

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

Present: Shri S.P.Nanda, Chairperson
Shri K.C. Badu, Member
Shri B.K. Misra, Member

Sou-Motu Case No. 111 of 2011

In the matter of: Suo-motu proceeding on fulfilling the Renewable Purchase Obligation (RPO) under the OERC (Renewable and Co-generation Purchase Obligation and its compliance) Regulations, 2010 by the Obligated Entity.

ORDER

Hearing date: 26.12.2011

Order date: 13 .02.2012

Before going to the present case, the commission feels it proper to go to the background of the present suo-motu Case No. 111 of 2011.

M/s Bhusan Power & Steel Limited had filed a petition registered by the Commission as Case No. 98 of 2011, with the following prayers:

- (i) Waive/relax the co-generation Obligation for the year 2011-12 as it has generated cogeneration energy from its CPP which is more than the specified figure in pursuant to the Regulation;
- (ii) waive/relax the solar and non-solar Renewable Purchase Obligation for the energy consumed by M/S BSPL towards captive use generated from its cogeneration based CPP;
- (iii) Pass such order/orders as this Hon'ble Commission may deem fit and proper.

2 In order to have a comprehensive hearing and taking decision on the issues involved in the present case and also to hear all other "obligated entity" of the State, i.e. GRIDCO, all the industries in Odisha having CPPs, open access consumers, the State Agency OREDA, and the Department of Energy, Govt. of

Odisha, and to review the progress so far made by the “obligated entities” to fulfill the renewable purchase obligation as per OERC (Renewable and Co-generated Purchase Obligation and its Compliance) Regulation, 2010, the Commission decided to issue public notice in the Case No. 98 of 2011 inviting views/suggestion/objection from various person, institutions, organizations and industries. Accordingly the public notice was issued indicating therein that hearing would be conducted on 26.12.2011.

3. In response to the said public notice, the Commission received views, suggestions/objections from GRIDCO; OREDA; OPTCL; SLDC; EIC-cum-PCEI, Government of Odisha,; Department of Energy ,Government of Odisha; M/s.Vedant Aluminum Ltd., M/s.Emami Paper Mills Ltd.’ M/s. CII; CCPPO,;M/s NALCO; M/s.OCL India Ltd.; M/s. Power Tech Consultants and Shri R.P.Mohapatra.

During course of hearing on 26.12. 2011, the learned Counsel for M/s Bhusan Power and Steel Ltd. prayed the Commission to allow the petitioner to withdraw the Case No.98 of 2011 filed by him as OREDA has already issued letter dated 20.12.2011 communicating the clarification issued by this Commission vide its Letter 23.11.2011 regarding Captive Generation Plants having waste Heat Recovery Boilers (WHRB) to furnish the steam flow data from its WHRB Conventional Boilers separately and annual generation of CPP at the end of each financial year to GRIDCO for certifying as to whether M/s Bhusan Power & Steel Ltd. is coming under Co-generation plant or not.

The counsel for M/s Bhusan Power & Steel further submitted that when the Commission has issued “Public Notice” to hear the parties in the nature of public hearing and pass a common order, in that case the written submission that he has made pursuance to the “Public Notice” issued by the Commission may be taken into consideration treating the said submission having been made in pursuance to the public notice issued by the Commission.

4. As the Commission had received suggestions/objections/views from the general public including CPPs, Co-generating Plants/Obligated Entities etc. to take

common decision on the Renewable Purchase Obligation Regulation it directed the Registry of the Commission to register a case for Suo-motu proceeding on the above matter in which the submissions /views of the public received pursuance to the public notice shall be taken into consideration. Accordingly, the Suo-motu proceeding has been initiated and it is Registered as Suo-motu Case No. 111/2011 (Suo-motu proceeding on RPO Regulations, 2010).

5. In the above backdrop, the present case is considered by the Commission.
6. Shri R P Mohapatra in his written submission, stated, that the industries owning Captive Co-generation Plants meeting the requirement of Sec. 2 (12) of the Electricity Act, 2003, should not have any obligation to procure renewable energy (Solar/non-solar) in view of the Judgment dated 26.04.2010 of the Hon'ble Appellate Tribunal for Electricity passed in Appeal No. 57 of 2009, wherein the Tribunal have held as follows;

“Para-45 (III). The fastening of the obligation of the Co-generation to procure electricity from renewal energy procures would defeat the object of Sec. 86 (1) (e)”

In his submission, Shri Mohapatra, suggested for deletion of Regulation 3 of the OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010.

7. M/s Emami Paper Mills, submitted that a CPP which uses Co-generation, should have no further obligation towards RPO u/S 86 (1) (e) of the Electricity Act, 2003 as it would defeat the intention of the Regulation and the objective of the Electricity Act, 2003. He submitted that, the CPP of the petitioner, is not a “Conventional Captive Generating Plant but is a Co-generation plant and meeting 100% of its requirement of power against 3.7% stipulated by the Hon'ble Commission towards procurement from “Co-generation”. He further submitted that, the CPP of the petitioner is connected to the GRID but is not supplying any power to GRIDCO. Since GRIDCO has been designated as the authority to certify the Co-generation status of CPP supplying their surplus power to GRIDCO, the Commission may also direct GRIDCO to certify the co-generation status of the CPPs which are not supplying power/synchronized with the GRID.

8. M/s Bhusan Power & Steel Ltd. submitted that, the Hon'ble Appellate Tribunal for Electricity has passed order dated 26.4.2010 in Appeal No. 57 of 2009 wherein it has been held that co-generation is not confined to generation from Renewable Energy Source alone but also include generation from fossil fuel. Hence, in view of the Judgment of the Hon'ble Appellate Tribunal the Captive Generating Plant of M/S BSPL is a co-generating plant. In case of any CPP, Auxiliary consumption is associated with the CPP which primarily is required for the power generation The Auxiliary consumption in the CPP should not be considered as part of self consumption by the industry owning the CPP. Therefore, there should not be any renewable & co-generation purchase obligation on Auxiliary consumption of any CPP. .
9. NALCO submitted that as the Generating units under Section 7 of the Electricity Act, 2003 are exempted from obtaining license, they are not covered under the ambit of OERC (Renewable and Co-generated Purchase Obligation and its Compliance) Regulation, 2010. Accordingly the RPO obligation for the Auxiliary power consumed by CPP and SPP are to be exempted from RPO (Solar, Non-Solar and Co-generation) obligation. He further submitted that, NALCO is not required to purchase RECs in respect of its Auxiliary power consumed in CPP and SPP being part of generating unit and it is also not required to purchase REC in respect of the Co-generation power consumed by NALCO
10. OCL India Limited, Rajgangpur submitted that it is an obligated entity as per OERC (Renewable and Co-generated Purchase Obligation and its Compliance) Regulation, 2010. It has Captive DG set of 25 MVA (5 nos. 5 MVA each) and 1 nos. 27 MW Captive Thermal Power Plant. He submitted that in case of non-availability of REC, obligated entity should be exempted from provisions of Sec. 142 of the Electricity Act, 2003.
11. M/s Vedanta Aluminum Ltd. (VAL) submitted that captive plants cannot be tinkered with or diluted by invoking any other section or clause of the Electricity Act, much less any regulation by the Hon'ble Commission. Since Captive plants cannot be regulated under the Act except for selling Electricity to DISCOMS, there is no question of imposing any RE obligation or any surcharge in pursuance

- of such obligation. When “construction”, “maintenance”, or operation of a captive plant cannot be regulated, it is obvious that no regulatory obligation can be imposed upon CPPs nor any direction be issued nor any surcharge can be levied for ignoring such directions.
12. M/S VAL submitted that under the Electricity Act 2003 de-licensing the generation including the captive plants is one of the major steps taken in the power sector reform. The objective of the legislation is to encourage growth of generating plants, so that without any capital investment by the Govt., Generation can be boosted substantially. When the parliament has de-licensed the Captive plants, the Commission should not regulate them through back door.
 13. M/S VAL further submitted that the authority of the Hon’ble Commission emanates from its licensing power. The Commission may promote RE in variety of ways but it has to confine itself to its jurisdiction. It can give direction only to the licensees and directions to licensees alone are binding. Direction of the Commission that captive plants and open access consumers should compulsorily purchase renewable energy (RE) is palpably beyond the jurisdiction of the Commission.
 14. M/s VAL has further submitted that by forcing a mandatory purchase of RE power, it would affect the generation of CPP. If the CPP is self sufficient to supply the captive consumption of the sister Industrial Units; the generation of CPP would have to backed down to meet the RPO obligation of the Industrial Unit. The Industrial Unit shall have to reduce their drawl of electricity through their captive plant with increase drawl from the GRID under open access for fulfilling their obligation for the renewable energy.
 15. M/s VAL submitted that, while promotion of non-conventional energy cannot be questioned and the DISCOMS as licensees have been rightly directed by the Hon’ble Commission to purchase the prescribed percentage of RE. Thus, the additional cost of purchase of power from the non-conventional energy is reflected in the tariff fixed by the Hon’ble Commission which the licensees charges from the consumers. By fixing such RE obligations upon the licensees, indirectly all the consumers including the CPPs and open access consumers (who

are drawing power from the Grid also) are made to contribute their proportionate share for promoting non-conventional share for promoting non- conventional energy in proportion to their consumption from the GRID.

16. Shri Sanjeev Das on behalf of Confederation of Captive Power Plants, Odisha, submitted that Sec-9 of the Electricity Act, 2003 enables a person to construct, maintain and operate a CPP without any restriction. This OERC (Renewable and Co-generate Purchase Obligation and its Compliance) Regulation, 2010 made by the Commission is ultra-vires and is inconsistent with Sec. 9 of the Act. To prescribe mandatory procurement of minimum percentage of renewable energy is beyond power and Jurisdiction of the Commission. The imposition of RE surcharge is in the nature of tax or cess or penalty and the Regulation imposing the same is contrary to the provision of the Act. The non-conventional energy being non-firm power is incapable of being sold to any industry under agreement, except to Distribution licensee. He submitted that keeping in view the provision of the Electricity Act, 2003, National Electricity Policy and Tariff Policy no other Regulatory Commission has imposed such obligation on CPPs as has been imposed under the OERC (Renewable and Co-generated Purchase Obligation and its Compliance) Regulation, 2010.
17. Heard the parties
18. During hearing and in the written submission the objectors/respondents such as M/s. Vedanta Aluminum Ltd.(VAL), CCPPO & CII etc. have in effect challenged certain provisions of the OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010 (hereinafter called the RCPO Regulation) imposing RCPO Obligation on the CPPs. They have submitted that the OERC Regulations dt.30th September, 2010 on RPO is contrary to the provisions as stipulated in the Electricity Act, 2003 and shall not be applicable to the CPPs, since the generation of electricity is a de-licensed activity. Hence, CPPs should be exempted from purchase obligations under the aforesaid Regulation. Further, CPPs generating electricity cannot be artificially equated with the common consumers of electricity.

19. Section 61(h) of the Electricity Act, 2003 (here in after Act) provides that the Commission while specifying the terms and conditions for determination of tariff shall be guided by the principle of promotion of co-generation and generation of electricity from renewable source of energy. Section 86 (1) (e) of the Act provides that, the State Commission should promote co-generation and generation of electricity from renewable source 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 source, a percentage of the total consumption of electricity in the area of distribution licensee. Clause 5.2.20 of the National Electricity Policy read with section 3 and 4 of the Act also mandates that efforts should be made to encourage private sector participation through suitable promotional measures in order to increase the over all share of non-conventional energy so that there will be an electricity mix.
20. In order to comply with the intention of the legislature and fulfill the mandate of the Act and the National Electricity Policy made there under, the Commission has made the OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010 (hereinafter called the RCPO Regulation). Before framing the RCPO Regulation, the Commission had made pre-publication of the RCPO Regulation under Section 181(3) of the Act inviting comments thereon. After obtaining views from all stake holders and conducting public hearing in Case No. 59 of 2010, the Commission in its order dated 30.9.2010 finalised the RCPO Regulation which was published in the Extraordinary Odisha Gazette on 14.12. 2010. The RCPO Regulation as provided under section 182 of the Act has also been laid in the Odisha Legislative Assembly. In view of the above position the RCPO Regulation having been enacted, published in the gazette and laid under section 182 of the Act in the State Legislature has attained its finality and also binding on every one. Therefore, the reopening of issues with respect to various provisions of the RCPO Regulation cannot be entertained as it amounts to re-opening of the issues which have already been decided by the Commission while conducting the Public hearing in Case No 59 of 2010 before framing the RCPO Regulation. . The Commission therefore rejects the submissions made by

different firm(s)/ person(s) as regards to framing of RCPO Regulations. For removal of doubt, Commission reiterates that the RCPO Regulation is applicable to industries of the State , for its consumption of power sources from its fossil fuel based captive plant and all open access consumers. Industries and open access consumers consuming electricity are the obligated entity and not any generators generating electricity. Therefore the contention of some of the objectors (e.g. M/S VAL) that CPP should be exempted from RCPO obligation has no relevance. The RCPO obligation is applicable to the Industrial Units consuming power from fossil fuel based captive plants. Accordingly, RCPO obligation is not applicable to auxiliary onsumption of any generating station including CPP.

21. With respect to the question of certification of Co-generation status of any generator, without getting into the merits of each individual case, the Commission holds that the directions issued in Case No.6/2009 in the matter of sale of surplus power from CPP, designating GRIDCO as the certifying agency for co-generation status, is also extended to the present cases irrespective of whether GRIDCO purchases power from the generating plants or not. Hence, GRIDCO is to confirm the status of Co-generation plants taking into consideration the eligibility criteria as mentioned in the Government of India, Ministry of Power Resolution dated.6th November, 1996. Therefore the plants are required to furnish the required data/information to GRIDCO.
22. The objectors draw our attention to Para 45(III) of the Judgment dated 26.4.2010 of Hon'ble Appellate Tribunal for Electricity passed in of Appeal No.57 of 2009 which basically relates to the issue of Co-generation Purchase Obligation vis-a-vis Renewable Purchase Obligation. We have gone through the above judgment of the Hon'ble Appellate Tribunal. The observations of Hon'ble ATE in appeal No.57 of 2009 has been made in the context of Maharashtra Electricity Regulatory Commission Renewable Purchase Obligation Regulations. The Maharashtra Electricity Regulatory Commission (MERC) has made Regulation towards Purchase Obligation from Renewable Sources alone whereas this Commission has framed Regulation both for "Renewable" and "Co-generation" purchase

- obligation as has been mandated under the Act and the National Electricity Policy.
23. Regulations 3 of RCPO Regulations, clearly specifies the minimum Purchase Obligation from (i) Renewable Energy Sources (Solar and Non-solar) and (ii) Co-generation Sources separately. Thus, the RCPO Regulation has been framed as per the legislative mandate under Section 86 (1) (e) of the Act, by promoting both the above sources simultaneously, unlike in case of Maharashtra, where fastening of liability on Renewable was promoted in preference to that Co-generation, as indicated in Para 45(IV) of the Hon'ble ATE Order in Appeal No57 of 2009.
24. Further, in order to remove difficulties likely to be faced by Obligated Entities, the Commission has clarified that the Obligation in respect of Co-generation can be met from both solar and non-solar sources in order to achieve the total purchase requirement of the financial year but the solar & non-solar Purchase Obligations has to be met mandatorily by the Obligated Entities. The Commission further wants to make it abundantly clear that consuming electricity only from Co-generation sources shall not relieve any obligated entity from its responsibility of meeting Renewable obligations of solar and non-solar renewable energy certificates(RECs) .
25. Accordingly the case is disposed of.

Sd/-
(B.K. Misra)
Member

Sd/-
(K.C. Badu)
Member

Sd/-
(S.P.Nanda)
Chairperson