

Before the  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**CASE Nos. 69, 71 & 73 of 2016**

**Date: 10 November, 2016**

**Coram: Shri. Azeez M. Khan, Member  
Shri. Deepak Lad, Member**

**Case No. 69 of 2016**

Petition of M/s Century Rayon under Regulation 92 of MERC (Conduct of Business) Regulations, 2004 seeking reconsideration of the MERC RPO Regulations, 2016 to the extent fossil fuel Co-Generators are required to procure electricity generated from eligible Renewable Energy sources.

M/s Century Rayon ..... Petitioner  
Appearance

For the Petitioner : Shri. Prakash Shah, Adv.  
Shri. Ajit M. Patil (Rep)

**Case No. 71 of 2016**

Petition of Captive Power Producers Association for review of the provisions of the MERC RPO Regulations, 2016.

Captive Power Producers Association ..... Petitioner  
Appearance

For the Petitioner : Shri. Vikas Nevagi, Adv  
Shri. Vikas Patangia

**Case No 73 of 2016**

Petition of M/s Uttam Galva Steels Limited under Regulation 85 of MERC (Conduct of Business) Regulations, 2004, for modification of the MERC RPO Regulations, 2016 to exempt captive users consuming power from fossil fuel-based Co-Generation Plants from applicability of RPO targets

M/s. Uttam Galva Steels Limited ..... Petitioner  
Appearance

For the Petitioner : Shri. Abhishek Khare, Adv.  
Shri. M.L. Agarwal

For the Consumer Representative : Dr. Ashok Pendse, TBIA

## **DAILY ORDER**

Heard the Advocates/Representatives of the Petitioners and Consumer Representative.

The Commission observed that, since similar issues have been raised in these Cases, they would be heard together. The Parties agreed.

### **Case No. 69 of 2016**

1. The Advocate of the Petitioner sought that the MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations ('RPO Regulations'), 2016 be modified to bring them in line with the earlier Regulations of 2010, or that the requirement that fossil fuel-based Co-Generators procure electricity from eligible Renewable Energy (RE) sources be relaxed by the Commission invoking its powers under Regulation 16 to waive such requirement.
2. He stated that the proviso to Regulation 11.3 of the draft RPO Regulations published by the Commission for public comments provided for such exemption from RPO for captive users consuming power from grid-connected fossil-fuel-based Co-Generation Plants with installed capacity of 5 MW and above. However, the final RPO Regulations, 2016 notified on 30 March 2016 removed this exemption.
3. Advocate for the Petitioner referred to the Judgment of the Appellate Tribunal for Electricity (ATE) dated 26 April, 2010 in Appeal No 57 of 2009 in the Petitioner's own case, which held that Co-Generation Plants were entitled to be promoted by the State Commissions. In the operative paras. 44 and 45, the ATE stated that, under the scheme of the Electricity Act (EA), 2003, both RE and Co-Generation (even if not based on RE or non-fossil fuels) are equally entitled to be promoted by the State Commissions through suitable methods and directions, and that Co-Generation Plants provide several benefits for the environment as well as to the public at large and entitled to be treated at par with other RE sources. Following that Judgment, the Commission accordingly incorporated an exemption from RPO in its RPO Regulations, 2010, which were notified in June, 2012.
4. He stated that the Gujarat Electricity Regulatory Commission (GERC) filed a Petition No 1311 of 2012 for review of this Judgment. However, in its Judgment dated 17 April, 2013, ATE did not condone the delay in filing the Review Petition. It also held that GERC was not an aggrieved person and that, therefore, the Review Petition was not maintainable. GERC has filed an appeal before the Supreme Court, which is pending. There is no stay on the Judgment of the ATE dated 26 April, 2010, and hence it is still valid, in force and is binding on the State Commissions.
5. He stated further that, in its full-Bench Judgment dated 2 December, 2013 in Appeal No 53 of 2012 (filed by Lloyds Metal against the Commission's interim Order dated 26 December, 2011), the ATE held that the State Commission may promote fossil fuel-based Co-Generation by other means such as facilitating sale of surplus energy, in the interest of promoting energy efficiency and grid security. The ATE did not disturb its earlier ruling regarding RPO not being applied to Co-Generation Plants. Hence, the present RPO Regulations, 2016 imposing RPO on Co-Generation

Plants is in conflict with the ATE Judgment dated 26 April, 2010 in Appeal No. 57 of 2009. Advocate of the Petitioner stated that most of the State Commissions are following the ATE Judgment in Appeal No 57 of 2009.

6. The Advocate of the Petitioner stated that the exemption from RPO was removed in the final RPO Regulations, 2016 based on the revised Tariff Policy notified by Govt. of India in January, 2016. However, the Tariff Policy 2016 cannot override Section 86(1)(e) of the Electricity Act, 2003 and the various judicial Orders of the ATE.

7. To a query of the Commission, the Advocate of the Petitioner stated that, in a recent Bombay High Court Judgment, it has been held that, while notifying final Regulations, the State Commission is not bound to hear the parties again if they differ from the previously published draft Regulations. However, where the Tariff Policy, which is only one of the guiding elements for a Commission under the EA, 2003, differs from a judicial Order of the ATE, the latter has to be given preference. If any Regulations are framed which are in conflict with the Judgments of ATE and notwithstanding the powers of the ATE under the EA, 2003, then there is a clear error of law. The matter filed by GERC is pending before the Supreme Court in CA No 6797 of 2013. There is no stay on the Judgment of ATE dated 26 April, 2010 in Appeal No 57 of 2009 and hence it is still valid and in force. Therefore, under the doctrine of precedence, ATE's decision is to be followed.

8. The Advocate of the Petitioner also cited the Rajasthan Electricity Regulatory Commission (RERC) RPO Regulations, 2010 and amendment dated 30 May, 2014 excluding Captive Power Plants (CPPs) based on fossil fuel-based Co-Generation from RPO. The Rajasthan High Court, by Order dated 31 August, 2012, had dismissed various Writ Petitions challenging RPO on Captive users. However, that matter was in respect of CPPs, and the High Court did not look into the issue of applicability of RPO targets on fossil fuel-based Co-Generation, because RERC itself has excluded them from RPO targets. Hence, there is no conflict between the High Court and ATE Judgments. He stated that, in any case, the Rajasthan High Court Judgment does not constitute a precedent, considering the Supreme Court Judgments (on the nature and how precedents are to be applied) in the Cases of Bhavnagar University and Bharat Petroleum (copies submitted to the Commission). The ATE had expressly examined the issue, and that issue was not before the Rajasthan High Court. Therefore, the ATE Judgment is still valid in law.

9. Advocate of the Petitioner submitted that, in the alternative, the Commission may invoke its power under Regulation 16 of the RPO Regulations, 2016 to relax or waive any provision suo moto or on an application to exempt its Plant from RPO.

10. As regards the issue of Regulations vis-à-vis ATE Judgments, Dr. Ashok Pendse of Thane-Belapur Industries Association (TBIA) stated that the Supreme Court, in the Case of Power Trading Corporation on an Order of the Central Electricity Regulatory Commission, had held that the Regulations would supersede such Judgments. Advocate for the Petitioner responded that he was making the point that the APTEL Judgment should be reflected while framing the Regulations.

### **Case No. 71 of 2016**

1. While broadly agreeing with the contentions in Case No. 69 of 2016, the Advocate of the Petitioner in Case No. 71 of 201 stated that, unlike the other Petitioners, he was seeking review of

the RPO Regulations, 2016 under Regulation 85 of the Conduct of Business Regulations, 2004 and Section 94 of the EA, 2003 so as to restore the proviso to Regulation 11.3 which was contained in the draft Regulations. That proviso retained the exemption to captive users of power from grid-connected fossil fuel-based Co-Generation Plants from RPO. However, the final RPO Regulations, 2016 were notified on 30 March, 2016 without this exemption considering Clause 6.4 of the Tariff Policy dated 28 January, 2016.

2. He stated that the ATE Judgment dated 26 April, 2010 in Appeal No 57 of 2009 is binding under S. 121 of the EA, 2003. Under S. 121, subordinate legislation (such as Regulations) or policies (such as the Tariff Policy, 2016) cannot override such Judgments. In the well-known Shah Banu case, the law was amended. He also submitted a chronology and compilation in this connection. The ATE ruling can be appealed against in the Supreme Court, but there is no Supreme Court finding against the ATE Judgment in Case No. 57 of 2009. The Tariff Policy, 2016 does not state that it has considered the ATE Judgment, nor has the law been amended. In Appeal No. 103 of 2015 (Maruti Suzuki), the ATE also held that the provisions of the Tariff Policy are not mandatory or binding on the State Commissions. The Commission observed that this position had been settled long back.

3. In light of the above, the Advocate for the Petitioner submitted that review of the exclusion of the exemption contained in the draft Regulations was an error apparent justifying review. The notified Regulations excluding the exemption was a major deviation from the draft published earlier, and an opportunity to respond ought to have been given before doing so. Even then, the ATE Judgment would prevail.

4. To the Commission's query as to what stand might have been taken had the new Tariff Policy provision been in force at the time of the ATE Judgment, he stated that it was open to the Commission to approach the ATE for directions in the light of the new Tariff Policy.

5. Advocate for the Petitioner stated that he would circulate other Judgments also and place on record the legal points.

6. Dr. Ashok Pendse of TBIA pointed out that, while Case No. 69 of 2016 concerns Co-Generation CPPs, Case No. 71 of 2016 refers to all CPPs. That distinction may be kept in mind.

### **Case No. 73 of 2016**

1. The Advocate of the Petitioner also broadly agreed with the contentions made in the earlier two Cases. He stated that the issue raised in Appeal No. 57 of 2009 was whether, as a Co-Generation CPP, Century Rayon is required to purchase power from a RE Co-Generator. The ATE held that Co-Generation in this context of the EA, 2003 was not limited to RE Co\_Generation alone, and hence that fastening of RPO on a Co-Generator (based on RE or otherwise) would defeat the purpose of Section 86(1)(e). The ATE full Bench on the Appeal against the Commission's Order in the Lloyds Metal Case had ruled against a Distribution Licensee having to purchase power from fossil fuel-based Co-Generation.

2. He also referred to the ATE Judgment dated 1 October, 2010 (India Glycols Ltd. v/s Uttarakhand Electricity Regulatory Commission (UERC)) in Appeal Nos. 112, 130 and 136 of 2014, in which the ATE had relied entirely on its Judgment in Case No. 57 of 2009 and had reiterated it with regard the UERC Regulations. That seems to be the latest Judgment on this subject.

**The Cases are reserved for Orders.**

**Sd/-  
(Deepak Lad)  
Member**

**Sd/-  
(Azeez M. Khan)  
Member**