



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017

F.11 (1695)/DERC/2019-20

Petition No. 56/2019
Under section 142 of the Electricity Act, 2003

In the matter of:
Indian Energy Regulatory Services **Petitioner**

Vs.

- 1. BSES Rajdhani Power Ltd.**
Through its: CEO
- 2. State Load Despatch Centre** **Respondents**

Coram:

Hon'ble Sh. Justice S S Chauhan, Chairperson
Hon'ble Sh. A.K. Singhal, Member
Hon'ble Dr. A.K. Ambasht, Member

Appearance:

1. Mr. Ankit, Adv for the Petitioner,
2. Mr. Kunal Singh, Adv., TPDDL,
3. Mr. Sushil Singh, Adv., SLDC.

ORDER

(Date of Order: 31.12.2020)

1. The instant Petition has been filed by Shri Gaurav Nand (owner/Proprietor) on behalf of M/s Indian Energy Regulatory Services, under Section 142 of the Electricity Act, 2003 against BSES Rajdhani Power Ltd & Ors. for non-compliance of DERC (Renewable Purchase Obligations and Renewable Energy Certificates Framework Implementation) Regulations, 2012 and DERC Open Access Orders dated 24.12.2013 and 01.06.2017.
2. In the present Petition, the Petitioner has made following prayers:
 - a) direct the Respondent no. 1 to refund/settle the CSS amount to the Green/Renewable Energy Consumers towards procurement of energy

through Open Access route as per DERC RPO Regulations & DERC Open Access guidelines;

- b) Non-compliance of DERC (Renewable Purchase Obligations and Renewable Energy Certificates Framework Implementation) Regulations, 2012 and DERC Open Access Orders dated 24.12.2013 and 01.06.2017 by Respondent no. 1 shall be dealt as per Section 142 of the Electricity Act, 2003;
- c) direct the Respondent no. 2 (Nodal Agency) to timely dispose the Open Access grievances (under Regulation 16(1) of DERC Open Access regulations) submitted to them by various Open Access consumers;
- d) pass such directions towards promotion of Renewable Energy Procurement by Delhi Consumers.

3. PETITIONER'S SUBMISSION:

- (i) That the present petition has been filed against the Non-compliance of DERC RPO Regulations and DERC open Access Orders violated by the Respondent No. 1 (BSES Rajdhani Power Ltd). that in the present instance of Delhi, Open Access Consumers namely M/s Asian. Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation have been procuring energy through green energy sources as per the guidelines of DERC open Access orders. As per DERC RPO Regulations & DERC Open Access Orders, if any Open Access consumer is procuring power through green/renewable energy sources, consumer shall be allowed an exemption of Cross Subsidy Surcharge to the extent of RPO percentage. During the power procurement made from green energy sources by these open access consumers, the Respondent no. 1 have neither refunded nor settled the Cross Subsidy Surcharge to the consumer for the above mentioned period due to which huge financial loss is caused to them. Hence, the respondent no. 1 is not complying with DERC (Renewable Purchase Obligations and Renewable Energy Certificates Framework Implementation) Regulations, 2012 which is clear violation and shall be treated under Section 142 of the Electricity Act, 2003. Also, they are willfully not complying with the DERC Open Access orders dated 24.12.2013 & 01.06.2017, due to which procurement of Green Energy Power by the consumers has become an uphill and non-feasible task.
- (ii) That DERC in Petition No. 43/2015 (M/s Duggar Fiber Pvt. Ltd. vs TPDDL) has already held the applicability for clause 9(4) of DERC (RPO and REC Framework Implementation) Regulation, 2012 and directed the Discom to refund of excess amount charged towards CSS.

(iii) That the Hon'ble Appellate Tribunal of Electricity vide its judgement dated 05.08.2019 in the case of TPDDL vs. M/s Duggar Fiber Pvt. Ltd. in Appeal no. 17 of 2016 directed TPDDL to refund the excess Cross Subsidy Surcharge (CSS). The Hon'ble Tribunal has dismissed the Appeal which was filed to challenge the decision given by DERC in Petition No. 43/2015 dated 23.12.2015 and upheld the decision given by the DERC. The relevant extracts of the APTEL's judgement are as follows:

"8.11 the state commission has correctly held that the Appellant is liable to refund the excess charged cross subsidy charges and we do not feel necessary to interfere with the decision of the state commission."

(iv) That the green energy consumers like M/s Asian Hotels (North) Ltd. (Hyatt Regency) have been procuring energy through green energy sources, but the respondent no. 1 have neither refunded nor settled the cross subsidy surcharge to the consumer due to which huge financial loss is caused to them and has eventually made the procurement of green energy power a very difficult and non-feasible task. Also in another instance of M/s Devki Devi Foundation, the Distribution Licensee did not refund the CSS amount to the consumer due to which the consumer suffered heavy loss as a result the consumer was not in a position to procure power through green energy/Renewable energy sources.

(v) That the consumer filed a complaint to the Nodal Agency (SLDC) i.e. Respondent no. 2 on 1st July, 2017, 1st August, 2017 and 3rd August, 2018 against the Respondent no. 1 towards the settlement of CSS, but till date they have not received any proper communication from them in regard to the refund/settlement of CSS towards green energy power procurement.

(vi) The Respondent are levying CSS on the whole volume of green power procured in green open access route. They ought to have refunded the CSS amount to the exempted percentage provided by the Commission.

4. ADDITIONAL SUBMISSION BY THE PETITIONER:

A. It had been repeatedly contended by the Respondent no. 1 in the pleading that the Petition cannot be filed in the Representative capacity. In this regard, it is important to mention here that according to Section 142 of the EA, 2003 any person can file a complaint before the Appropriate commission to redress their grievance.

B. Respondent no. 2 /SLDC has never taken necessary steps in respect of grievance of complaint under Regulation 16 (1) of DERC (Terms and conditions for Open access) Regulations, 2005 (for the consumer on behalf of whom the present petition has been filed). Also, the Respondent no. 2 being the Nodal agency in UT of Delhi never issued any appropriate directions to the Respondent no. 1 to initiate refund of excess CSS amount.

5. SUBMISSIONS ON BEHALF OF RESPONDENT NO. 1, BRPL:

- a. The Present Petition is an abuse of the process of court since the present petitioner does not have a locus standi to maintain the present petition. The Petition is under the name and title "Indian Energy Regulatory Services", without even disclosing as to whether the Petitioner is a legal entity or not. The Petition itself records that the Petitioner is preferring the same as a "Consumer representative". The Petitioner is not an "authorized consumer representative" under Section 94(3) of the Electricity Act, 2003. The Petitioner is nothing but an interloper who is, to the best of the Respondent's belief trafficking in litigation.
- b. The Petitioner does not have any cause of action and it by itself cannot be aggrieved.
- c. That there is no authority letter in favour of the petitioner by the aforesaid consumer to prefer the present petition.
- d. The Petition has been signed by one "Mr. Gaurav Nand" who undisputedly is not an open access consumer.
- e. The Petition cannot be in a representative capacity. There is no lis between the petitioner and the respondents nor does the petition disclose any lis. The petition only discloses the facts of two consumers by the name of "M/s Asian Hotels (North) Ltd. [Hyatt Regency] & M/s Devki Devi Foundation" ("two open access consumers/two consumers").
- f. That the present petition is not maintainable also for the reason that the essence of the dispute raised by the petitioner in strictu-senso a dispute between a consumer and a licensee pertaining to bills raised by the licensee on such consumer. It is hence a "billing dispute" in the guise of a Petition under section 142 of the EA, 2003.
- g. Present petition alleges violation of the order of the commission dated 01.06.2017, which apart from the fact that the said order was passed without hearing the licensee, the said order is pending in Appeal before the Hon'ble APTEL in Appeal no. 335 of 2017
- h. That in terms of this Hon'ble Commission's Order dated 01.06.2017,

“6(2)Petitioner has not provided any certification from the State Agency that the aforesaid two consumers are receiving electricity from RE sources to the extent of RPO for which they claim exemption from Cross subsidy surcharge. Furthermore, petitioner has not provided any certification that the generators are not claiming REC for supplying R power to the aforesaid two consumers....”

- i. The State agency is mandated to submit quarterly status of 15th of next month, after end of quarter to the commission in respect of compliance of renewable purchase obligation by the obligated entities in the format as stipulated by the Commission
- j. There is no information that has been submitted by the petitioner whereby it could be ascertained that (1) The two open access consumers are receiving RE power to the extent of RPO for which they claim exemption from CSS and (2) The generator using RE sources are not claiming REC for the very same power.
- k. An “authorized consumer representative” is one who is appointed as such by the Commission under Section 94(3) of the EA, 2003. At no point of time has the Petitioner been able to show that he has been ever appointed as such. Hence, the Petitioner holding himself out to be a “consumer representative” is nothing short of a false and misleading claim.
- l. That the present Petition, though purportedly filed on behalf of 3 named consumers, has not been filed with the consumers as the Petitioners and the IERS as their authorized representative representing them in their litigation. The Petition has been filed by IERS as the petitioner in its name. it is submitted that such a petition is unknown to law.

6. SUBMISSIONS ON BEHALF OF RESPONDENT NO. 2, SLDC:

- a) That pursuant to the letters dated 01.07.2017 and 01.08.2017 the respondent held discussions with BRPL (Respondent no.1). Moreover, vide letter dated 26.09.2017, BRPL had clarified to the consumers regarding cross subsidy surcharge (CSS) that consumers shall ensure compliance of DERC (RPO and REC Framework Implementation) Regulation, 2012 and shall provide monthly report to the State Nodal Agency with copy to BRPL i.e. Respondent no.1 to which no objection was raised and NOC for the transaction was given. The consumers, on whose behalf the present petition has been filed, did not comply with the aforesaid regulations as required vide the aforesaid letter dated 26.09.2017 and did not approach the State Nodal Agency. Without complying with the aforesaid regulation and without approaching the State Nodal Agency, after about a year, the consumers approached the SLDC vide letter dated 03.08.2018. Accordingly, it was not possible

to do the needful in the absence of necessary certification from the state Nodal agency.

b) SLDC made sincere efforts and took all necessary steps to resolve the grievance. However, since the consumers, on whose behalf the present petition has been filed, did not comply with the aforesaid regulations and did not do the needful, energy in respect of the said consumers could not be certified.

c) In response to the letters dated 28.11.2017 and 16.01.2018 necessary action was initiated well in time by SLDC and refund was duly processed.

7. The Commission observed that the Petitioner has only been appointed as a consultant of the Asian Hotel (Hyatt Regency) and the same cannot be treated as authorization to file a Petition before the Commission.

8. It was stated by the Representative of the Petitioner that the interested parties are willing to implead themselves in the present petition because they are being directly affected against non-compliance of DERC (Renewable Purchase Obligations and Renewable Energy Certificates Framework Implementation) Regulations, 2012 and DERC Open Access Orders dated 24.12.2013 and 01.06.2017 by the distribution licensee, BRPL. It has been further submitted that the Petitioner has been recognized for its Policy Advocacy and Advisory roles for the Open Access consumers and for safeguarding the interests of the Open Access Consumers and promotion. Various Petitions were made by IERS to different regulatory Commission. It has requested the Commission to allow in the representative capacity as the consumers had already provided Authorization letters to file Petitions, Written Submissions, applications and other relevant needful documents before the DERC.

9. The matter was heard on 18.08.2020, wherein, the Commission granted time to the Petitioner to file its response on the query as to “whether a person can be impleaded as a Petitioner?”.

10. On the above query raised by the Commission as to “whether a person can be impleaded as a Petitioner?”, the Representative of the Petitioner quoted Order 1 Rule 10 (2) of the code of Civil Procedure, 1908 which is as follows:

“The Court may at any stage of the proceedings,

a. Either upon or

b. Without the application of either party,

c. And on such terms as may appear to the court to be just,

Order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence

before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

The above provision makes it crystal clear that the Court at any stage of proceedings can implead either parties at any stage of the proceedings either upon or even without any application, and on such terms as may appear to it to be just and fair.”

The test for determining the necessary parties in a suit has been decided in the case of **Benares Bank Ltd. vs Bhagwandas (AIR 1947 All. 18)**. It was held by the Hon'ble Court that the questions whether a particular party is necessary party to the proceedings:

- “there has to be a right of relief against such a party in respect of the matters involved in the suit.
- The Court must not be in a position to pass an effective decree in the absence of such a party”

In the matter of **Deputy Commr., Hardoi vs. Rama Krishna. (Air 1953 SC 521)**. Relevant extracts of the judgement are as follows:

“...(1) that there must be a right to some relief against such party in respect of the matter involved in the proceedings in question, and (2) it should not be possible to pass an effective decree in the absence of such party.....”

Moreover, the present issue regarding joinder of petitioners has been addressed by the Apex Court in the matter of Ramarao and Ors vs. All India Backward Class Bank Employees Welfare Assn & Ors. (2004) (I) LLJ 1061 SC)

“.... It is true that the order of promotion was in question in Writ Petition No. 1551 of 1990 at the instance of one Ashok but even in the said writ petition the Promotees were not impleaded as parties. As in the case of the Association, even in the writ petition filed by Ashok, the order of dereservation passed by Union of India or NABARD or the Sponsor Bank had not been questioned. Admittedly, Union of India or NABARD were not parties in the said writ petitions. An order issued against a person without impleading him as a party and, thus, without giving him an opportunity of hearing must be held to be bad in law. The appellants herein, keeping in view the fact that by reason of the impugned direction the orders of promotion effected in their favour had been directed to be withdrawn indisputably were necessary parties. In their absence, therefore, the writ petition could not have been effectively adjudicated upon. In absence of the 'Promotees' as parties, therefore, it was not permissible for the High Court to issue the directions by reason of the impugned judgment.”

11. In response to the above query sought by the Commission vide Interim Order dated 20.08.2020, Respondent no. 1/BRPL in its additional written submissions dated 10.11.2020 has submitted:

- i. That the application for impleadment as Petitioner purportedly filed by the Petitioner on their behalf is neither in the form prescribed by the Commission, nor is the same accompanied by an affidavit. It is also submitted that to the knowledge of the Respondent, no prescribed fee has also been paid. It is thus liable to be rejected on this ground as well.
- ii. As regards impleadment of the consumers as Petitioners, impleadment is contemplated, if at all under Order 1 Rule 10 of the CPC. There is no other provision in the Electricity act or the conduct of Business Regulations of this Commission which would permit such impleadment as maintainable.
- iii. The impleadment of another person as a petitioner in addition to the present petitioner IERS could, in law, only be for a more complete adjudication of the dispute. However, the facts of the matter is that IERS has no dispute at all with BRPL. Hence, the impleadment of any of the consumers, even as petitioners, would not cure this basic and fundamental defect in the lack of locus standii of IERS to maintain the present petition even as one of the Petitioner. To put it differently, even if the petition had been filed by IERS and with any of the named consumers as co-petitioners, the Petition as framed would be bad for mis joinder of parties, since IERS could not be a petitioner at all in such petition whether individually or even jointly with anyone else.
- iv. Without prejudice to the above submissions it is submitted that a petition under Section 142 of the Electricity Act, 2003 could be filed by a petitioner who suffers a grievance arising out of an alleged violation of the Act, Regulations or Orders. It could not be filed by a rank interloper. If at all a rank interloper wanted to only bring information to the Hon'ble Commission as an "informant" about an alleged violation, it may perhaps do so but then such person must then stop there. However, if such person was seeking to prosecute a petition like a aggrieved party then such person ought to be a party who has suffered a legal injury. Undisputedly IERS is not an aggrieved party. Undisputedly, IERS is espousing the cause of 3 named consumers of the Discoms. Hence IERS cannot be allowed to maintain a petition in its own name and prosecute the same as if it were an aggrieved party.
- v. Since IERS is espousing the cause of 3 named consumers, the present petition could also not be construed as a petition in a representative capacity on the lines of one permissible under Order 1 Rule 8 of the CPC. Even if order 1 Rule 8 applicable, which it is not in the present case, the prime requirement of Order 1 Rule 8 is where ".....there are numerous persons having the same interest in one suit....". IERS has no interest at all, hence he could not possibly maintain a suit even under Order 1 Rule 8 on

behalf of any others for the simple reason that IERS has no interest which is the same as the other 3 name consumers.

COMMISSION'S ANALYSIS:

12. The Commission has heard the arguments of the Petitioner and the Respondents and has also gone through the entire record of the Petition. The Respondent has raised a specific issue with regard to necessary party having not been impleaded. The following issue arise for consideration and decision:-

- a) whether the order for which the petitioner, IERS has filed the instant petition is directly affecting him in the enjoyment of his legal rights?
- b) whether a party can implead itself as petitioner in a petition filed on its behalf by 3rd person claiming to be its representative?

13. The Petitioner has relied upon the judgement of **Deputy Commr., Hardoi vs. Rama Krishna. (Air 1953 SC 521)**, however the same is distinguishable and is not applicable in the instant case. This is because it is about impleadment of party who's right to some relief is likely to be effected by the decision in the matter and it should not be possible to pass an effective decree in the absence of such party, whereas in the instant petition, the parties are already present through the representative. Similar is the situation in the matter of **Ramarao and Ors vs. All India Backward Class Bank Employees Welfare Assn & Ors. (2004) (I) LLJ 1061 SC**.

14. The claim of the Petitioner that DERC has allowed him as Petitioner in Petition No. 14/2017 titled as Guarav nand vs BSES Rajdhani Power Ltd. & Ors., wherein he has raised the complaint that all the Discoms of Delhi (BRPL, BYPL, TPDDL, SLDC) are violating the provisions of Open Access order, is also distinguishable as in the aforesaid Petition, he had filed Petition under Section 142 of the Electricity Act, 2003 on behalf of general Open Access consumers, and not as a representative of a particular Open Access consumer,

15. It is apparent that the Petitioner was interested in being given an opportunity of hearing in the matter. Keeping in view the mandate under the Electricity Act to ensure transparency while exercising its powers and discharging its functions, the Petitioner has been given sufficient opportunity of hearing in the matter to represent the views of the Open Access Consumers namely M/s Asian. Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation, in the matter. The only question that remains for consideration is whether a person can be impleaded as a petitioner''

16. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which

cannot be effectually and completely settled unless he is a party. It is necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights.

17. The present petition has arisen out of the dispute between the petitioner and the respondents with regard to non-compliance of DERC RPO Regulations 7 and DERC Open Access Orders. None of the aforesaid mentioned consumers is a petitioner in the cause. The only petitioner is one Mr. Gaurav Nand who undisputedly is not an open access consumer and cannot be said to be aggrieved by any decision in a dispute arising out of the non-compliance of the RPO Regulations or Open Access Orders. IERS has no interest in the subject-matter of the litigation and the presence of the IERS is not required to adjudicate upon the issue involved in the Petition for the purpose of deciding the real matter involved.
18. Moreover, a Petition under Section 142 of the EA, 2003 could be filed by a Petitioner who suffers a grievance arising out of an alleged violation of the Act. IERS in the instant case, has no dispute at all with the Discom. IERS is not an aggrieved party nor it has suffered any legal injury. Therefore, the impleadment of any of the consumers, even as Petitioners, is not maintainable since IERS is not an aggrieved party.
19. It is also observed that an application for joining applicants is not filed by the main petitioners, namely M/s Asian Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation. The Petition filed on behalf of the consumers, has not been filed with the consumers as the Petitioner nor the application for impleadment, filed by the Petitioner on behalf is in the form prescribed by the Commission, or is accompanied by an affidavit. Thus, in the absence of an application by the main petitioners for addition of the name of the applicants as petitioners, criteria of Order 1 Rule 10 of the Civil Procedure Code, 1908 to join the applicants as petitioners in petition No. 56/2019 is not fulfilled. Therefore, in the absence of a necessary party, no effective Order can be passed by the court.
20. The moot question is that whether a party can implead itself as petitioner in a petition filed on its behalf by 3rd person claiming to be its representative. It is worth consideration that a petition can be filed through representative but in the array of parties i.e. petitioners and respondents, the name of the party will be reflected and not that on its representative. In the instant case IERS has filed petition in its name claiming to be representatives of M/s Asian Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation. As such IERS has no locus standi to file petition in its name. The loss or injury has been caused to parties namely M/s Asian Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation and the petitions can be filed by them through IERS but IERS cannot be a party to the petition.

21. Even it is considered that IERS is pleading on behalf of parties, how it is possible the party would also become petitioner in the same petition contesting for the same cause of action. It is an absurd situation and cannot be allowed in any judicial proceeding.

22. On the question of impleadment as petitioner under Order 1 Rule 10 of CPC, it is to be noted that a party can be impleaded as necessary party in a petition which is filed by another person because same cause of action interests are also being affected by the decision in the petition. Secondly, petition is filed by another person for his own interest and not on behalf of the aggrieved person. Whereas in the instant case the petition is filed by IERS on behalf of M/s Asian Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation and in the same petition they want to get impleaded as petitioner. Moreover, so called applications for impleadment are in the form of letter and not in the proper format which cannot be entertained in normal course.

23. In view of our observation, as above, it is amply clear that a person cannot implead himself in a petition filed on his behalf. Secondly, IERS can represent party but the petition should be in the name of parties not in the name of IERS. IERS has to act as representative for the purpose of filing, pleading and preferring arguments. Therefore, the present petition is liable to be dismissed with a liberty to M/s Asian Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation to file a fresh petition in their own name whether on its own or through IERS to represent them.

24. In the light of the aforesaid observations, and considering the facts of the instant case, the Petition is dismissed. However, liberty is given to the Open Access Consumers namely M/s Asian Hotels (North) Limited (Hyatt Regency) & M/s Devki Devi Foundation to file a fresh Petition before the Commission on the issues raised in the instant petition.

25. The Petition is dismissed accordingly.

**Sd/-
(A.K. Ambasht)
Member**

**Sd/-
(A.K. Singhal)
Member**

**Sd/-
(Justice S S Chauhan)
Chairperson**