

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.203 of 2016

Dated: 14.08.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

INDIAN WIND POWER ASSOCIATION (IWPA)

Northern Regional Council
513 & 514, World Trade Centre,
Barakhamba Lane,
New Delhi – 110001

Through its Authorised Representative

... Appellant

Versus

**1. EASTERN POWER DISTRIBUTION COMPANY OF
ANDHRA PRADESH LIMITED (APEPDCL)**

Rep by its Chairman and Managing Director
P&T Colony, Seethammadhara,
Vishakapatnam – 530020

**2. ANDHRA PRADESH ELECTRICITY REGULATORY
COMMISSION**

4th Floor, Singareni Bhavan, Red Hills,
Hyderabad – 500 004

Through its Secretary

... Respondents

Counsel on record for the Appellant(s) : Vishal Gupta
Kumar Mihir

Counsel on record for the Respondent(s) : Sidhant Kumar for Res. 1

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant Indian Wind Power Association (in short "IWPA"), a non-profit organization registered under the Tamil Nadu Society Registration Act, 1975 has come in appeal before us against the order dated 28.05.2016 passed by the 2nd respondent Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as "the Commission") in Review Petition No.19 of 2015 whereby the Commission has reversed its earlier order dated 05.06.2015 passed in O.P. No.19 of 2014 filed by the 1st respondent Eastern Power Distribution Company of Andhra Pradesh Limited along with three other distribution companies of Andhra Pradesh.

2. The Commission, in exercise of powers conferred under Sections 61, 66, 86(1)(e) and 181 of the Electricity Act, 2003, passed Regulation No.1/2012 titled as Andhra Pradesh Electricity Regulatory Commission Renewable Power Purchase Obligations (Compliance by Purchase of Renewable Energy / Renewable Energy Certificates) Regulations, 2012 (hereinafter referred to as APERC Regulations, 2012). Regulations 3.1, 4.1, 7.1 and 9 are relevant for the disposal of this appeal and are reproduced hereinbelow: -

"3.1 Every distribution licensee shall purchase from renewable energy sources, at the generic tariff rates determined by the Commission, for purchase of electricity from different types of renewable energy sources, a quantum of not less than 5% of its

consumption of energy, during each of the years from 2012-13 to 2016-17 (each year commencing from 1st April of the Calendar Year and ending on 31st March of the subsequent Calendar Year), provided that the purchase of Renewable Energy Certificates issued under the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issue of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 as amended from time to time, shall also be treated as fulfilment of the Renewable Power Purchase Obligation (RPPO) prescribed herein;

Provided that a minimum of 0.25 percentage point out of the 5% Renewable Power Purchase Obligation (RPPO) above specified, shall be procured from generation based on solar as renewable energy sources;

Provided that in the event of the obligated entity, fulfilling the Renewable Power Purchase Obligation (RPPO) by purchase of certificates, the obligation to purchase electricity from generation based on solar as renewable energy source can be fulfilled by purchase of solar certificates only, and the obligation to purchase electricity from generation based on renewable energy other than solar can be fulfilled by purchase of non-solar certificates.

Provided further, that the fulfilment of such obligation to purchase renewable energy shall be inclusive of the purchases, if any, from renewable energy sources already being made by concerned obligated entity;

Provided further, that the purchase of renewable power, by the distribution licensee, from other distribution licensees in the state of Andhra Pradesh, shall also be taken into account for computing the fulfilment of Renewable Power Purchase Obligation (RPPPO) by such a licensee;

Provided further, that the consumption of a Rural Electricity Supply Co-operative Society (RESCO) shall be taken into account for calculating the consumption of a distribution licensee for the purpose of these Regulations. There shall be no separate Renewable Power Purchase Obligation on the RESCOs;

Provided also that the power purchases under the Power Purchase Agreements for the purchase of renewable energy sources already entered into by the distribution licensees and consented to by the Commission shall continue to be made till their present validity, even if the total purchases under such agreements exceed the percentage as specified hereinabove.

Provided further, that the Commission may, either on its own motion or on recommendation of the State Agency

or on receipt of an application from the obligated entity(s) or eligible entity(s), revise for any year the percentage targets given herein above as deemed appropriate;”

...

“4.1 The procurement, by the obligated entity(s), of Renewable Energy Certificates issued under the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issue of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 shall be subject to such directions as the Commission may issued from time to time.”

...

“7.1 If the obligated entity(s) does not fulfil the Renewable Power Purchase Obligation as provided in clause (3) of these regulations during any year, the Commission may direct the obligated entity(s) to deposit into a separate fund, to be created and maintained by the State Agency, such amount as the Commission may determine on the basis of the shortfall in units of Renewable Power Purchase Obligation (RPPO) and the forbearance price decided by the Central Commission.

Provided that the fund so created shall be utilised, for purchase of the certificates or as may be directed by the Commission;

Provided further that the Commission may empower an officer of the State Agency to procure from the Power Exchange the required number of certificates to the extent of the shortfall in the fulfilment of the obligations, out of the amount in the fund.”

...

“9. Power to remove difficulties:

The Commission, Suo-Motu or on an application from any person generating electricity from renewable sources or an entity mandated under clause (e) of sub-section (1) of section 86 of the Act to fulfil the Renewable Power Purchase Obligation (RPPPO), may review, add, amend or alter these regulations and pass appropriate orders to remove any difficulty in exercising the provisions of these regulations.”

3. The 1st respondent along with three other distribution companies of Andhra Pradesh filed a petition bearing O.P. No.19 of 2014 before the Commission under Section 86(1)(e) of the Electricity Act, 2003 invoking its power to remove difficulties under Regulation 9 of the above noted APERC Regulations, 2012 and made following prayers: -

“i) To consider the actual of NCE generation for FY 2012-13 as base year and 0.5% increased for every year in the control period of Regulation 1 of 2012.

ii) To reduce the minimum limit of percentage of energy to be procured from NCE sources, keeping in view of the

capacities for which PPAs are already entered into, provision for future development and burden on consumers.

iii) To permit recovery of the penalty to be paid by utilities to APERC from consumers as green energy cess/charges, in monthly bills and file the same in ARR 2012-14.

iv) To differ the penal provisions for not fulfilling the obligation at least for next 3 years as APDISCOMs in not rejecting any proposal from NCE generators to enter PPAs at preferential tariff.”

4. The petition came to be dismissed by the Commission vide order dated 05.06.2015 holding that the reasons for proposing the amendments to Regulation 1/2012 (APERC Regulations, 2012) for reducing the Renewable Power Purchase Obligation and waiver of penalty for non-compliance thereof do not appear convincing or strong enough to override or ignore to statutory mandate under Section 86(1)(e) of the Electricity Act as well as the national policy and national plan of action and the decisions of Forum of Regulators and the Ministry of New and Renewable Energy, Government of India, as well as the previous decision of this Tribunal.

5. Thereafter, the 1st respondent approached the Commission again by way of a petition titled as Review Petition which was numbered as RP 19 of 2015. The prayer made in the petition was as under: -

“8) In the circumstances explained above, the petitioner humbly pray the Hon’ble Commission

i. That the said review petition may be taken on record and admitted.

ii. to pass such order to exempt APEPDCL for purchase of RE Certificates for the years 2012-13 to 2016-17 and granting more time for achieving RPPO and requested the APERC may fix the RPPO targets for APEPDCL as tabulated below:

	<i>FY15-16</i>	<i>FY16-17</i>	<i>FY17-18</i>	<i>FY18-19</i>	<i>FY19-20</i>	<i>FY20-21</i>	<i>FY21-22</i>
<i>Solar</i>	<i>0.75%</i>	<i>1.00%</i>	<i>1.25%</i>	<i>1.50%</i>	<i>1.75%</i>	<i>2.00%</i>	<i>2.25%</i>
<i>Non solar</i>	<i>1.75%</i>	<i>2.00%</i>	<i>2.25%</i>	<i>2.50%</i>	<i>2.75%</i>	<i>3.00%</i>	<i>3.25%</i>
<i>Total</i>	<i>2.50%</i>	<i>3.00%</i>	<i>3.50%</i>	<i>4.00%</i>	<i>4.50%</i>	<i>5.00%</i>	<i>5.50%</i>

”

6. Even though, the petition was captioned as “Review Petition” yet its contents as well as the prayer made therein, as noted hereinabove, do not indicate that the 2nd respondent / petitioner was actually seeking review of the earlier order of the Commission dated 05.06.2015. The petition appears to be a fresh original petition invoking powers of the Commission under Regulation 9 of the APERC Regulations, 2012, seeking exemption from compliance of Renewable Power Purchase Obligations (RPPO) for the years 2012-13 to 2016-17 and as well as for fixing revised RPPO targets for the appellant.

7. It appears that for this very reason, the Commission did not treat the petition technically as a review petition and proceeded with the same as

being a petition invoking its powers to remove difficulties under Regulation 9 of APERC Regulations, 2012. Accordingly, a public notice of the petition was posted on the website of the Commission as well as on the website of the 1st respondent calling for responses / objections from interested persons / shareholders. The Commission also noted that the outcome of the petition would necessarily have an impact on Southern Power Distribution Company of Andhra Pradesh Limited and accordingly notice was issued to the said company also. It appears that in response to the public notice, the New and Renewable Energy Development Corporation of Andhra Pradesh, Shri M. Venugopala Rao (Senior Journalist and Convener of the Centre for Power Studies) and the appellant appeared before the Commission and filed their objections / submissions.

8. The Commission considered the objections of all the objectors / interveners and found that the request of the 2nd respondent is within its power and jurisdiction. Upon noting the acute lack of source of renewable power within the operational area of the 1st respondent and considering its financial conditions, the Commission allowed the petition and passed the following order: -

“35. Therefore, the deficit in meeting the Renewable Power Purchase Obligation under Regulation 1 of 2012 of this Commission by the petitioner for the years 2012-13 to 2016-17 shall be met by purchase of Renewable Energy or Renewable Energy certificates in each corresponding year from 2017-18 to 2021-22 respectively. This carry forward of the Renewable Power Purchase Obligation is in addition to the Renewable

Power Purchase Obligation which the petitioner has to discharge each year under the corresponding regulation of this Commission to be made in succession to Regulation 1 of 2012 for the years 2017-18 to 2021-22. Any default by the petitioner in discharging the Renewable Power Purchase Obligation concerning any of the years from 2012-13 to 2021-22 will result in the petitioner becoming liable for the prescribed consequences for such default under Regulation 1 of 2012 or its successor regulation of this Commission. The petition is ordered accordingly. No costs.”

9. It is the said order dated 28.05.2016 passed by the Commission on the above noted petition of the 1st respondent which has been impugned before us in this appeal.

10. We have heard the learned counsels appearing for the appellant and the 1st respondent in detail. We have also perused the entire material on record as well as the written submissions filed by the learned counsels.

11. It was vehemently argued on behalf of the appellant that the Commission has illegally exercised the review jurisdiction when the 1st respondent had miserably failed to allege or show any error apparent on the face of record in the order dated 05.06.2015 passed in O.P. No. 19 of 2014. It is argued that as per settled position of law, a review petition is maintainable upon (i) discovery of new and important matter / evidence which was not available to the review applicant despite exercise of due diligence when the order in question was passed; (ii) on account of some

mistake or error apparent on the fact of record and (iii) for any other sufficient reason. According to the learned counsel none of these conditions were satisfied in this case, and therefore, the Commission has committed a grave error in invoking its review jurisdiction and thereby reversing its previous order dated 05.06.2015 passed in O.P. No. 19 of 2014.

12. These arguments raised on behalf of the appellants would appear attractive as well as persuasive in the first blush but upon considering the actual nature of the petition filed by 1st respondent before the Commission (R.P. No. 19 of 2015) and the manner in which it was dealt with by the Commission, as noted hereinabove, these evaporate in thin air. We have already noted that the petition bearing R.P. No. 19 of 2015 was not treated by the Commission as a review petition. It was dealt with by the Commission as being an original petition invoking its power to remove difficulties under Regulation 9 of APERC Regulations 2012. Therefore, the objection to the maintainability of the petition before the Commission is totally misconceived and meritless.

13. Having said so, the issue would arise as to whether the appeal would lie to this Tribunal under Section 111 of the Electricity Act, 2003 against such an order passed by the Commission invoking its power to remove difficulties under Regulation 9 of APERC Regulations, 2012.

14. We have already noted hereinabove the prayer made by the 1st respondent in the petition being R.P. No.19 of 2015 before the Commission. A bare reading of the prayer clause of the petition would

reveal that the 1st respondent had in effect and substance sought relaxation / exemption from carrying out the Renewable Power Purchase Obligations under Regulation 3.1 of the above noted Regulations of 2012 stating certain difficulties encountered by it in the purchase of the requisite capacity of renewable energy as well as the renewable energy certificates. The Commission has found it a fit case to exercise its power of removal of difficulties under Regulation 9 of these Regulations and accordingly acceded to the prayer of the 1st respondent thereby granting it relaxation in fulfilling the RPPO for the years 2012-13 to 2016-17.

15. It was vehemently argued on behalf of the 1st respondent that the Commission, while passing the impugned order dated 28.05.2016, has invoked its regulatory / legislative jurisdiction under Regulation 9 of APERC Regulations, 2012, and therefore, appeal against such an order is not maintainable before this Tribunal under Section 111 of the Electricity Act, 2003. Referring to the judgment of the Hon'ble Supreme Court in *PTC India Limited v. Central Electricity Regulatory Commission* (2010) 4 SCC 603, it was argued by the learned counsel that the regulations made or the amendments / alterations carried out thereto in exercise of legislative authority can only be assailed in judicial review proceedings before the Constitutional Courts under Article 226 and 32 of the Constitution and such a power is not vested with this Tribunal.

16. On the other hand, it is argued on behalf of the appellant that the instant appeal is against an order implementing the APERC Regulations and not against the Regulations themselves, and therefore, the same is maintainable.

17. On this aspect, we may profitably refer to the judgment of Supreme Court in Jalan Trading Company Private Ltd. v. Mill Mazdoor Sabha (1967) 1 SCR 15. In that case, the apex court was concerned with Section 37 of the Payment of Bonus Act, 1965 which is akin to above noted Regulation 9 and conferred power upon central government to make provision, not inconsistent with the purposes of the Act, for removal of difficulties or doubts in giving effect to the provisions of the Act. Para 21 of the judgment is as under: -

“21. But Section 37 which authorises the Central Government to provide by order for removal of doubts or difficulties in giving effect to the provisions of the Act, in our judgment, delegates legislative power which is not permissible. Condition of the applicability of Section 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the Act, Section 37 is not saved from the vice of delegation of legislative authority. The Section authorises the Government to determine for itself what the purposes of the Act are and to make provisions for removal of doubts or difficulties. If in giving effect to the provisions of the Act any doubt or difficulty arises, normally it is for the Legislature to remove that doubt or difficulty. Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an

executive authority. Sub-section (2) of Section 37 which purports to make the order of the Central Government in such cases final accentuates the vice in sub-section(1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt has arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act.”

18. In the instant case, Regulation 9 of APERC Regulations, 2012 also empowers the Commission to review, aid, amend or alter these regulations and pass appropriate orders to remove the difficulty in exercising the provisions of these regulations either *suo-motu* or on the application of any affected entity. Undoubtedly, the Commission, while passing the impugned order has invoked its power under the said Regulation 9 in passing appropriate order to remove difficulty in the way of 1st respondent in fulfilling its Renewable Power Purchase Obligations under Regulation 3.1. Therefore, the Commission was clearly exercising its regulatory / legislative authority in passing the impugned order which could not have been assailed in appeal before this Tribunal under Section 111 of the Electricity Act, 2003.

19. We are fortified in our view also by the judgment of this Tribunal in *Maharashtra State Electricity Distribution Company Limited v. Central Electricity Regulatory Commission and Ors. (Appeal No.92/2011)* decided on 28.07.2011. In that appeal, challenge was to an order passed by CERC in the matter of removal of difficulties for giving effect to certain provisions

of CERC Regulations, 2010. In that case also, National Load Despatch Centre had presented a petition before the Central Commission to consider the difficulties in implementation of the CERC Regulations, 2010 and it was held by this Tribunal as under:-

“15. The question arises in this case is this “whether the impugned order amending the Regulations by the Central Commission is the outcome of the exercise of the power by the Central Commission under Regulatory power or under adjudicatory power?”. It is strenuously submitted by the Appellant that the impugned order is not in the nature of legislative exercise and as such Appeal is maintainable. This submission is misconceived. We are of the view that even assuming that the exercise is not in the legislative exercise, the Appeal cannot be maintained as the impugned order passed by the Commission was only by exercising its Regulatory power and not adjudicatory power and as such the submissions of the Appellant have to be rejected. The detailed reasons are as follows:

16. As Hon’ble Supreme Court has held, the twin powers have been conferred to the Central Commission with regard to their functions by the Act. Section 61 of the Act deals with the powers of the Central Commission under which the ISTS Regulations have been framed by exercising the Regulatory Power. Under Section-62 of the Act, the Central Commission has been vested with

the adjudicatory power in connection with determination of the tariff.

17. The learned Senior Counsel for the Appellant submits that the ISTS Regulations must be considered to be the order relating to the tariff determination of under Section 62 of the Electricity Act, 2003. This submission deserves outright rejection.

18. The ISTS Regulations were notified on 15.06.2010 and they were to come into force with effect from 01.01.2011. By this order, the NLDC (R-2) was designated as Implementation Agency to implement the Regulations. As R-2 experienced difficulties in implementing these Regulations, it approached the Central Commission under Regulation 21 for removal of certain difficulties which were being encountered in the run up to the implementation of the said Sharing Regulations.

...

22. Tariff of the inter-State transmission system is fixed under Chapters 3 & 4 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009 ("Tariff Regulations") which has been framed under Section 61 read with Section 178(2)(s) of the Act. Regulation 33 of the Tariff Regulations dealt with

sharing of inter-State transmission charges determined under chapters 3 and 4 of the Tariff Regulations. The ISTS Regulations has repealed the Regulation 33 of the Tariff Regulations which governed the sharing of transmission charges till 30.06.2011. The ISTS Regulations introduced a new methodology for sharing of transmission charges and losses based on actual use of Inter-state Transmission System. The ISTS Regulations in Chapter 3 details the principles and mechanism for sharing ISTS losses and charges. Chapter 4 of ITSS Regulations provides for processes for sharing of transmission charges and losses allocations which is a radical change from the earlier 'postage stamp method'. Based on the Yearly Transmission Charges (YTC) of ISTS network, the Point of Connection charges and Loss Allocation Factors for the designated ISTS customers shall be computed by the Implementing Agency using load flow based method and Point of Connection charging method (Regulation 4). 'Yearly Transmission Charges' has been defined in Regulation 2(y) of ISTS Regulations as the annual transmission charges for existing lines determined by the Commission in accordance with the Tariff Regulations or adopted in case of tariff based competitive bidding and for new lines based on benchmarked capital cost. Thus the ISTS Regulations contain the principles and methodology for

sharing ISTS charges and loses and there is no determination of tariff as is sought to be contended.

23. As indicated above, the exercise of the power while passing this impugned order was not under adjudicatory power of the Central Commission but was under regulatory power. It is clarified, in the para 22 above, that the tariff of Inter State Transmission System under Section 62 of the Act is fixed in accordance with principles and methodology laid down in Chapter 3 & 4 of the Tariff Regulations of the Central Commission.

24. Merely because the presentation through the petition was submitted by the NLDC (R 2) and the same was entertained by the Central Commission which heard the NLDC and passed the impugned order amending the Regulations by giving reasons, it cannot be held that this order has been passed by exercising the adjudication of quasi-judicial powers conferred upon the Commission under Section-62 of the Electricity Act, 2003.

25. The bare reading of the impugned order dated 4.4.2011 clearly shows that the directions given by the Commission becomes integral part of ISTS Regulations of 2010. When the direction in relation to the amendment of Regulations is given, it cannot be said that it is an adjudicatory order which decides the disputes between

the parties. The Electricity Act, 2003 contains separate provisions for performance of dual functions of the Commission.”

20. Ultimately, this Tribunal held that under Section 111 of the Electricity Act, 2003, it cannot interfere with the orders passed in exercise of regulatory powers vested with the Central Commission and accordingly, dismissed the appeal as not maintainable.

21. Hence, considering the nature of the impugned order passed by the commission as well as the legal position enunciated by the Hon'ble Supreme Court as well as this Tribunal in the judgments noted hereinabove, we are of the considered opinion that the instant appeal is not maintainable as having been filed against an order of the Commission passed in exercise of its regulatory / legislative powers. Accordingly, the same is hereby dismissed.

Pronounced in the open court on this the 14th day of August, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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