



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P.No.31 of 2016

Dated: 01-07-2017

Present

Sri Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member

Between:

Rain Cements Limited
Rain Center 34, Srinagar Colony
Hyderabad – 500 073.

... Petitioner

A N D

1. A.P. State Load Despatch Centre, Hyderabad
Rep. by Chief Engineer/SLDC, APTRANSCO
Vidyut Soudha, Hyderabad – 500 082
2. Southern Power Distribution Company of AP Limited
Rep. by its Chief General Manager, Comml. & RA
D.No.19-13-65/A, Srinivasapuram, Tiruchanur,
Tirupati – 517503, A.P.

... Respondents

The petition has come up for hearing finally on 09-06-2017 in the presence of Sri T. Vizhay Babu, learned counsel representing Sri Challa Gunaranjan, learned counsel for the petitioner and Sri G.V.Brahmananda Rao, learned counsel representing Sri P. Shiva Rao, learned Standing Counsel for the respondents. After carefully considering the material available on record and after hearing the arguments of both parties, the Commission passed the following:

ORDER

A petition under Section 86 (1) (e) of the Electricity Act, 2003 to exempt the power generated by the petitioner from co-generation process through waste heat received from flue gases from Renewable Power Purchase Obligation under Regulation 1 of 2012 and any other appropriate orders as may be deemed fit.

2. In the petition, the learned counsel simply extracted para 11 from the petition in O.P.No. 7 of 2016 which pertains to Rain CII Carbon (Vizag) Limited. In this para the petitioner stated that the plant is situated at Visakhapatnam against the actual location situated at Racharla Village, Kurnool District. The learned counsel shall take utmost care at least hereafter in drafting the pleadings before the Commission.

3. The petitioner's case is that it is a company engaged in the manufacturing of Cement under the trademark Priya Brand. The petitioner company is having its unit at Kurnool. The petitioner also established a co-generating power plant at its unit at Kurnool with an installed capacity of 6.4 MW. The power produced from the 6.4 MW power plant is totally based on the waste heat recovered from the flue gases generated during the manufacturing process of clinker. Explaining the process of production of electricity, the petitioner explained that there is no combustion of fuel and the energy so produced is clean energy or renewable energy. The pulverized raw materials like lime stone, laterite, clay, iron ore along with fuel like pulverized coal or pet coke is fed into a rotary kiln which is a tube upto 200 metres long and 6 metres in diameter, with a long flame at one end. The raw materials fired inside are maintained at the temperature of 900⁰C and 1450⁰C in the sintering zone of rotary kiln. During the sintering process at 1450⁰C, the intermediate product of cement clinker is formed. After completion of this process, flue gases with temperature of 300⁰C to 350⁰C is vented out through chimney. The heat required for power generation is extracted from these waste flue gases vented through the chimney into the atmosphere. In the Waste Heat Recovery Boiler the heat available in the flue gases is utilized to generate high pressure and low pressure steam. The steam produced in the Waste Heat Recovery Boiler (WHRB) is used for production of 6.4 MW of electricity by the turbine-generator.

4. The entire power produced in the co-generation power plant is consumed for internal purpose and no power is exported to APSPDCL.

5. The Commission made Regulation 1 of 2012 prescribing the Renewable Power Purchase Obligation for obligated entities by purchase of energy from Renewable Energy Sources or purchase of Renewable Energy Certificates at the prescribed percentages with a minimum percentage of the same being from solar energy. The petitioner which installed a co-generating unit as per Section 2 (12) of the Electricity Act, 2003 cannot be considered as an obligated entity, as observed by the Appellate Tribunal for Electricity in Appeal No.57 of 2009. The petitioner which described in detail the sintering process and co-generation process in its power plant claimed that the Appellate Tribunal for Electricity interpreted Section 86 (1) (e) of the Electricity Act, 2003 as making Section 2 (12) of the Electricity Act, 2003 understood as defining co-generation which has to be promoted by the Commission and it was held that fastening of the obligation on the co-generator to procure electricity from Renewable Energy Sources would defeat the object of Section 86 (1) (e) of the Electricity Act, 2003. The findings were applied to all co-generation based captive consumers using any fuel and this view in Century Rayon case was followed in A.No.54 of 2012, A.No.59 of 2012, A.No.125 of 2012 and A.No.53 of 2012. The petitioner referred to the order of this Commission in O.P.No.21 of 2014 and I.A.No.7 of 2014 dated 23-05-2015 and claimed that the contrary demand by the Chief Engineer, SLDC/APTransco by a letter dated 12-07-2013 mandating compliance with minimum purchase of Renewable Energy from 01-04-2012 has to be negated by granting exemption to the petitioner from Renewable Power Purchase Obligation like M/s. Rashtriya Ispat Nigam Limited, which was granted exemption in O.P.No.21 of 2014. Hence, the petition.

6. The 1st respondent filed a counter on behalf of both the respondents, which referred to clause 6.4 of Resolution on National Tariff Policy, 2006 issued by the Ministry of Power, Government of India on 28-01-2016, which provided that co-generation from sources other than renewable sources shall not be excluded from the applicability of RPOs. The provision thus mandates to cover the consumers of co-generation plants based on Non-renewable sources also within the ambit of RPPO. The prior judgments of Appellate Tribunal for Electricity or the order in O.P.No.21 of 2014 of this Commission exempting co-generation based captive consumers from RPPO, irrespective of the nature of fuel of such co-generation plants have no binding effect in the changed legal scenario. The Hon'ble Supreme Court in judgment dated 13-05-2015 in Civil Appeal No.4417 of 2015 upheld the

validity of RPPO regulations issued by Rajasthan Electricity Regulatory Commission which imposed RPPO upon captive power plants and open access consumers also. Later, Karnataka Electricity Regulatory Commission vide an order dated 04-08-2015 has re-imposed RPPO on captive consumers and open access consumers consuming electricity from co-generation plants based on non-renewable sources. As the mandatory directions contained in the Resolution on National Tariff Policy, 2006, prevail over the previous judgments of the Appellate Tribunal for Electricity, the plea of the petitioner seeking exemption cannot be sustained. Hence, the petition be dismissed with costs.

7. The petitioner filed a rejoinder claiming that the National Tariff Policy is only a declaration of a policy and a plan not having the sanctity of law which cannot replace Section 86 (1) (e) of the Electricity Act, 2003. The judgment of Appellate Tribunal for Electricity still holds good not being overruled by any superior court and a non-binding Resolution of National Tariff Policy cannot prevail over the judgment of the Appellate Tribunal for Electricity. The process of generation of energy by the petitioner is co-generation which has to be exempted from RPPO following Nagarjuna Fertilizers and Chemicals and Rashtriya Ispat Nigam Limited (RINL) cases of APTEL (?). The orders of the Karnataka Electricity Regulatory Commission do not bind this Commission nor do lay down any proposition of law and as a renewable source of energy is used by the petitioner, the orders of the Karnataka State Commission covering non-renewable sources of energy do not apply. The judgment of the Hon'ble Supreme Court deals only with imposition of RPPO on captive power plants and open access consumers and not with a co-generating plant using renewable source. Hence, the petitioner desired that the averments of the respondents be negated and appropriate orders be passed.

8. Sri Challa Gunaranjan and Sri Thotakura Vizhay Babu, learned counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondents, assisted by Sri G.V. Brahmananda Rao, learned counsel, were heard.

9. The point for consideration is whether the petitioner is entitled to be exempted from the Renewable Power Purchase Obligation under Regulation 1 of 2012 of this Commission.

10. The Resolution dated 28-01-2016 of the Ministry of Power, Government of India notifying the revised Tariff Policy in exercise of the powers conferred under Section 3 (3) of the Electricity Act, 2003 stated the legal position in this regard. Clause 2.2 of the Resolution stated that the Central Electricity Regulatory Commission and the State Electricity Regulatory Commissions shall be guided by the Tariff Policy in discharging their functions including framing the Regulations. The contents of the Resolution therefore operate as guidance in discharge of the functions of the State Electricity Regulatory Commissions, which cannot be equated to a statutory provision or rule or regulation. While clause 6.4 of the Resolution, of-course provided that co-generation from sources other than renewable sources shall not be excluded from the applicability of RPOs, such a condition has not so far been made a part of the Renewable Power Purchase Obligation (Compliance by purchase of Renewable Energy / Renewable Energy Certificates) Regulations, 2012 (Regulation 1 of 2012) of this Commission, by any amendment subsequent to the Resolution dated 28-01-2016. While Clause 4.0 (e) states promoting generation of electricity from Renewable sources of energy as one of the objects of the Tariff Policy, it is clear from a reading of the Resolution as a whole that the Resolution only contains a policy declaration requiring action by those concerned to achieve the declared objectives of the policy and till such time, it remains a declaration of intent, which will acquire enforceability only on such action being taken by the concerned. The contents of Clause 6.4 therefore will become operative only on the appropriate Commission providing for a suitable regulatory framework as indicated therein.

11. In Century Rayon Vs. Maharashtra Electricity Regulatory Commission and others, Appeal No.57 of 2009, the Appellate Tribunal for Electricity by the judgment dated 26-04-2010 clearly held that the definition of co-generation in Section 2 (12) of the Electricity Act, 2003 did not restrict the said process to mean production of energy from any form of fuel and it may be fossil fuel or may be non-fossil fuel. Section 86 (1) (e) was interpreted to include co-generation irrespective of fuel used and generation from Renewable Sources of Energy. The expression 'co-generation' in Section 86 (1) (e) of the Electricity Act, 2003 does not mean anything different from what is defined in Section 2 (12) of the Electricity Act, 2003 or co-generation from renewable sources only. The Appellate Tribunal for Electricity referred to the National Electricity Policy, National Tariff Policy and National Electricity Plan then in vogue and also Regulations of some State Commissions which categorized co-

generation as renewable energy without reference to the fuel used for such co-generation. The conclusions of the Appellate Tribunal for Electricity therefore were with reference to two specific provisions of the Electricity Act, 2003 i.e., Section 86 (1) (e) and Section 2 (12) which continued to be the same even after the Resolution dated 28-01-2016. Regulation 1 of 2012 governing the RPPO defined 'Renewable energy sources' in clause 2 (m) as meaning renewable sources such as co-generation (from renewable sources of energy like bagasse) etc., and also such other sources as recognized or approved by the Ministry of New and Renewable Energy. Such sources therefore do not cover co-generation from sources other than renewable energy sources and as already stated Regulation 1 of 2012 has not been amended making the applicability of RPPOs govern co-generation from sources other than renewable energy sources also. In view of the interpretation by the Appellate Tribunal for Electricity that Section 86 (1) (e) read with Section 2 (12) of the Electricity Act, 2003 mandates the State Commission to promote both the categories: one is co-generation as defined in Section 2 (12) irrespective of the fuel used and another is generation of electricity from the renewable sources of energy, a co-generator irrespective of fuel used by it is entitled to be promoted under Section 86 (1) (e) and the fastening of the obligation on the co-generator to procure electricity from renewable energy sources would defeat the object of Section 86 (1) (e). Therefore, unless the direction in the Resolution dated 28-01-2016 not to exclude co-generation from sources other than renewable energy sources from the applicability of RPPOs is incorporated in Regulation 1 of 2012 or made part of the mandate of Section 86 (1) (e) read with Section 2 (12) of the Electricity Act, 2003, the interpretation of the Appellate Tribunal for Electricity in Appeal No.57 of 2009 cannot be considered to have been nullified.

12. The Hon'ble Supreme Court in Civil Appeal No.4417 of 2015 and batch decided in the judgment dated 13-05-2015 that renewable energy obligation imposed upon captive power plants and open access consumers by the Rajasthan Electricity Regulatory Commission's Regulations cannot be stated to be restrictive or violative of the fundamental rights. However, the question in the present case is not the legality or constitutionality of the imposition of renewable power purchase obligation upon captive power plants and open access consumers or any other obligated entities including those involved in co-generation. The issue involved herein is whether co-generation irrespective of the nature of the fuel used for the

same is liable to be protected with reference to Section 86 (1) (e) of the Electricity Act, 2003 and whether such a co-generation will not make the generating unit as obligated entity within the scope of Regulation 1 of 2012. Similarly, the order of Karnataka Electricity Regulatory Commission dated 04-08-2015 is with reference to a Regulation which is applicable to captive co-generation plants using fuel other than a renewable source for power generation and that Commission, following the view of the Appellate Tribunal for Electricity in Appeal No.57 of 2009 and subsequent orders, decided not to impose renewable purchase obligation on any person consuming electricity generated from co-generation power plants using fuel other than renewable source. From a reading of the order it is as though the decision created an exemption for such persons as the relevant Regulations are applicable to them and it was that exemption that was withdrawn by the order dated 04-08-2015 with reference to the orders of the Hon'ble Supreme Court of India in Civil Appeal No.4417 of 2015 and batch. As stated above, the decision of the Hon'ble Supreme Court of India was with reference to the validity of the Rajasthan Electricity Regulatory Commission's Regulation imposing a renewable energy obligation on captive power plants and open access consumers but not about the persons like the present petitioner.

13. In the order dated 23-05-2015 in O.P.No. 21 of 2014 (I.A.No. 7 of 2014) and the order dated 06-08-2016 in O.P.No. 7 of 2016, the Commission was dealing with Visakhapatnam Steel Plant and Rain CII Carbon (Vizag) Limited respectively, which claimed to be not obligated entities, as the captive power plant is a co-generation unit as per Section 2 (12) of the Electricity Act, 2003. Taking note of the consistent view of the Appellate Tribunal for Electricity and following the same as a matter of judicial discipline and propriety, this Commission concluded that co-generation being promotable irrespective of the nature of the fuel used, the petitioner therein has to be exempted from the RPPPO obligation, if necessary, even in relaxation of Regulation 1 of 2012. The principles are squarely applicable to the facts of the present case, notwithstanding the declaration of the policy by the Resolution of the Ministry of Power, Government of India dated 28-01-2016 or other factors relied on by the respondents as the statutory provisions, as interpreted by the Appellate Tribunal for Electricity and Regulation 1 of 2012 continued to remain the same and to be of the same effect. (Regulation 1 of 2012 is now replaced by Regulation No. 1 of 2017 with effect from 01-04-2017. As the issue herein relates to a period when

Regulation 1 of 2012 was inforce, the petition is decided with reference to the said regulation only). The petition has to therefore succeed.

14. In the result, the petition is allowed and the petitioner shall stand exempted from Renewable Power Purchase Obligation under Regulation 1 of 2012 of this Commission as prayed for. The parties shall bear their own costs.

This order is corrected and signed on this the 1st day of July, 2017.

Sd/-
Sri P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman