

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR - 751 012**

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

Case No. 42/2015

M/s. Paradeep Phosphates Ltd.	Petitioner
Vrs.		
OREDA	Respondent

In the matter of: **An application under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 (1) of the OERC (Conduct of Business) Regulations, 2004 for review of Order dated 07.08.2015 of the Commission passed in Case No. 59/2014.**

For Petitioner: Shri M. K. Mishra, Sr. Advocate, Shri M. K. Rajguru, Advocate.

For Respondent: Shri Ashok Kumar Choudhury, Dy. Director (OREDA), Sujata Dash, Verifier, OREDA.

Order

Date of hearing: 04.12.2015

Date of order: 04.02.2016

The petitioner in this case M/s. Paradeep Phosphates Ltd. (PPL) has sought to review our order in Case No. 59/2014 dated 07.08.2015. In the said case the Commission on an application of M/s. OREDA has held that all obligated entities of the State shall comply with the Renewable Purchase Obligation (RPO) as per the OERC (RCPO) Regulations, 2010. The present petitioner M/s. PPL who was a party in the said order has prayed for reviewing the order on the ground that it is not an obligated entity as per OERC (RCPO) Regulations, 2010.

2. The petitioner M/s. PPL has submitted that the Commission at Para 20 of the said order dated 07.08.2015 has observed that “we are not inclined to accept the contention raised by various obligated entities regarding non-fulfilment of RPO and all the arguments advanced by these parties are untenable in view of the decision of the Hon’ble Supreme Court”. This is an error apparent on the face of record in as much as PPL’s co-generation plant is based on non-fossil sources utilizing the heat generated from the exothermic reaction of the Sulphuric Acid. This contentions of M/s. PPL had been noted by the Commission in the said order dated 07.08.2015 of the Commission.

However, while passing the said order the Commission has not considered the facts relating to the petitioner company and included the petitioner in the general category of obligated entity, whereby the petitioner's CGP does not use coal, fossil fuel or any other material of similar nature so as to bring it within the purview of obligated entity. As per the RCPO Regulations, 2010 obligated entity has been defined as distribution licensee (or any entity purchasing power on their behalf) and also any other person consuming electricity generated from conventional captive generating plant having capacity of 5 MW and above for his own use and or procured from conventional generation through open access and 3rd party sale. But as described above, the petitioner's CGP cannot be construed as a conventional source of energy.

3. Further, the Commission at Para-19 of the said order has observed that "now the matter is therefore beyond doubt that the reliance placed by the various respondents on the judgments of the Hon'ble ATE in different appeals to relieve them from RPO Obligations is misplaced and has no relevance in view of orders of the judgment dated 13.05.2015 of the Hon'ble Supreme Court of India passed in Civil Appeal No. 4417 of 2015". This observation of the Commission is also incorrect and not applicable to the present petitioner company, because Hon'ble Supreme Court in the said judgment has only dealt with and upheld vires of RPO Regulations of Rajasthan Electricity Regulatory Commission. The said judgment does not deal with the subject as to whether an obligated entity is required to meet RPO if it is a co-generation based CGP/captive user. So question here for adjudication is not validity of Regulation but whether the appellant company is to be exempted from renewable purchase obligation. Therefore, said judgment of Hon'ble Supreme Court is neither relevant nor applicable in this case. Hon'ble Supreme Court in the said judgment has given emphasis on the ability of the industry to pass on the costs of compliance with RPO onto the consumer, but M/s. PPL cannot pass on the associated cost on to the consumer being engaged in the manufacture of fertilizers, where the commodity price is regulated by the Ministry of Chemicals and Fertilizers.
4. Further, there is no interim order or stay of the order dated 30.01.2013 and 31.01.2013 passed in Appeal No. 54 i.e. in the case of EMAMI Paper Mills Vrs. OERC and in the case of M/s. Vedanta Aluminium Vrs. OERC in Appeal 59 of 2012 of Hon'ble ATE. A plain reading of the above Orders of the Hon'ble ATE, also established that the order dated 13.02.2012 in Case No. 111/2011 of the Commission was set aside, as it

contravenes the Order of the Hon'ble ATE in the judgment in Appeal No. 57 of 2009, in the Century Reyon Case, wherein it was held that Appeal will be equally applicable to all co-generation based captive consumers". Therefore, the order of the Hon'ble ATE is binding on the Commission till the same is not set aside/quashed by the appropriate court. Therefore, the order dated 07.08.2015 is liable to be reviewed and the applicant company be absolved from its obligation to purchase REC to fulfill its RPO under the regulation. In another judgment dated 01.10.2014 of the Hon'ble ATE in Appeal Case Nos. 112, 130 & 136 of 2014 in the case of India Glycols Ltd. Vrs. Uttarakhand Electricity Regulatory Commission (UERC) the Hon'ble ATE has again given emphasis to the judgments passed on 26.04.2009 in Appeal No. 57 of 2009, in the Century Reyon Case which establishes that the judgment in Century Rayon Case has its applicability till it is challenged and reversed.

5. Further, M/s. Action Ispat & Power (P) Ltd. has challenged the said order dated 07.08.2015 of the Commission and the vires of the Regulation vide W.P.(C). No. 16467 of 2015 and the Hon'ble High Court of Orissa by its order dated 11.09.2015 has been pleased to grant stay on the order dated 07.08.2015. The Commission has erred in assuming jurisdiction purportedly under Regulation for Renewable and Co-generation Energy Purchase Obligation and its compliance which has been clearly stayed by the Hon'ble High Court. In view of the above, the said order dated 07.08.2015 of the Commission is also liable to be reviewed in the interest of justice.
6. The Respondent M/s. OREDA submitted that on submission of a representation by the petitioner M/s. PPL for grant of exemption from the purview of obligated entity, the Deputy Director, OREDA had visited the manufacturing unit of M/s. PPL and observed that M/s. PPL has a 1000 x 2 MT Sulphuric Acid Plant. This sulphuric acid is a part of production process requirement to produce fertilizer. During the process of making of sulphuric acid high pressure steam is generated due to exothermic process, this steam in turn is used to run the turbines to produce power. In this process coal or fossil fuel is not being used.
7. The OERC (RCPO) Regulations, 2010 had defined Obligated Entity as "Distribution Licensees (or any entity procuring power on their behalf) and also any other person consuming electricity generated from conventional captive generating plant having capacity of 5 MW and above for his own use and/or procure from conventional generation through open access and third party sale. But there was no description of

conventional captive generating plant in the said regulation. However, Sec. 2(8) of Electricity Act, 2003 defined “Captive generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such cooperative society or association.

8. In the case of M/s. PPL sulphur is the primary source of heat and it is not clear whether it is a conventional source of energy or not. Hence, M/s. OREDA has sought clarification from MNRE, GoI requesting them to indicate if sulphur based plants can be included under the purview of obligation.
9. However, the recent OERC (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2015 defined conventional generating plant as “Any power plant generating electricity by using sources other than renewable energy sources mentioned in these Regulations”. As per this Regulation, generating plant using Sulphur as source of heat may not be a renewable source of energy and hence, Sulphuric Acid Plant of M/s. PPL falls under the category of conventional generating plant and is liable to fulfil its RPO.
10. Heard the parties and took their submissions into record. We observe that as per Regulation 2 (h) of OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010 “Obligated entity” means the entity mandated under clause (e) of Sub-section (1) of Section 86 of the Act to fulfill the renewable purchase obligation and identified under clause 3 of these Regulations:

This shall be applicable to:

- i. Distribution licensee (or any entity procuring power on their behalf)
 - ii. Any other person consuming electricity (i) generated from conventional Captive Generating Plant having capacity of 5 MW and above for his own use and/or (ii) procured from conventional generation through open access and third party sale.
11. Further, as per Regulation 2 (j) of OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010 “Renewable energy sources” means renewable sources such as small hydro, wind, solar including its integration with combined cycle, biomass, bio fuel cogeneration, urban or municipal waste, and such other sources as recognized or approved by MNRE;

12. According to above Regulation the process used by the petitioner in its CGP for power generation from sources mentioned by the Petitioner has not been recognised as a renewable source by MNRE. Therefore, the respondent M/s. OREDA has sought clarification from MNRE, Govt. of India to indicate whether Sulphur based plant like that of the petitioner can be included under the purview of RPO. After the clarification from MNRE, if such Sulphur based plants is considered as renewable sources then the petitioner can get the benefits applicable to the renewable energy sources, they submitted.
13. Hon'ble Supreme Court in Civil Appeal No. 4417-34 of 2015 in Para 41 observed that *"the Coal dominates the Thermal Power Generation which results in Green House Gases resulting in global warming. The said facts were brought to our notice that the same would certainly justify the case of the RERC in framing the impugned Regulation to achieve the object of the Act and the Constitution by imposing RE obligation on the captive gencons."*
14. Therefore, the contention of the Petitioner that the Court has only upheld the vires of the RERC Regulation is not correct since the Court has justified the intention of the Act and action of the Commission on framing the Regulation which is to reduce the emission of green house gases responsible for global warming and climate change.
15. The reference to the orders of Hon'ble APTEL is also misplaced. In subsequent judgement in appeal No. 53/2012 dated 02.12.2013 (Lloyds Metal and Energy Ltd. Vrs. Maharashtra Electricity Regulatory Commission & others) it has been 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"
16. While passing of the above judgement, full Bench Hon'ble APTEL has taken into consideration the judgements passed in M/s. Vedanta and M/s. Emami case by Division Benches which are earlier judgements. So the fossil fuel based co-generation

does not absolve any entity from meeting RPO obligation. The reference of these cases by the Petitioner is not relevant to this case.

17. The Tariff Policy of the Ministry of Power, Government of India notified on 28.01.2016 at 6.4 (1) states “Provided that co-generation from sources other than renewable sources shall not be excluded from the applicability of RPOs.” Therefore, the matter is settled.
18. The matter, whether the power produced by exothermic reaction during the production of Sulphuric Acid can be termed as renewable energy has been referred by M/s. OREDA to MNRE, GoI. The Commission is not inclined to classify the same under renewable energy category till the matter is decided by MNRE. Therefore, the Petitioner has to follow the extant law under which it has to comply with RPO Regulation.
19. With this observation the review petition is not allowed and the case is disposed of.

Sd/-
(A. K. Das)
Member

Sd/-
(S. P. Swain)
Member

Sd/-
(S. P. Nanda)
Chairperson