

DELHI ELECTRICITY REGULATORY COMMISSION
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi –110017

F.11 (1110)/DERC/2014-15/4340

Petition No. 19/2014

Under section 142 of the Electricity Act, 2003

In the matter of:

M/s Green Energy Association

.....**Petitioner**

Versus

Tata Power Delhi Distribution Ltd & Ors.

....**Respondents**

Petition No. 80/2015

Under section 142 of the Electricity Act, 2003

In the matter of:

M/s Indian Wind Power Association

.....**Petitioner**

Versus

BSES Rajdhani Power Limited & Ors.

.....**Respondents**

Coram: Hon'ble Mr. Justice S S Chauhan, Chairperson

Appearance:

1. Mr. Buddy Ranganathan, Counsel for BYPL/BRPL
2. Mr. Raunak Jain, Counsel for TPDDL

ORDER

(Date of Order: 18.09.2019)

1. Aforesaid two Petitions have been filed by M/s Green Energy Association and M/s Indian Wind Power Association on the issue of non-compliance of Renewable Energy Purchase Obligation (RPO) by the Discoms of Delhi viz Tata Power Delhi Distribution Ltd. (TPDDL), BSES Yamuna Power Ltd. (BYPL) and BSES Rajdhani Power Ltd. (BRPL).
2. The Petitioners have filed the Petitions under Section 142, Section 146 and Section 86(1) of the Electricity Act, 2003. The Petitioners have requested for action against the Discoms under Regulation 11(1) and 11(2) of the DERC (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2012 for alleged failure to meet Renewal Purchase Obligation (RPO).

3. The Petitioner, M/s Green Energy Association vide Petition No. 19/2014 has sought action against Discoms for non-compliance of Solar RPO by obligated entities for financial years 2012-13 and 2013-14. Whereas Petitioner, M/s Indian Wind Power Association vide Petition No. 80/2015, has sought action against Discoms for non-compliance of RPO for financial years 2012-13 to 2014-15.
4. The main contention of the Petitioners is that the Commission has allocated fund to the Respondent for purchase of RECs to meet the RPO and even when RECs were available in the market, no efforts had been made by the Discoms to fulfill their RPO, therefore, it's a willful default on the part of the Discoms for which they should be penalized under Section 142 of the Electricity Act, 2003.
5. The Respondent Discoms were issued preliminary notices and hearings were afforded to them. After considering the submissions of the Respondent Discoms, a Show Cause Notice dated 17.11.2014 was issued in Petition No. 19/2014 (filed by M/s Green Energy Association)
6. In response to the Show-Cause Notice dated 17.11.2014, the Respondent Discoms submitted their replies; and after hearing the submissions of the Discoms the matter was reserved for final Order.
7. However, before the final order was pronounced two of the Discoms, namely BRPL and BYPL filed Petitions No. 30/2015 and 31/2015 before this Commission seeking extension of time for fulfilling RPO. As the Discoms had filed Petitions for extension of RPO the decision in Petition No. 19/2014 had become incumbent upon the outcome of the aforesaid Petitions.
8. In another development M/s. Indian Wind Power Association also filed Petition No. 80/2015 seeking action under Section 142 of the Electricity Act, 2003 against the Discoms for non-compliance of RPO for the year 2012-2013 to 2014-2015.
9. The Petitions No. 30 & 31 of 2015 seeking extension of time for RPO were dismissed vide order dated 11.06.2018. However, by the time Petitions No. 30/2015 and 31/2015 were decided, the Members of the Commission who had heard the Petition No. 19/2014 got retired and accordingly, the Petition had to be heard afresh by new Members of the Commission.
10. A Show Cause Notice in Petition No. 80/2015 was also issued vide Order dated 29.01.2018. The Discoms have replied to the show cause notices.
11. Both the matters being similar were tagged and heard together and a common order is being pronounced.

12. The replies of the Discoms to the Show Cause Notices are summarised as under:

a. BYPL and BRPL:

- I. This Hon'ble Commission has straight away issued the show cause notice under section 142 of the Electricity Act, 2003 to all the Respondents including BYPL and BRPL as to why penal action be not taken for failure to meet the renewable purchase obligation, without even stating as to whether BYPL and BRPL have indeed failed to meet the renewable purchase obligation.
- II. In accordance with the law laid down by the Hon'ble Supreme Court of India, in Uma Nath Pandey vs. State of 'U'P, AIR 2009 SC 2375, Commissioner of Central Excise vs. Vrindavan Beverages Pvt. Ltd. 2007(5) S C C 388, Karnataka Rare Earth & Anr. vs. Senior Geologist, Department of Mines & Geology & Anr. 2004(2) SC 783, DERC was bound to take on record, examine and consider the reply dated 25th September 2014 and 24th September 2014 filed by BYPL and BRPL respectively and only thereafter arrive at a satisfaction to issue show cause notice while initiating penalty BYPL to arrive at a satisfaction as to whether there is a *prima facie* case of contravention committed or not.
- III. In its reply dated 25th September, 2014 and 24th September, 2014 as filed by BYPL and BRPL respectively, it was *inter alia* submitted that due to the pendency of approval for deviation from the procurement guidelines for procurement from solar sources pending with DERC, BYPL and BRPL are not in a position to procure from solar generators. BYPL and BRPL had specifically submitted that the matter is still pending with the DERC. In the said reply, BYPL and BRPL had explained the bona fide steps and actions that BYPL has taken to fulfill its obligation for the FY 2013-14. However, DERC has ignored the said submission filed by BYPL and BRPL in their reply dated 25th September 2014 and 24th September, 2014 while issuing the show cause notice under section 142 vide its order dated 17th November 2014. DERC has ignored the action plan that BYPL has put in place for meeting the cumulative solar RPO target of 2015-16 by way of long-term contract and rooftop solar generating capacity as mentioned in the aforesaid replies.
- IV. Section 86(1)(e) of the Electricity Act, 2003 vests on State Commissions the function to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and

also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. This is the only section in the 2003 Act other than section 66, which puts the State Commission on a promotional role i.e, to take steps to promote co-generation and generation of electricity from renewable sources of energy. While so embarking on the promotional role, the State Commissions will need to appreciate that section 86(1)(e) is neither directory nor mandatory in nature. Section 86(1)(e) also does not contemplate an adjudicatory role of the State Commissions. On the other hand, while taking steps to promote co-generation and generation of electricity from renewable sources of energy, the State Commission has to take into consideration the ground realities as any form of generation from renewable source of energy is dependent on various natural and geographical factors. For the State of Delhi, DERC is aware that there is in fact no generation of electricity from wind, hydro, bagasse, bio- mass, negligible generation from solar, and urban/municipal waste. A report prepared by Ministry of Statistics and Programme Implementation on the Energy statistics regarding status of renewable energy generation in the different states of India.

- V. The legislative intent behind the promotional measure contained in section 86(1)(e) of the 2003 Act has to be derived from the relevant and concerned statutory documents. The Tariff Policy has been notified under section 3 of the 2003 Act and requires the State Commission to promote generation from renewable energy sources "taking into account availability of such resources in the region and its impact on retail tariffs". Section 3 of the 2003 Act vests the role on the Central Government to prepare the National Electricity Policy and Tariff Policy for development of the power system based on optimal utilization of resources, such as inter alia hydro and renewable sources of energy. Following this mandate of Law, the Central Government has in the Tariff Policy, mandated the State Commissions to take into account the availability of such sources in the region and its impact on retail tariffs, while fixing the minimum percentage for purchase of energy from such sources in accordance with section 86(1)(e).
- VI. In view of the above, it follows that any implementation of the promotional measure under section 86(1)(e) has to take into account the fact that the State of Delhi is not endowed with renewable sources in plenty. In fact, the promotional measure

under section 86(1)(e) may have to be viewed in such a manner that the mandate under section 3 is fulfilled i.e. development of the power system based on optimum utilization of resources such as inter alia renewable sources of energy. Accordingly, DERC could take steps under section 86(1)(e) by promoting "co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person". This Hon'ble Commission may also encourage the generation from renewable sources of energy in the State of Delhi by providing an attractive tariff structure. However, as far as specifying a percentage of the total consumption of electricity in the area of the distribution licensees for purchase of electricity from renewable sources of energy, the fact would remain that the consumers of Delhi by bearing this financial burden will not in any manner be benefited from any reduction in the greenhouse gas emission in the atmosphere of Delhi. It is agreed that the promotional measure casted upon all the Regulatory Commissions of all States of India is a national strategy to deal with climate change. However, it cannot be denied that the consumers of Delhi will be burdened with the additional tariff (whether by way of REC or otherwise) for promoting the setting up and generation of renewable sources of energy in other States which do not result in the immediate reduction of accumulated greenhouse gas emissions in the atmosphere in the State of Delhi.

- VII. As per RPO Regulations, 2012, any shortfall in the RPO will have to be met either by way of purchase of renewable energy/solar energy from other States or by buying Renewable Energy Certificate (REC) from the power exchange. In both the instances, high rates of sourcing will have to be ultimately borne by the electricity consumers of the Licensee.
- VIII. Taking into consideration the non-availability of cost-reflective tariffs and the precarious financial condition of the Licensee due to accumulation of huge Regulatory Assets to the tune of Rs. 5,534 crore (BYPL) and Rs. 9,237 crore (BRPL) till FY 2012-13 (as is recognized by the Hon'ble Commission in its Statutory Advice dated 01.02.2013 to GoNCTD, procurement of such renewable energy to meet RPO targets will burden the consumers and is against the interest of the electricity consumers of the Licensee.

IX. That if the RPO is aligned to the realistic estimates of renewable energy available or planned within the State, the consumers would not be excessively burdened by way of purchase of RECs or Buying expensive power from other states in order to meet the RPO shortfall. Additionally, the Licensee submits that the Discoms are already incurring heavy financial losses and the substantial time lag between incurring additional high power purchase cost on account of RECs or renewable power purchased from outside the State and recovering the same from consumers would 'only aggravate the financial woes of the cash - strapped Discoms.

X. The RPO Regulations apply to "Obligated Entity(ies)" which is defined under Regulation 2 (m) of the RPO Regulations as follows:

"(m) Obligated Entity means the distribution licensees, Captive users and Open Access Consumers in the National Capital territory of Delhi, which is mandated to fulfill RPO under these Regulations."

It can be seen from the above that though the Obligated Entities are distribution licensees, captive users and Open access consumers, the petition seeks the enforcement of the RPO Regulations only qua the Respondents who are Private distribution licensees. It is respectfully submitted that the intention of the RPO Regulations is to promote Renewable Purchase Obligation amongst all the obligated entities and not to single out only the Private Distribution Licensees. Hence, it would not be appropriate to seek the enforcement of the RPO Regulations only qua the Respondents who are Private Distribution Licensees. Accordingly, it is submitted that the position is defective as it suffers from non-joinder of parties since Captive Users and Open Access Consumers, have not been made a party to the petition.

XI. The Respondents cannot be subjected to imposition of any penalty under Section 142 of the 2003 Act in view of the following reasons:

- i. The alleged non-compliance was entirely due to the circumstances and factors beyond the control of the answering respondent;
- ii. Without prejudice to the submission that there is no contravention within the scope of Section 142 as section 86 (1)(e) itself does not provide for imposition of any penalty, it is submitted that no willful default or mens rea can be attributed to the Respondents so as to impose penalty u/s 142 of the Act.
- iii. The Hon'ble Supreme court in *Karnataka Rare Earth & Anr. Vs. Senior Geologist, Department of Mines and Geology & Anr.* Has inter alia held as follows:

"18.....An order imposing penalty for failure to carry out the statutory obligation is the result of a quasi criminal proceeding and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation. Penalty will also not be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed, the authority competent to impose the penalty may refuse to impose penalty if the breach complained of was a technical or venial breach or flew from a bonafide though mistaken belief."

XII. Hence, in accordance with the law laid down by the Hon'ble Supreme Court, willful default has to be established for imposing any penalty. Even assuming that mens rea need not be established willful default needs to be established. No willful default can be attributed on the Respondents.

I. There could not be any consequence of non-compliance with RPO Targets year on year inter-alia for two basic reasons:

a. Year on year, the Tariff Order for such year has never been released before the starting of the year. The obligation to release the RPO targets before the commencement of the year is founded upon the APTEL judgment in OP No. 1 of 2013 dated 20.04.2015 as also judgment in Appeal No. 24 of 2013 dated 25.04.2014. Hence unless this fundamental obligation is discharged by the Commission in specifying the RPO targets before the Commencement of the year there can be no question of the Discoms being found wanting in complying with such targets.

Under the Commissions RPO regulations the target is to be a percentage of the sales approved by the Commission in the Tariff Order. Hence unless the tariff Order is passed for each year, the Discom is not aware as to what the approved sales are and consequently what the RPO percentage is.

b. Year on year the approved power purchase cost has always been inadequate i.e. to say that the actual power purchase traded up by the Commission and/or incurred actually by the Discom has always been more than the approved number. In terms of the interim order 03.07.2014 in WP (c) 104 of 2014, the Discom is obliged to make payment of current dues to the various generators/transco's to comply with the orders of the Hon'ble SC. In such inadequate power purchase cost if the Discoms were to comply with the ex post facto RPO targets it would necessarily have to default on making payments

to other generation companies and transmission companies in violation of the Hon'ble SC's Orders.

- II. Meanwhile, the Commission has vide Order dated 28.02.2018 in Petition No. 50 of 2017 for (1) Relaxation in compliance of Regulation 4 of Renewable Purchase Obligation Regulations, 2012 which provides for RPO obligation for the period FY 2012-13 to FY 2016-17; and (2) Waiver of Penalty of Rs. 25.13 crore imposed vide Tariff Order dated 31.08.2017, in the matter of TPDDL has given the following Order:

"In view of the foregoing discussion, all the facts and the efforts made by the petitioner to clear the back log of Annual RPO targets, this Commission has reached to a considered decision to allow 10% of the cost of REC to a tune of Rs. 25.13 crore, which was disallowed in the Tariff Order dated 31.08.2017 for underachievement of RPO targets by the Petitioner. The aforesaid amount of Rs.25.13 crore shall be considered in the next Tariff Order for the Petitioner."

b) TPDDL

- I. The Answering Respondent has taken various solar generation initiatives, for which petitions seeking approval have been filed with DERC as far back as 2010 itself, before notification of the RPO Regulations and hence such initiatives by the Answering Respondent posit that the Answering Respondent has always been sincerely engaged in the promotion of generating green energy for the benefit of all the concerned stakeholders.
- II. The Answering Respondent for the sake of the welfare of its consumers and in order to reduce additional financial burden arising due to purchase of Renewable Energy Certificate ("REC") intends to acquire the physical power from renewable sources at the best prices and therefore, there is no violation by the Answering Respondent of the RPO mandate as sought to be asserted by the Petitioner.
- III. It is submitted that purchasing of RECs to meet RPO targets will entail additional cost over and above the cost for procurement of conventional power (from Generating Stations like Dadri I). A Cost Benefit Analysis was conducted to ascertain the benefit/loss of purchasing REC, which concluded that the procurement of physical power (renewable) instead of purchasing RECs results in substantial benefit due to procurement of physical renewable power against conventional power which is volatile and has continuously shown unstable trends.

- IV. It is brought to the notice of DERC that, on the one hand, while there is no purpose being served in terms of consumer satisfaction or reliability/quality of power with the purchase of these RECs, the eventual impact all tariff is evident. Therefore, the Answering Respondent, in order to safeguard the interest of consumers in its license area sought bona fide deferment of RPO targets and accordingly invited bids in order to fulfill the obligation.
- V. That the requests made by the Answering Respondent are not for any exemption under the RPO regulations but only for the deferment of the same which DERC is empowered to allow in terms of Regulation 13 and 15 of the said regulations.
- VI. That, in view of the above it is established beyond doubt that the conduct of the Answering Respondent has been bona fide, in the interest of the consumers within its license area and intended to fulfill the requisite RPO mandate in a manner which could serve the interest of the consumer in the best way possible and therefore, no penalty under section 142 of the Electricity Act ought to be imposed upon the Answering Respondent, due to absence of *mens rea* on part of the Answering Respondent. In this regard, it is submitted that it is well settled law that the element of *mens rea* is necessary to establish in the mind of the Respondent in case of levying of penalty by any authority having discretionary power in this respect. This has been laid down in a variety of case laws of the Hon'ble Supreme Court notable among which are *Bharjatiya Steel Industries Vs. Commissioner, Sales Tax, U.P* ((2008) 11SCC617) and *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Anr.* (2008)3SCC35.
- VII. That this Hon'ble Appellate Tribunal, upholding the above principle in its judgment in Appeal No. 115/2007 dated 13.09.2007, has categorically held that
- "Firstly, mens rea is the basic ingredient of any offence. Mere non-compliance with an order could not be sufficient to take penal action. It was necessary for the Commission to obtain evidence of mens rea or culpable state of mind before holding the appellant guilty of a punishable offence. A mere failure to meet a deadline in complying with an order cannot be an offence. Section 142 of the Electricity Act 2003 does not create an absolute offence.*
- VIII. Vide its order dated 29.01.2018, Learned Commission has directed the Respondents, including the Answering Respondent No, 3 herein, to file their replies, as to why penalty under Section 142 of

the Electricity Act, 2003 should not be imposed on them' for violation of provisions of RPO as per the DERC(Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations,2012.

- IX. That there is no occasion whatsoever to take any action under Section 142 of the Electricity Act, 2003 .or otherwise, or impose any penalty on the Answering Respondent No.3, Tata Power-DDL, since , Tata Power-DDL has already fulfilled the RPO, both - Solar and Non-solar, for the period in question i.e. FY 2012-13, 2013-14 & 2014-15, and has further fulfilled the RPO for the period: of 2015-16 & 2016-17 under the DERC (Renewable Purchase Obligation and (Renewable Energy Framework Certificate) Regulations, 2012. At the outset, it is respectfully submitted' that there is no occasion whatsoever to take any action under Section 142 of the Electricity Act, 2003 or otherwise, or impose any penalty on the Answering Respondent No. 3, Tata Power-DDL, since , Tata Power-DDL has already fulfilled the RPO, both - Solar and Non-solar, for the period in question i.e. FY 2012-13, 2013-14 & 2014-15, and has further fulfilled the RPO for the period: of 2015-16 & 2016-17 under the DERC (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2012 as amended. Answering Respondent No. 3 , Tata Power-DDL, has also report the 100% compliance of RPO for the period of FY 2012-13 to FY 2016-17 to DERC vide its letter No. TPDDL/REGULATORY/2017-18/PMG/15 dated 29.12.2017, including the Compliance Statement of RPO as on 27th December, 2017 for FY 2012-13 to FY 2016-17. Petitioner has further enclosed the REC certificate procured by TPDDL in fulfilling its RPO mandate under the 2012 Regulations.
- X. It is evident from the aforesaid communication of Tata Power-DDL, that RPO for FY 2012-13 and FY 2013-14 (both, Solar and Non-Solar), have been fully met by , Tata Power-DDL and duly reported to DERC vide, Tata Power-DDL affidavit dated 06.11.2017 submitted to DERC. Further, Tata Power-DDL had committed to DERC that RPO for the remaining period i.e. FY 2014-15 to FY 2016-17 shall be met by 31 "st Dec' 2017. The communication dated 29.12.2017 further notes that in compliance to its commitment, Tata Power-DDL has further procured 748754 Non-solar RECs in the trading session dated 27th December 2017, in addition to the purchase of 748765 Non-solar RECs in the trading session dated 29th November, 2017, which was duly intimated to DERC vide TPDDL's letter dated 30.11.2017. On procurement of this Non-solar RECS, Tata Power-DDL has completely fulfilled its Non-solar RPO for the period of FY 2014-15 to FY 2016-17 as well.

- XI. The letter dated 29.12.2017 also reports that since the trading of Solar RECs had not resumed in the exchange, Tata Power-DDL has met the shortfall of 1.23 MUs in Solar RPO for FY 2014-15 through its Solar Power procurements in FY 2017-18. Aforementioned 1.23 MUs Solar Power of FY 2017-18 shall not be considered while meeting the Solar RPO for 2017-18. Tata Power-DDL has reported that with the above Non-solar REC purchase and Solar Power adjustment, Tata Power-DDL has now fully met its RPO for the entire period of FY 2012-13 to FY 2016-17.
- XII. That in view of the aforesaid 100% compliance of RPO targets by Answering Respondent No. 3, Tata Power-DDL the reliefs sought by the Petitioner are infructuous as against the Answering Respondent No. 3, TPDDL and the petition does not survive. DERC may be pleased to dispose off the petition as against the Answering Respondent, as infructuous, and further discharge the present notice from the notice issued by DERC under Section 142 of the Electricity Act, 2003 without levying any penalty as the same is not warranted.
- XIII. M/s Tata Power-DDL has filed its reply on 15.02.2018 wherein it has submitted that RPO for FY 2012-13 and FY 2013-14 (both solar and non-solar), have been fully met by Tata Power-DDL and duly reported to the Commission vide affidavit dated 06.11.2017. Further, it has completely fulfilled its Non-Solar RPO for the period FY 2014-15 to FY 2016-17 as well.

COMMISSION ANALYSIS:

13. On the basis of submissions made by the Respondent DISCOMs, following five issues are to be decided:-
1. Whether Show Cause notice was issued without following the prescribed procedure.
 2. Whether element of mens rea is an essential ingredient to decide cases u/S 142 of Electricity Act, 2003 of renewable energy purchase obligations.
 3. Whether cost-benefit analysis is a must factor for such socially oriented obligations.
 4. Whether non-availability of Renewable Energy Sources in the State may be a reason for not meeting the RPO.
 5. Whether exact quantum of Renewable Energy under RPO must be known before hand i.e. in the beginning of financial year to meet the RPO.

14. **Issue No. 1. Whether Show Cause notice was issued without following the prescribed procedure:**

On the issue of non adherence to the prescribed procedure before issuing a show cause notice, the contention of the Respondents is that the show-cause notice was straight away issued without indicating whether they have failed to meet the RPO. The Respondent DISCOMs were given opportunity by issue of preliminary notice to file their response on the issue of non compliance of Renewable Energy Purchase Obligations and the contention of the Respondent that the show-cause notice was issued without considering the response is miss found and without basis. It is only after being certain on the basis of submissions and admission of the Discoms that prima facie the Respondents had failed to meet their respective RPOs, the show cause notices were issued; and there was no more deliberation required to find out whether the Discoms have failed to meet RPO. The replies of the Discoms to the show cause notices are required to be considered to decide whether it is a case to impose penalty and the quantum of penalty. The submissions made by the Respondent Discoms have been duly considered in the succeeding paragraph.

15. **Issue No. 2. Whether element of mens rea is an essential ingredient to decide cases u/S 142 of Electricity Act, 2003 of renewable energy purchase obligations:**

The issue of necessity of presence of element of mens rea as a condition for proceedings under section 142 of the Electricity Act, 2003 has been deliberated upon time and again in various legal forum. This Commission has also deliberated upon the issue of mens rea in Petition No. 05/2017 and has observed the following.

17.As much related to the Issue No. 2, regarding assessing ingredient of mens rea before imposing penalty on the Respondent, the judgement of the Hon'ble APTEL quoted by the Respondent as well as by Petitioner have been considered. Hon'ble APTEL in the matter of B. M. Verma vs Uttrakhand Electricity Regulatory Commission, Appeal No 115/2007 has held that:

"9. We are shocked to see how Commission has totally gone wrong both in the matter of procedure and in the matter of approach. The Commission entirely lost sight of the fact that it was proceeding to take criminal action and accordingly the basic principles of criminal law and procedure should not have been lost sight of. We are not saying that the Commission was required to follow the strict procedure of Criminal Procedure Code. But the basic principles could not have been ignored, a proposition to which the respondent counsel agreed.

10. Firstly, mens rea is the basic ingredient of any offence. Mere noncompliance with an order could not be sufficient to take penal action. It was necessary for the Commission to obtain evidence of mens rea or culpable state of mind before holding the appellant guilty of a

punishable offence. A mere failure to meet a deadline in complying with an order cannot be an offence. Section 142 of The Electricity Act 2003 does not create an absolute offence".

18. *Whereas in Appeal No 53/2009, in the matter of Bihar State Electricity Board vs. Central Electricity Regulatory Commission Hon'ble APTEL has held that element of mens rea need not be examined for imposing penalty in case of violation under Section 142 of the Electricity Act, 2003. The Hon'ble APTEL has held the following:*

"24. In the light of the above facts, let us now come to the question as to whether the Commission can impose penalty whenever there is a contravention under Section 142 of the Act in the absence of the mens rea. Mens rea in the matter of violation means the criminal intent to violate i.e. deliberate intention to violate or dishonest intention to violate. As per Section 142 of the Act, the Commission, if it is satisfied that any person has violated the direction issued by it, shall give opportunity by seeking for explanation from that person regarding the said violation through show cause notice and by giving personal hearing. In spite of the explanation, if the Commission takes the view that the explanation is not satisfactory and forms a definite opinion that the contravention has been committed, it may impose the penalty. Thus, it is evident that the language in Section 142 of the Act does not indicate the need to establish the presence of dishonest intent namely mens rea to commit that contravention or violation as in the prosecution of an offence in the criminal proceedings. Mens rea namely the deliberate, dishonest and wanton violation is one thing. The violation due to lack of diligence and lack of bona fide is entirely a different thing. Therefore, mens rea in these cases is immaterial as this involves civil liability. It is enough to establish the contravention and there need not be the criminal intent or dishonest intent to commit it. At the same time, we should not lose sight of the ground realities.

25. *The very fact that Section 142 of the Act mandates the Commission to issue show cause notice would indicate that even though the Commission finds that there is contravention on the basis of the materials given in the complaint, it has to take final decision only after considering the explanation from the person concerned. If the explanation is satisfactory, it need not impose penalty. The words "may impose" contained in Section 142 convey this. In other words, even when there is some contravention of a direction which warranted the issuance of show cause notice, the Commission is not duty bound to impose penalty in those cases where it is found that such a contravention has been committed bona fide and due to the*

circumstances beyond his control. If the Commission found that the conduct of the person on whom show cause notice was served was bona fide or if the person has satisfied the Commission that the circumstances were beyond his control due to which he was unable to comply with the direction of the Commission, then the Commission may accept the said explanation and discharge a person without imposing any penalty. It is entirely depending upon the facts and circumstances of the case.

26. In this context, it would be worthwhile to refer to the relevant observation made in the judgment rendered by the Hon'ble Supreme Court in 1969 Vol.2 SCC 627 Hindustan Steel Ltd. Vs. State of Orissa, which are as under: "Penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for the failure to perform the statutory obligation, is a matter of discretion of the authority to be exercised judicially and on consideration of the relevant circumstances." The above observation and the wordings contained in Section 142 which mandates the Commission to impose penalty only after giving opportunity to the person concerned to explain his stand would reveal that the Commission has to exercise its authority judicially and judiciously by taking into the consideration all the relevant circumstances explained by the person concerned before deciding the necessity to impose penalty."

19. From the discussion and observation made by the Hon'ble APTEL in both cases, it is established that the element of mens rea is required to be examined in case of criminal offence and plain reading of Section 142 does not make violation and contravention of the parties as criminal offence. However, this has to also be seen that eventually a penalty has to be imposed on to the violators and therefore, it has to be seen whether it was a lawful default or due to certain reasons the directions of the Commission were not met. It is no doubt important to find out whether the violation committed by party is due to lack of diligence or lack of bonafide or both. To see whether it was due to certain reasons beyond the control of the person concerned that the order or direction of the Commission was not complied with even though bonafide efforts were made, the person should be given opportunity through a show cause notice to explain his stand and in case the Commission find the explanation not satisfactory penalty may be imposed.

16. In view of the above it is not necessary to examine the element of mens rea before taking any action u/S 142 of the Electricity Act, 2003. There are certain obligations for which presence of mens rea is not necessary because any relaxation or laxity in implementation of such obligation would jeopardize the aim

of environment protection, which shall prove far costly and therefore, strict implementation of obligation is necessary.

17. **Issue No. 3. Whether cost-benefit analysis is a must factor for such socially oriented obligations.**

It is to be kept in mind that the cost of renewable energy had been on a very higher side in previous years and now it has come to a reasonable level. Nonetheless it was the tariff policy, which mandated that even such costly power from renewable energy may be procured by the DISCOMS and made it mandatory just to take care of environmental issue related to electricity generation. The cost of ignoring RPO may be inestimable in comparison to the cost likely to incur to meet the RPO. It is not the monetary loss which has to be looked upon to see the intent of the Legislature or the Government in making the RPO a mandatory obligation. Therefore, the contention of the Respondent DISCOMs that purchase of REC or purchase of costly renewable energy would have impacted in increase in tariff is not sustainable. It may also be noted that in initial years the targets for RPO were kept low and it was not beyond the capability of Respondent DISCOMs to meet such obligations. Even assuming that meeting the obligations would have resulted in higher tariff electricity, the increase in tariff would not have been substantial as has been claimed by the Respondent DISCOMs. In view of the above, the contention of the DISCOMs that the RPO would have resulted in higher tariff may not be considered as a cogent reason for non implementation of RPO.

18. **Issue No. 4. Whether non-availability of Renewable Energy Sources in the State may be a reason for not meeting the RPO.**

The provision of REC itself is a measure that in case there is no availability of renewable energy sources in the state, the utility may opt for purchase of REC to meet their Renewable Energy Purchase Obligations. The RPO cannot be looked upon in narrowly, limited within the boundary of the state rather it is for the country as a whole and addresses the man kind requirement for a better environment. Therefore, the plea of the Respondent DISCOM that the renewable energy sources in Delhi are deficient can never be accepted as an argument to further their case. Further, the APTEL judgement dated 20.04.2015 in OP No. 1, 2 & 4 of 2013 has held that :

“24. The State Commissions’ Regulations recognize REC as a valid instrument for fulfilling RPO. The objective of REC mechanism is also for promoting development of renewable sources of energy by providing pan India market for the renewable energy generators which will help in accelerated development of renewable energy sources in the country. The development of renewable energy is of great importance to the country for energy security, achieving low carbon growth and for safeguarding the health of

the people. If we hesitate to pay proper price for the growth of renewable energy, the future generation may have to pay a heavier price due to environmental degradation. It should, therefore, the endeavour of the State Commission that REC mechanism is encouraged and it is not allowed to be extinguished"

19. One has to understand that environmental concern is one of the utmost concern of the whole world and therefore, RPO cannot be ignored on the ground of it not being cost effective because cost of damage to the environment may be such, which cannot be evaluated in terms of money. The mankind may have to pay heavy prices for neglecting the environmental warnings. The basic aim of RPO is intended to make the environment better.

20. **Issue No. 5 : Whether exact quantum of Renewable Energy under RPO must be known before hand i.e. in the beginning of financial year to meet the RPO.**

The contention of the Respondent that they failed to meet the RPO because the exact quantum of RPO was not made known to them before hand i.e. in the beginning of the financial year is not tenable neither is reflected from their action. The percentage of RPO for respective financial year is very much given in the RPO Regulations and the Respondent DISCOMs have to act in a systematic way to meet the RPO by taking stock of the total sale every quarter and the shortfall of RPO is allowed to be met in the next quarter. This is why, RPO for the financial year may be fulfilled by the end of June of the next financial year.

21. Further, the Commission while deciding the petitions No. 30/2015, 31/2015 and 01/2018 has deliberated upon almost all the issues and observed the following :

"5. Before going into the merits of the case, it is to be pointed out that it is incumbent upon the Commission u/s 86(i)(e) to promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectively with the grid and sale of electricity to any person, and also specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of distribution licensee.

6. The above position has been reiterated by Hon'ble Supreme Court and Honb'le Appellate Tribunal for Electricity in certain judgments. The Hon'ble Supreme Court in Hindustan Zinc Ltd. vs Rajasthan Electricity Regulatory Commission has observed that Article 51A (g) of the Constitution of India cast a fundamental duty on the citizen to protect and improve the natural environment. The object being reduction of pollution by promoting renewable source of energy, larger public interest must prevail over the interest of the industry.

7. Further the Hon'ble Appellate Tribunal for Electricity in OP No. 1, 2 and 4 of 2013 has given directions to all State Electricity Commissions that: (i) The provisions in Regulations like power to relax and power to remove difficulty should be exercised judiciously under the exceptional circumstances, as per law and should not be used routinely to defeat the object and purpose of the Regulations.

8. Regulation 11 (1) of Delhi Electricity Regulatory Commission (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2012, stipulate that:

11. Effect of default (2) Where any obligated entity fails to comply with the obligation to purchase the required minimum quantum of purchase from renewable Energy Sources or the Renewable Energy Certificate(s), it shall also be liable for penalty, as may be decided by the Commission, under Section 142 of the Act; Provided that in case of genuine difficulty in complying with the renewable purchase obligation because of non-availability of Certificate(s), the obligated entity may approach the Commission for carry forward of compliance requirement to the next year. However, credit for excess renewable energy purchase would not be adjusted in the next year.

9. It is since 2012 when the RPO Regulations were notified by the Commission. The petitioners are in default and have failed to fulfill the RPO obligation even till date despite the fact that necessary finance has been provided in the ARR of the Petitioners of respective years to meet the RPO obligations through purchase of REC. Moreover, there was no 'non-availability' of certificates to meet the RPO in respective years as such to attract relaxation under the provision to Regulation 11 of the DERC (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2012.

10. The contention of the Petitioner that the RPO Targets are not specified before the commencing of the year is unfounded because RPO targets have been well defined in terms of percentage for the respective years in the RPO Regulations. The Petitioners had knowledge about their RPO targets even in the year 2012 and therefore, this plea cannot be accepted. Regarding the actual purchase in terms of unit the Commission provides extra 3 months to calculate the exact figure to meet the RPO Obligation and it can be done only at the end of the financial year and not in the beginning.

11. Similarly, the contention of the Petitioner that the financial inadequacy has forced them in a position that they could not comply with the RPO targets is again a non acceptable plea because the Petitioners have to manage finance through equity and loan not only for RPO targets but also for other

activities of their distribution business. The Commission is allowing carrying cost towards regulatory assets. Failure to manage finance cannot be a reason for deferment of RPO targets."

22. The Commission vide Tariff order dated 31.08.2017 has disallowed 10% of the cost of REC for under achieving of RPO targets by the Respondent Discoms. Against this decision of the Commission the Review Petition No. 50/2017 filed by TPDDL has been disposed off with the following direction:

"The Commission has reached to a considered decision to allow 10% of the cost of REC to a tune of Rs. 25.13 crore, which was disallowed in the Tariff Order dated 31.08.2017 for underachievement of RPO targets by the Petitioner. The aforesaid amount of Rs.25.13 crore shall be considered in the next Tariff Order for the Petitioner."

23. In the ARR of the Discoms, the cost of RECs to meet the RPO for respective financial years had been provided, nonetheless the Respondent Discoms failed to meet their RPO targets and therefore 10% of cost of REC has been temporarily disallowed while true up the ARR of the Discoms. The 10% cost of RECs, disallowed in true up, shall be allowed to the Discoms once they meet the RPO. Such disallowance is a fiscal measure and should not be misunderstood as penalty of any sort.

24. Considering the submission made by the Petitioners and Respondent Discoms, it is observed that there is no doubt that the Discoms have failed to meet their RPO. They had certain reasons for not fulfilling the RPO one of them is the cost benefit analysis that purchase of REC is going to increase burden on consumers because no physical power can be obtained against purchase of REC. It has also been seen that the Discoms are making efforts to procure power or electricity from other renewable resources of energy so as to meet their RPO in future.

25. Keeping in view all the factors & various direction of the APTEL, it is established that failure of Discoms to meet the RPO make them liable to pay penalty under Section 142 as discussed below:

There will be no penalty for financial year 2012-13 as the RPO Regulations were issued in mid of the financial year and to expect that it will be fulfilled in the same financial year would be demanding. However, not meeting of RPO for the financial year 2012-13 even after 30th June,2013 shall constitute contravention of Regulations as continuing default and Discoms shall be liable to pay a penalty at a rate of Rs. 5,000/- per day. For the FY 2013-14 and FY 2014-15, a penalty of Rs. 1 lakh for each year of default and also Rs. 5000 per day for continuing default till the RPO for the respective year is fulfilled by the Discoms. Penalty for each financial year shall be calculated and payable, separately.

26. The penalty calculated as per para 24 above in respect of each Discom is as under:

A. **TPDDL**: As per the affidavit filed by TPDDL, the RPO for the FY 2012-13, FY 2013-14 and FY 2014-15 were complied with on 22.02.2017, 25.10.2017 and 29.11.2017, respectively. Accordingly, penalty payable by TPDDL shall be as under:

FY 2012-13: Rs.66,60,000/- for failure to meet RPO after 1st July, 2013 till 22nd February, 2017 as continuing default for 1332 days at a rate of Rs.5,000/- per day.

FY 2013-14: Rs1,00,000/- for failure to meet RPO and Rs.59,20,000/- after 1st July, 2014 till 27th September, 2017 as continuing default for 1184 days at a rate of Rs.5,000/- per day

FY 2014-15: Rs1,00,000/- for failure to meet RPO and Rs.44,10,000/- after 1st July, 2015 till 29th November, 2017 as continuing default for 882 days at a rate of Rs.5,000/- per day

B. **BRPL and BYPL** : No compliance of RPO has been reported by BRPL or BYPL and they are in continuous default of meeting the RPO and accordingly penalty separately payable by BRPL and BYPL shall be as under:

FY 2012-13: Rs.1,13,60,000/- for failure to meet RPO after 1st July, 2013 till 20th September, 2019 as continuing default for 2272 days at a rate of Rs.5,000/- per day. The penalty at a rate of Rs. 5,000/- per day shall be payable for further continuing default after 5th August,2019 till the Discom meets the RPO.

FY 2013-14: Rs1,00,000/- for failure to meet RPO and Rs.95,35,000/- after 1st July, 2014 till 20th September, 2019 as continuing default for 1907 days at a rate of Rs.5,000/- per day. The penalty at a rate of Rs. 5,000/- per day shall be payable for further continuing default after 5th August,2019 till the Discom meets the RPO.

FY 2014-15: Rs1,00,000/- for failure to meet RPO with Rs.77,10,000/- after 1st July, 2015 till 20th September, 2019 as continuing default for 1542 days at a rate of Rs.5,000/- per day. The penalty at a rate of Rs. 5,000/- per day shall be payable for further continuing default after 5th August,2019 till the Discom meets the RPO.

27. The Respondent Discoms are directed to pay the aforesaid amount of penalty within one month. Regarding 10% of the cost of REC disallowed to the Discoms BRPL and BYPL, once the RPO is achieved by the concerned Discom, the disallowed cost shall be allowed in the subsequent ARR of the Discoms.

28. With the aforesaid directions, the Petitions stand disposed of.

Sd/-
(Justice S S Chauhan)
Chairperson