had participated in the proceedings before the CERC or not. Further, the Government of India is the concept creator of REC framework, which was conceptualized vide the “National Action Plan on Climate Change (NAPCC)” dated 30.06.2008 and vide the “Report on the Development of Conceptual Framework for Renewable Energy Certificate Mechanism for India”, issued by MNRE. It is further submitted that the Ministry of Power issued the Revised Tariff Policy, 2016, which provides that long term growth trajectory of Renewable Purchase Obligations (RPOs) will be prescribed by MoP in consultation with MNRE. In this context, Clause 6.4 (1) of the Revised Tariff Policy, 2016 is relevant.

in view of the aforesaid, the following is submitted by the applicant:

(a) The Tariff Policy is issued by the Government of India under Section 3 of the Act, and it has statutory force. This was also held by

the Hon'ble Supreme Court in *Energy Watchdog* Judgment [*(2017) 14 SCC 80*];

(b) The Renewable Purchase Obligation (RPO) is a mechanism which specifically mandates the Obligated Entities, such as the Distribution Licensees (on behalf of the end consumers of electricity across the country), open access consumers and captive industries to necessarily procure a specified percentage of renewable energy;

(c) The State Commissions have issued their respective regulations, whereby the total percentage of RPO is specified (both solar and non-solar) which such Obligated Entities are mandated to procure;

(d) Each RPO Regulation of each State mandates that RPO is to be fulfilled by purchase of RECs, apart from physical renewable energy;

(e) As per Clause 6.4 (1) of the aforesaid Tariff Policy, the MoP is assigned with the role of issuing long term growth trajectory of Renewable Purchase Obligations (RPOs), in consultation with the

MNRE. In other words, the MoP decides the threshold (percentage) of RPO which the obligated entities would be mandated to procure.

Therefore, it can be concluded that MoP is not only the concept creator of RECs, but also controls its sale and purchase through regulating RPO norms of various States. This makes the MoP as a quasi-regulator of the REC/ RPO market, as well as the biggest of the stakeholders in the said market. As such, to argue that the biggest stakeholder should not be heard, is not only preposterous, but equals the previous conduct of the Appellant in surreptitiously assailing the impugned order without making the other necessary stakeholders (such as the Applicant/ Respondent No. 4 and other entities which have to purchase RECs) as party Respondents to the present appeal.

Applicant/R-4 also made reference to the discussion paper dated 04.06.2021 issued by MoP.

The applicant further submits that the entire premise on the basis of which the impugned order is passed, is that the tariff of renewable energy has been constantly and drastically reducing ever since competitive bidding has been introduced since the year 2016-17. This reduction compelled the CERC to determine the price of RECs by keeping in mind the tariff being

discovered through bidding under Section 63 of the Electricity Act, 2003. REC being additional revenue for the purpose of recovery of cost of setting up of a renewable project, the pricing of the same is bound to change/ reduce when the cost of setting up a renewable project itself goes down.

The applicant further submits that in fact, as evident from the discussion paper, the price of Renewable Energy has substantially reduced to Rs 3.5 per unit (for wind energy). In this regard, it becomes imperative to mention herein that the price of REC is determined on the basis of the difference between the cost of renewable energy and the cost of energy through conventional sources (which in the current scenario, is being sold at an average of Rs. 3.5 per unit). Therefore, it is clear that there is no difference in the price of electricity between the conventional and non-conventional sources of energy (renewable). As such, in terms of the current market scenario, there is no real price of REC. As a result of the same, even the forbearance price, as decided in the impugned order, has a substantial impact on the end consumers of electricity. Hence, from the afore-quoted extract of the discussion paper, it is evident that MoP is proceeding under the same philosophy (i.e., the reducing cost of setting up renewable project) which led to the passage of the impugned order. In view of the aforesaid, being the biggest stakeholder in the REC market and a

quasi-regulator, MoP is both a necessary as well as a proper party which deserves issuance of a notice.

Applicant further submits that any proceedings without arraying the said parties would suffer from the illegality of misjoinder of parties, thereby leading to the order which would be passed, as null and void.

ANALYSIS & DECISION

We have gone through the submissions made by both the parties pertaining to the issue whether at this stage impleadment of Ministry of Power and Ministry New and Renewable Energy as party Respondents is necessary and proper.

The impugned order which is the subject matter of this Appeal is dated 17.06.2020 by Central Electricity Regulatory Commission (CERC). The impugned order involves Regulations 2010 dated 14.01.2010. In other words, the discussion paper dated 04.06.2021 which seems to be the genesis for the present impleadment application was not even born as on the date of impugned order i.e., 17.06.2020. In other words, whatever was the discussion, analysis and reasoning in the impugned order did not pertain to the discussion paper or the suggestions or the outcome of the

discussion paper which is yet to be finalized. Definitely, it was not taken into consideration by the CERC. Even otherwise, the discussion paper dated 04.06.2021 at Para 5.1 reads as under:

> *"The latest order of the CERC notifying the floor and forbearance price, effective from 1st July 2020, is sub-judice and no trading session of RECs has been held from July 2020 onwards."*

As on the date of issuance of discussion paper, MoP was conscious about the present proceedings. Till date, it did not opt to get them impleaded in the above proceedings. Though MNRE was a party in one of the Appeals, it did not choose to appear before this Tribunal in the above proceedings. Whatever has been done or proceeded with till date based on the 2010 Regulations has no connection with probability of some policy decision to be taken by the concerned authority in view of the discussion paper dated 04.06.2021 in future. The discussion paper is yet to fructify into policy. The test for impleading a party either as a necessary party or proper party cannot be that it has some relevant evidence to advance or arguments to submit. The test is such a party must be directly and legally interested in the outcome of the proceedings i.e., such an outcome would directly affect such a party legally. This is the settled principle of law.

If the discussion paper tabled by Ministry of Power becomes a policy, then the CERC Regulations 2010 needs modification/alteration accordingly. Till such event happens, present regulations and existing policy governs the field.

We are of the opinion that impleadment application as projected by the applicant/R-4 based on the discussion paper dated 04.06.2021 has no bearing on the controversy to be settled/adjudicated upon by this Tribunal in the above Appeal on merits. Therefore, the impleading application being IA No. 1001 of 2021 deserves to be dismissed and accordingly dismissed.

There is no order as to costs.

List the matter along with batch matters for hearing on ***16.08.2021***.

Pronounced in the Virtual Court on this the 26th day of July, 2021.

Ravindra Kumar Verma
(Technical Member)

Justice Manjula Chellur
(Chairperson)

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