

ODISHA ELECTRICITY REGULATORY COMMISSION
PLOT NO. 4, CHUNUKOLI, SHAILASHREE VIHAR,
BHUBANESWAR-751021

Present : Shri S. P. Nanda, Chairperson
Shri S. P. Swain, Member
Shri A. K. Das, Member

Case No. 36/2015

M/s. Utkal Alumina International Limited	Petitioner
Vrs.		
OREDA	Respondent

In the matter of: **An application under S.86 (1) (e) of the Electricity Act, 2003 read with Regulation 2 (h) of the OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010 seeking clarification regarding obligated entity.**

For Petitioner: Shri Partha Mukherji, Advocate

For Respondents: Shri Ashok Kumar Choudhury, Deputy Director, OREDA, Sujata Dash, Verifier, OREDA & Shri Sukanta Panda, DGM(Elect.), GRIDCO Ltd.

ORDER

Hearing Date: 17.06.2016

Date of Order: 30.07.2016

The petitioner has filed the present case under Section 86(1)(e) of the Electricity Act, 2003 read with Regulation 2(h) of the OERC (Renewable and Co-Generation Purchase Obligation and its Compliance) Regulations, 2010 to declare it not an obligated entity and therefore, not required to discharge RPO in terms of Regulation 3 of OERC (Renewable and Co-Generation Purchase Obligation and its Compliance) Regulations, 2010.

2. The Petitioner has established a Co-generation based Captive Generating Plant of 90 MW capacity for meeting its power requirement for refining bauxite to produce alumina. ‘Co-generation’ has been defined in Section 2 (12) of the Electricity Act, 2003 as follows:

“Co-generation means a process which simultaneously produces two or more forms of useful energy (including electricity).”

3. The Petitioner submitted that the power plant owned by him is a co-generation plant as it utilises the thermal energy of coal to generate steam as a main product and electricity as a part by product.
4. The Petitioner also pointed out two judgements of Hon’ble APTEL in Appeal No. 54/2012 (Emami Paper Mills Ltd. Vrs. OERC) and in Appeal No. 57/2009 (M/s. Century Rayon Vrs. MERC) where Hon’ble Tribunal has held that the co-generation based captive power plant is

not a conventional captive power plant and hence an entity sourcing its requirement of captive power consumption from such co-generation based power plant is not an obligated entity within the meaning of Clause 2 (h) of the Regulations, 2010 and consequently not obligated to discharge the renewable purchase obligation.

5. During the hearing the Commission sought the views of the representative of the Petitioner on the later judgement of Hon'ble APTEL in Appeal No. 53/2012 dated 02.12.2013 (Lloyds Metal & Energy Ltd. Vrs. Maharashtra Electricity Regulatory Commission & Others). The representative expressed his ignorance about this judgement. However, for the sake of convenience we are reproducing the same.

In Appeal No. 53/2012 dated 02.12.2013 (Lloyds Metal & Energy Ltd. Vrs. Maharashtra Electricity Regulatory Commission & Others) has held as under

“39. Upon conjoint reading of the provisions of the Electricity Act, the National Electricity Policy, Tariff Policy and the intent of the legislature while passing the Electricity Act as reflected in the Report of the Standing Committee on Energy presented to Lok Sabha on 19.12.2002, we have come to the conclusion that a distribution company cannot be fastened with the obligation to purchase a percentage of its consumption from fossil fuel based co-generation under Section 86(1)(e) of the Electricity Act, 2003. Xxxxxxxx”

6. We have heard the submission of the petitioner. What the petitioner seeks to achieve through this application is that their plant need to be excluded from the category of obligated entity required under RCPO Regulations, 2010 because of its “cogeneration” status leading to exemption from procurement of renewable energy as obligated entity.

The reason urged by the petitioner is on the basis that their plant is a cogeneration plant and therefore not required to purchase renewable energy by virtue of orders in Appeal No.57 of 2009 and Appeal No.54 of 2012 of Hon'ble APTEL.

7. The respondent OREDA, submitted that the provision in section 86(1)(e) of Electricity Act, 2003 is to be interpreted what it says and cogeneration is to be construed as cogeneration from RE sources only and therefore the petitioner is an obligated entity.
8. In RCPO Regulations, 2010, the Commission has provided measures for promotion of cogeneration and generation for renewable energy giving due importance to each of them. However, realising the difficulties faced by certain users, the Commission subsequently in Case No. 111 of 2011 has also provided for meeting the deficiency in the non-fulfilment of cogeneration obligation from the renewable sources.

Hon'ble APTEL dwelling on the above issues concluded that non-fulfilment part of renewable purchase obligation could have been compensated through excess cogeneration also.

9. In Appeal No. 57/2009 (M/s. Centruy Rayon case) Hon'ble APTEL has recognised the need for promoting renewable sources of energy in para 45. However, Hon'ble APTEL has held that fastening of the obligation on the co-generator to procure electricity from renewable energy sources would defeat the object of 86 (1) (e) of the Electricity Act, 2003. In Appeal No. 52/2012 (in Emami Paper Mill case), Hon'ble APTEL again held that co-generation captive power plants are not required to fulfil renewable energy purchase obligations as because co-generation and renewable energy are required to be promoted equally. OERC has preferred an SLP against the order in Emami's case, being Civil Appeal No. 5466/2013, wherein the said issue is sub-judice and no stay order has been passed by the Hon'ble Supreme Court.
10. Thus in short, Hon'ble APTEL through various decisions referred to by the petitioner, has held that
 - Co-generation does not mean cogeneration from renewable sources alone. It is distinctly different.
 - The definition of obligated entity would not cover a case where a person is consuming power solely from cogeneration plant.
 - Cogeneration and renewable energy generation has to be promoted independently without fastening obligation of one on the other.
 - A small percentage of captive cogeneration does not qualify for exclusion from the domain the obligated entities.
11. The decision of Hon'ble APTEL, was different from the position adopted by Commission. While Commission interpreted the provisions of 86(1)(e) linked to Renewable Energy, Hon'ble APTEL held that cogeneration and generation from renewable energy are two different aspects. This led to divergent conclusions on applicability of "obligated entities" status.
12. The Commission does not have any other reason placed before it afresh by the petitioner to reconsider and depart from our old decisions.
13. Moreover, in the meantime the intention of law, has been clarified in Ministry of Power, Govt. of India in its new Tariff Policy dated 28th January, 2016.

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Provided that cogeneration from sources other than renewable sources shall not be excluded from the applicability of RPO's."

14. The draft amendment to Electricity Act, 2003 proposed to be laid before legislature also reinforces the decision taken by the Commission earlier in this regard while the Central Government has brought clarity to the issue, we feel, the reasons urged by the petitioner does not survive.
15. In this context it is important also to note the views of Hon'ble Apex Court.

In the Civil Appeal No.4417 of 2015 between M/s Hindusthan Zinc. Ltd. Vrs. Rajasthan Electricity Regulatory Commission, Hon'ble Supreme Court of India has opined that -

"44. XXXXXXXX

The impugned Regulations have been enacted in order to effectuate the object of promotion of generation of electricity from renewable sources of energy as against the polluting sources of energy which principle is enshrined in the Act, the National Electricity Policy of 2005 and the Tariff Policy of 2006. The provisions requiring purchase of minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect environment and prevent pollution in the area by utilizing renewable energy sources as much as possible in larger public interest. The High Court has considered the submissions of the appellants and has rightly rejected the same on the ground that the RE obligation imposed on the captive gencos under the impugned Regulations is neither ultra vires nor violative of the provisions of the Act of 2003 and cannot in any manner be regarded as a restriction on the fundamental rights guaranteed to the appellants under the Constitution."

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"49. The purchase of nominal quantum of energy from renewable resources cannot adversely affect the cost effectiveness of the Captive Power Plant. Moreover, the object being reduction of pollution by promoting renewable sources of energy, larger public interest must prevail over the interest of the industry herein which will in any case pass on the extra burden, if any, will be as part of the cost of its products and therefore, the same does not burden the appellants."

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"50. Article 51A(g) of the Constitution of India cast a fundamental duty on the citizen to protect and improve the natural environment. Considering the global warming, mandate of Articles 21 and 51A(g) of the Constitution, provisions for the Act of 2003, the National Electricity Policy of 2005 and the Tariff Policy of 2006 is in the larger public interest, Regulations, have been framed by RERC imposing obligation upon captive power plants and open access consumers to purchase electricity from renewable sources. The RE obligation imposed upon captive power plants and open consumer through impugned Regulation cannot in any manner be said to be restrictive of violative of the fundamental rights conferred on the appellants under Articles 14 and 19(1)(g) of the Constitution of India. Upon consideration of the rival submissions by the well-reasoned order, the High Court has rightly upheld the validity of the impugned Regulation and we do not find any reason to interfere with the impugned judgment. All the appeals are dismissed as the same are devoid of merit.

16. Thus what is important from the above observations of Hon'ble Supreme Court is that development of Renewable Energy through purchase from such sources through implementation of RCPO Regulations, 2010 is a mandate under the Electricity Act, 2003 and it has been appropriately promoted by the Commission through the Regulations (RCPO Regulations, 2010 and its subsequent Regulations).
17. Because of divergence on the issue with APTEL this Commission has gone an appeal through SLP No. 5466 of 2013 and 5467 of 2013 to Hon'ble Supreme Court. The decisions of the said Court are awaited.
18. It has been submitted by the petitioner that its plant uses fossil fuel for production of steam to be eventually used in the process and the generating plant thus satisfies the condition of co-generation plant.
19. Therefore, we find no merit in the present application of the petitioner. We do not find any new parameters to consider for departure from our earlier decisions. We do not agree with the petitioner and hold the view that the petitioner is an obligated entity and required to fulfil RPO Obligations as enshrined under RCPO Regulations, 2010.
20. The APTEL in Appeal No. 57 & 54 of 2009 has recognised the importance of promoting renewable energy as mandated under the Act. However, due to divergence in interpretation of cogeneration plants definition the Commission has gone on appeal to Hon'ble Supreme Court of India as mentioned above. Some other entities have also approached Hon'ble High Court of Orissa to be excluded from the ambit of above obligations since they are consuming electricity from fossil fuel co-generation plant. The decisions are awaited.
21. From above, we are of the opinion that in the present circumstances the petitioner is an obligated entity and has to comply the renewable purchase obligations mandated under the RCPO Regulations, 2010 subject to final outcome on the issue by Hon'ble High Court and Hon'ble Supreme Court of India in the above appeals.
22. Accordingly, the case is disposed of.

Sd/-
(A. K. Das)
Member

Sd/-
(S. P. Swain)
Member

Sd/-
(S. P. Nanda)
Chairperson