

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,  
BENGALURU**

**Dated : 25<sup>th</sup> August, 2016**

- |                                 |          |
|---------------------------------|----------|
| 1. Shri M.K Shankaralinge Gowda | Chairman |
| 2. Shri H.D. Arun Kumar         | Member   |
| 3. Shri D.B. Manival Raju       | Member   |

**RP No.4/2015**

**BETWEEN :**

JSW Steel Limited,  
Vijayanagar Works  
P.O. Vidyanagar,  
Torangallu, Sandur Taluk,  
Ballari – 583 275 ..

**PETITIONER**

*[Represented by Shri Adarsh Gangal, Advocate]*

**RP No.5/2015**

**BETWEEN :**

JSW Steel Limited,  
Vijayanagar Works  
P.O. Vidyanagar,  
Torangallu, Sandur Taluk,  
Ballari – 583 275 ..

**PETITIONER**

*[Represented by Shri Adarsh Gangal, Advocate]*

**RP No.2/2016**

**BETWEEN :**

Ultra Tech Cement Limited,  
Adityanagar,  
Malkhed Road -585 292,  
Kalaburagi . ..

**PETITIONER**

*[Represented by Shri Shailendra Kumar Gupta  
Executive President of the Company]*

**AND :**

Nil ..

**RESPONDENT**

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**COMMON ORDER**

- 1) The above Review Petitions involve common questions of law and facts. Therefore, this common Order is being passed in these cases.
  
- 2) In substance, in these Review Petitions, the Petitioners have prayed for:
  - (a) Revoking the Order dated 4.8.2015 passed by this Commission, wherein this Commission recalled, with immediate effect, the decision taken in its meeting held on 8.5.2013, not to impose the Renewable Energy Purchase Obligation (RPO) on captive consumers or open access consumers consuming electricity obtained from Co-generation Plants, using sources other than renewable sources for generation of electricity; and,
  
  - (b) In place of the said Order dated 4.8.2015, to pass an appropriate Order allowing the set-off of the generated electricity from the Co-generation Plants against the RPO of the obligated entity specified in the relevant Regulations of this Commission.
  
- 3) The facts leading to the decision taken by this Commission, in its meeting held on 8.5.2013, not to impose the Renewable Purchase Obligation (RPO) on captive consumers or open access consumers consuming electricity obtained from Co-generation Plants using sources other than renewable sources for generation of electricity and the subsequent

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decision dated 4.8.2015 recalling the earlier decision dated 8.5.2013, may be stated as follows:

- (a) In respect of the grid-connected captive users obtaining electricity from captive generating plants using other than renewable sources and having a total capacity exceeding 5 Mega Watts (MW), the Karnataka Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations, 2011 (hereinafter referred to as the 'RE Regulations, 2011') would impose the RPO at 5% of their consumption of energy from the Renewable Sources of Energy.
- (b) The Co-generation Plant is a species of Captive Generating Plants. Therefore, a Co-generation Plant, using fuel other than renewable sources, was liable to meet with the RPO as specified in the RE Regulations, 2011. In the meanwhile, the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.57/2009, in the case of *Century Rayon – Vs- Maharashtra Electricity Regulatory Commission and others*, at Paragraph-45 of its Order dated 26.4.2010 has held thus:

**“45. Summary of our conclusions is given below:**

- (I) *The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration from renewable sources alone. The meaning of the term 'co-generation' has to be understood as defined in definition Section 2(12) of the Act.*
- (II) *As per Section 86(1)(e), there are two categories of generators, namely (1) co-generators (2) Generators*

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*of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.*

- (III) *The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86(1)(e).*
- (IV) *The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative intent.*
- (V) *Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.*
- (VI) *The intention of the legislature is to clearly promote cogeneration in the industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone."*

- (c) The above Order was challenged by the Gujarat Electricity Regulatory Commission before the Hon'ble ATE in Review Petition, RP No.1311/2012. The Hon'ble ATE had dismissed the said Review Petition vide its Order dated 17.4.2013. Further, the Hon'ble ATE passed an Order in Appeal No.125/2012 on 10.4.2013 in the case of *M/s.Hindalco Industries Limited,*

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re-affirming its earlier Order dated 26.4.2010 passed in Appeal No.57/2009, exempting the Co-generation Plants from the RPO. This Commission, after deliberating upon the above Orders of the Hon'ble ATE, in its 226<sup>th</sup> meeting held on 8.5.2013, decided not to impose the RPO on any person consuming electricity generated from Co-generation Plants using fuel other than the renewable sources.

- (d) Subsequently, in Appeal No.53/2012, in the case of *Lloyds Metal and Energy Limited –Vs- Maharashtra Electricity Regulatory Commission and others*, the Full Bench of the Hon'ble ATE examined the findings arrived at in the *Century Rayon* case (Appeal No.57/2009), and held at Paragraph-39 of its Order dated 2.12.2013 thus:

**“39. Summary of findings:**

*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 Electricity Act, 2003. Such purchase obligation can be fastened only from electricity generated from renewable sources of energy. However, the State Commission can promote fossil fuel based co-generation by other measures such as facilitating sale of surplus electricity available at such co-generation plants in the interest of promoting energy efficiency and grid security, etc.”*

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- (e) In Special Civil Application No.171/2011, in the case of *M/s. Hindalco Industries Limited* and other connected matters, one of the issues considered by the Hon'ble High Court of Gujarat at Ahmedabad is, whether for fulfilling the RPO, the electricity generated or co-generated from renewable sources, should alone be considered. After considering the rival contentions on this issue, the Hon'ble High Court of Gujarat, by its Order dated 2.3.2015, approved the decision of the Full Bench of the Hon'ble ATE, in the case of *Lloyds Metal and Energy Limited* (Appeal No.53/2012) on this issue, and has further observed that the Judgment dated 26.4.2010 in the *Century Rayon* case (Appeal No.57/2009) and other Judgments of the Hon'ble ATE, following the decision in the *Century Rayon* case, have no significance and force of law, in view of the Full Bench decision of the Hon'ble ATE in the *Lloyds Metal and Energy Limited* case on the said issue.
- (f) The question of validity of the Regulations of the Rajasthan's Electricity Regulatory Commission, imposing the RPO on captive consumers obtaining power from Captive Power Plants using fossil fuel, arose before the Hon'ble Supreme Court in Civil Appeal No.4417/2015 in the case of *Hindustan Zinc Ltd. –Vs- Rajasthan Electricity Regulatory Commission*. The Hon'ble Supreme Court has passed its orders on 3.5.2015 upholding the Regulations of the Rajasthan Electricity Regulatory Commission, imposing the RPO on captive consumers and open access consumers consuming electricity obtained from Captive Generation Plants using fuel other than renewable sources.

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- (g) On consideration of the decision of the Full bench of the Hon'ble ATE in *Lloyds Metal and Energy Limited* case in Appeal No.53/2012, the Judgment of the Hon'ble High Court of Gujarat in the *Hindalco Industries Limited* case and the Judgment of the Hon'ble Supreme Court in the *Hindustan Zinc Limited* case, this Commission, in its 321<sup>st</sup> meeting held on 4.8.2015, decided to re-introduce the imposition of the RPO for Captive Cogeneration Plants using fossil fuels, by issuing the necessary orders in the matter. Thereafter, on the same day, i.e., on 4.8.2015, the Commission issued the Order in question. The operative portion of the said Order reads thus :

*"In the light of the order dated 13.05.2015 of the Hon'ble Supreme Court in the Civil Appeal No.4417/2015, the Commission hereby decides to recall with immediate effect its decision taken in the Commission's meeting held on 08.05.2013, not to impose Renewable Purchase Obligation (RPO) on captive consumers or open access consumers consuming electricity obtained from cogeneration plants using sources other than renewable sources for generation of electricity."*

- 4) The Petitioners in these Review Petitions have prayed for revoking the said Order dated 4.8.2015 passed by this Commission, and in its place, to pass an appropriate Order allowing the set-off of the generated electricity from the Co-generation Plants, irrespective of the fuel used, against the RPO of the obligated entities specified in the relevant Regulations of this Commission.

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- 5) We have heard the learned senior counsel for the Petitioners in RP No.4/2015 and RP No.5/2015, and Shri Shailendra Kumar Gupta, Executive President of the Petitioner-Company in RP No.2/2016.
  
- 6) Using fossil fuel, each of the Petitioners in these Review Petitions has set-up Co-generation Plant(s), apart from setting up Captive Power Plants for their captive use. The learned senior counsel for the Petitioners in RP No.4/2015 and RP No.5/2015 has raised the following contentions in support of the Petitioners' prayers referred to above :
  - (a) That the principles laid down in the *Century Rayon* case have not come up for consideration before the Hon'ble Supreme Court in the *Hindustan Zinc Limited* case. Therefore, co-generation, irrespective of the nature of fuel used, is to be treated on par with the renewable sources of energy and it should be allowed to be set-off against the RPO.
  
  - (b) That the definition of 'Renewable Sources of Energy' stated in Regulation 2(1)(i) of the RE Regulations, 2011 issued by this Commission is deemed to include co-generation also, irrespective of its source of fuel, because the specific types of non-conventional renewable energy mentioned in the said definition, viz., mini hydel, micro hydel, wind, solar, biomass, urban/municipal waste, are only illustrative in nature and would not



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exclude what is covered by the term, 'non-conventional and renewable electricity generating source'.

- (c) Further, it is submitted that the Co-generation Plants cannot be fastened with the RPO, as held in the *Century Rayon* case.

The above contentions have been reiterated by the Petitioner in RP No.2/2016.

- 7) After considering the material on record and the submissions of the parties, our findings, on the above contentions of the Petitioners, are as follows :

- 8) Contention No.(1) :

- (a) The Petitioners have relied upon the *Century Rayon* case and also the *Imami Paper Mills Limited* case (Appeal No.54/2012 decided on 30.1.2013), in which the principles laid down in the *Century Rayon* case have been followed. In the *Century Rayon* case, the question that arose for consideration was, whether a person consuming energy produced from the Co-generation, using fuel other than the Renewable Source of Energy, was liable to comply with the RPO. The Hon'ble ATE held that, such person was not liable to comply with the RPO. The summary of the reasons stated by the Hon'ble ATE in the said case have already been extracted above.

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- (b) In the *Imami Paper Mills Limited* case, the same question arose for consideration by the Hon'ble ATE. The Hon'ble ATE reiterated the principles stated in the *Century Rayon* case.
- (c) In their pleadings, the Petitioners have not referred to the decision of the Full Bench of the Hon'ble ATE in the *Lloyds Metal and Energy Limited* case. In that case, the Appellant, viz., Lloyds Metal and Energy Limited, was a Steel Manufacturing Company, which had commissioned a 13 MW capacity Co-generation Plant based on industrial waste heat generated by the Sponge Iron Plant of the Appellant with the use of fossil fuel (coal). The Appellant had filed a Petition before the State Commission for determination of tariff for supply of electricity from its fossil fuel based Cogeneration Plant to the Distribution Licensees in the State of Maharashtra and for fixing of the purchase obligation of the Distribution Licensees for the electricity produced from the fossil fuel based Cogeneration Plants under Section 86(1)(e) of the Electricity Act, 2003 (hereinafter referred to as the 'Act'). The State Commission, vide its Order dated 29.12.2011, refused to grant the reliefs sought for by the Appellant. After hearing the rival contentions, the Full Bench of the Hon'ble ATE concluded that, a Distribution Licensee cannot be fastened with the obligation to purchase a percentage of its consumption from the fossil fuel based co-generation under Section 86(1)(e) of the Act. Further, it held that, such purchase obligation can only be fastened from the electricity generated from Renewable Sources of Energy. Hence,

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the Appeal was dismissed by the Hon'ble ATE. Therefore, the effect of the Full Bench decision of the Hon'ble ATE is that, the energy generated from the Co-generation Plants using fossil fuel cannot be treated on par with the Renewable Sources of Energy to comply with the RPO.

(d) It may be true that, in the *Hindustan Zinc* case, the questions concerning the Co-generation Plants, as put forth in the *Century Rayon* case or in the *Lloyds Metal and Energy Limited* case, have not come up for decision. In the *Hindalco Industries Limited* case of the Hon'ble High Court of Gujarat, one of the questions was, whether for fulfilling the RPO, the electricity generated or cogenerated from the renewable sources should alone be considered. In this decision, approving the reasons stated in the Full Bench decision of the Hon'ble ATE in the *Lloyds Metal and Energy Limited* case, the Hon'ble High Court of Gujarat answered the said question in the affirmative and also further observed that the decision in the *Century Rayon* case on this controversy has no force of law.

(e) For the above reasons, the first contention raised by the Petitioners, relying only on the *Century Rayon* case, is not tenable.

9) Contention No.(2) :

(a) The definition of 'Renewable Sources of Energy' stated in Regulation 2(1)(e) of the RE Regulations, 2011 issued by this Commission reads thus:

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*“‘Renewable sources of energy’ means non-conventional, renewable electricity generating sources such as min-hydel, micro-hydel, wind, solar, biomass (including bagasse based co-generation), urban/municipal waste, or such other sources as approved by the MNRE, Government of India, or Government of Karnataka”*

- (b) In support of their second contention, the Petitioners in RP No.4/2015 and RP No.5/2015 have stated thus :

*“The Petitioner submits that the above definition of the term, ‘Renewable Sources of Energy’ in the Regulation includes all non-conventional and renewable electricity generating sources including co-generation of the nature undertaken by the Petitioner. The primary clause in the opening part states, ‘means non-conventional Renewable electricity generating sources’. The co-generation is definitely Non-Conventional, Renewable Generating Source within the meaning of the above clause. The specific types of Non-Conventional Renewable Electricity mentioned in the above definition, namely, Mini-Hydel, Micro-Hydel, Wind, Solar, Biomass, Urban/Municipal Waste etc. are illustrative in nature and would not exclude what is covered by the term ‘Non-Conventional and Renewable Electricity Generating Sources’. ...”*

- (c) In RP No.2/2016, a similar contention is raised by the Petitioner on the ground that, co-generation is environmental-friendly, therefore co-generation should be treated as a ‘Renewable Source of Energy’.

- (d) In our view, the contention of the learned senior counsel for the Petitioners, that co-generation falls within the ambit of the definition ‘Renewable Sources of Energy’ cannot be accepted. The contention

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that, specific types of non-conventional Renewable sources of Energy mentioned in the definition are only illustrative in nature and would not exclude what could be covered by the term 'non-conventional and renewable sources of energy', is not acceptable. That is so because, the definition of 'Renewable Sources of Energy' narrates in specific terms, the sources of renewable energy, such as mini-hydel, micro-hydel, wind, solar, biomass (including bagasse-based cogeneration), urban/municipal waste or such other sources as approved by the MNRE, Government of India, or Government of Karnataka, and these enumerations are exhaustive and not illustrative in nature. If the enumeration is not followed by any generic word pertaining to that clause, the same should be limited to only those Renewable Sources of Energy that are specifically mentioned therein. Therefore, we are of the considered view that, the co-generation in general cannot be considered to be falling under the definition of 'Renewable Sources of Energy'. Hence, the second contention of the Petitioners cannot be accepted.

10) Contention No.(3) :

(a) The learned senior counsel for the Petitioners urged that the question, whether co-generation from sources other than the Renewable Sources of Energy should be excluded from the applicability of the RPO, had directly arisen in the *Century Rayon* case and that the decision of the Hon'ble Supreme Court in the *Hindustan Zinc Limited* case does not, in

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any way, support recalling of the decision of this Commission, taken in the meeting held on 8.5.2013, not to impose the RPO on the captive consumers or the open access consumers consuming electricity obtained from Co-generation Plants using sources other than the Renewable Sources of Energy. As already noted, in the *Hindustan Zinc Limited* case, the questions raised in the *Century Rayon* case or in the *Lloyds Metal and Energy Limited* case had not come up for consideration. However, the decision to recall this Commission's decision dated 8.5.2013 was taken up, upon consideration of the Full Bench decision of the Hon'ble ATE in the *Lloyds Metal and Energy Limited* case and also the decision of the Hon'ble High Court of Gujarat in the *Hindalco Industries Limited* case, apart from referring to the decision in the *Hindustan Zinc Limited* case. The Full Bench decision of the Hon'ble ATE in the *Lloyds Metal and Energy Limited* case and also the above-mentioned decision of the Hon'ble High Court of Gujarat, would certainly justify recalling of the decision taken in this Commission's meeting held on 8.5.2013. It is true that, it would have been appropriate to refer to the Full Bench decision of the Hon'ble ATE and the decision of the Hon'ble High Court of Gujarat, in support of the decision to recall this Commission's earlier decision taken in the meeting held on 8.5.2013 and that the Order dated 4.8.2015 in question of this Commission requires modification to that effect.

- (b) We are of the considered view that, the inferences that emerge out of the Full Bench decision of the Hon'ble ATE are that: (1) the co-generation

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from fossil fuel cannot be treated on par with the Renewable Sources of Energy for complying with the RPO; (2) the State Commission can promote fossil fuel based co-generation by other measures, such as facilitating sale of surplus electricity available at such Co-generation Plants and Grid security, etc.; and (3) as a promotional measure, the State Commission may even exclude the fossil fuel-based co-generation from the applicability of the RPO.

- (c) This Commission had not excluded the fossil fuel-based co-generation from the RPO under its RE Regulations, 2011. Such exclusion was extended only in compliance with the directions issued in the *Century Rayon* case by the Hon'ble ATE. Subsequent to the Full Bench Decision of the Hon'ble ATE in the *Lloyds Metal and Energy Limited* case, this Commission decided to recall the exclusion from the applicability of the RPO granted earlier.
- (d) Assuming that the above contention of the learned senior counsel for the Petitioners should be accepted, the same cannot now hold good in view of the new Tariff Policy dated 28.1.2016.
- (e) Section 86(4) of the Act states that, in discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3 of the Act. The proviso to Clause 6.4(1) of the present Tariff Policy dated 28.1.2016 states

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that, co-generation from sources other than the renewable sources shall not be excluded from the RPO.

- (f) The relevant portion of Clause 6.4(1) of the earlier National Tariff Policy, for our purpose, reads thus :

**“6.4 Non-conventional and renewable sources of energy generation including co-generation.**

*(1) Pursuant to provisions of Section 86(1)(e) of the Act, the appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of distribution licensee for purchase of energy from such sources, taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by the SERCs latest by April 1, 2006. ...”*

- (g) The relevant portion of Clause 6.4(1) of the present Tariff Policy, which replaces Clause 6.4(1) of the earlier Tariff Policy, reads thus :

**“6.4 Renewable sources of energy generation including Co-generation from renewable energy sources:**

*(1) Pursuant to provisions of Section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs. Cost of purchase of renewable energy shall be taken into account while determining tariff by SERCs. Long term growth trajectory of Renewable Purchase Obligations (RPOs) will be prescribed by the Ministry of Power in consultation with MNRE.*

*Provided that cogeneration from sources other than renewable sources shall not be excluded from the applicability of RPOs. ...”*



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- (h) The changes effected in the new Tariff Policy would make it clear that, co-generation from sources other than the Renewable Sources of Energy cannot be equated to the Renewable Sources of Energy and that such co-generation shall not be excluded from the applicability of the RPO.
- (j) The findings in the *Century Rayon* case were based on the interpretation of the Act along with the then existing Tariff Policy. We are of the considered opinion that, had the present Tariff Policy dated 28.1.2016 been taken into consideration, the findings given on the present controversy by the Hon'ble ATE in the *Century Rayon* case would have been different. Therefore, we cannot accept the third contention of the Petitioners.
- 17) For the foregoing reasons, we pass the following :

**ORDER**

- (i) The above Review Petitions are dismissed.
- (ii) The original of this common Order shall be kept in RP No.4/2015 and a copy of it be retained in the other two connected cases.

Sd/-  
(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-  
(H.D. ARUN KUMAR)  
MEMBER

Sd/-  
(D.B. MANIVAL RAJU)  
MEMBER