

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of clarifications, whether the petitioner's Co generation plant (Waste heat recovery) satisfies the requirement of clause 4.1 of the MPERC Regulations 2010 Revision-1 (co-generation and generation of electricity from renewable source of energy) with regard to procurement of power from co-generation plant.

Petition No. 15/2019

ORDER

(Date of Order: 9th January' 2020)

M/s. Ultra Tech Cement Ltd.

(Unit: Dhar Cement Works)

Village : Tonki, Tehsil: Manawar

Dist: Dhar (M.P.) 454 446

- **Petitioner**

Versus

1. **M.P. Power Management Company Ltd.,**
Block No. 2, Shakti Bhawan, Rampur, Jabalpur – 482008

2. **The Managing Director**
M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd.
Shakti Bhawan, Rampur, Jabalpur – 482008.

3. **The Managing Director**
M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.
Nishtha Parisar, Govindpura, Bhopal – 462023

4. **The Managing Director**
M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Compound, Pologround, Indore.

- **Respondents**

Shri Rajesh Mehta, GM (O), Shri Rajneesh Chanrudia, AGM (E), Shri Ajay Porwal, Consultant Shri Atul Jain, AGM, Shri R.S. Patel, Sr. Consultant, Ms. Bhakti Vyas, Advocate appeared on behalf of the Petitioner.

Shri Aashish Bernard Advocate, Shri G.L. Pandey DGM, Shri Sanjeev Khare, DGM and Shri G.R. Patele, GM appeared on behalf of Respondents.

The petitioner Ultra Tech Cement Ltd. has filed the subject petition in the matter of clarification, whether the petitioner's Co generation plant (Waste heat recovery) satisfies the requirement of clause 4.1 of the MPERC Regulations 2010 Revision-1 (co-generation and generation of electricity from renewable source of energy) with regard to procurement of power from co-generation plant. The prayer in the petition was subsequently amended by the petitioner on 26.03.2019 that its co-generation plant (WHRS) be treated as renewable power and no Renewable Power Obligation (RPO) is applicable.

2. As requested by the petitioner during hearing held on 23rd April' 2019, the petitioner was allowed to make a presentation on 14th May' 2019 for the process flowchart diagram of its plant.

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The petition was admitted and the petitioner was directed to serve the copy of petition at the earliest on all Respondents in the subject matter.

3. By affidavit dated 11th July' 2019 Respondent No. 1 (MPPMCL) filed its reply to the subject petition. In the hearings held on 16th July' 2019 and 3rd September' 2019 the petitioner and the Respondent No. 1 had sought adjournment, respectively. On 16th September' 2019 the petitioner filed its rejoinder to the aforesaid reply filed by Respondent No. 1 (MPPMCL). During the course of hearing held on 15th October' 2019, the representatives of both parties placed their detailed arguments in support of their contention in the subject matter. On 2nd November' 2019 Respondent No. 1 filed its written submission.

4. The petitioner has broadly submitted the following in its revised petition:

(i) *"The petitioner has established a Waste Heat Recovery Plant (Co-Generation Plant) of 13 MW. The petitioner has quoted Clause 4.1 of MPERC (Co-Generation and Generation of Electricity from Renewable Sources of Energy) (Revision -1) Regulation, 2010 with regard to the Renewable Projects Obligations (RPO) for obligated entities. It has also quoted amendment to Regulations 4, 5, 7 and 10 of MPERC (Co-Generation and Generation of Electricity from Renewable Sources of Energy) (Revision -1) Regulation, 2010.*

(ii) *Section 86(1)(e) of the Electricity Act' 2003 mandates that the State Commission shall promote both co-generation and the generation of electricity from the renewable energy and therefore, the cogeneration plant which is to be promoted cannot be compelled to purchase electricity from the renewable energy plants.*

(iii) *The term "co-generation is defined under Section 2(12) of the Electricity Act which is as follows:*

"Co-generation means a process which simultaneously produces two or more forms of useful energy (including electricity)".

The definition given in section 2(12) supra of the Act would show that the legislature has not restricted the said process to mean production of energy from any form of fuel. It may be fossil fuel or may be non-fossil fuel.

(iv) *The petitioner further submits the details of units generated from waste heat recovery plant and consumed from grid power & from waste heat recovery plants are as under:*

Year	Total power consumed	WH Co-Generation	DISCOM
	MU	MU	Purchase MU
2018-19	47532.0	4739.2	42792.8

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(v) *The WHRS has been commissioned by Thermax Ltd./ Triveni Engineering on dated 03.10.2018 and required meters were installed as per approval of electricity inspector vide permission ref. T/3105/265/1010 dated 17.09.2017.*

(vi) *Meter readings of the readings of the said WHRS are as tabulated below:*

Year	Initial reading of the meter	Final reading of the meter	MF	Total Kwh generated by WHRS
2018-19	3.93	4743.087	1000	4739157

(vii) *The petitioner therefore seeks clarification that it is exempted from the RPO obligations”.*

5. The petitioner has sought clarification for exemption of its Waste Heat Recovery Plant (WHRP) from RPO obligations on the following main grounds:

- (i) Hon'ble Appellate Tribunal for Electricity in its order dated 26th April'2010 in Appeal no. 57 of 2009 has held that co-generation plants are to be treated at par with the renewable generator.
- (ii) MPERC in its order dated 17.02.2012 in petition No. 02/2012 has placed reliance on the aforesaid order of Hon'ble Appellate Tribunal for Electricity in Appeal no. 57 of 2009 supra has held that co-generation and renewable energy plants are to be treated at par. Thereafter, amendment to some sub-regulations of MPERC (Co-Generation and Generation of Electricity from Renewable Sources of Energy) Regulations (Revision I) 2010 were made substituting the word “Co-generation from Renewable Sources” by “Co-generation”
- (iii) United Nations Framework Convention on climate change has also recognized WHRC as green power.

6. In its reply and written submission, the Respondent No.1 broadly submitted the following:

- (i) *“In this regard, it is most respectfully submitted that the answering respondent herein has filed a brief reply dated 11.07.2019 and it is the principal submission of the answering respondent that WHRB based power plants are not regarded as co-generation plants in view of the stay granted by the Hon'ble Supreme Court and, therefore, there is no question of them being granted renewable energy status or being exempted from renewable purchase obligations.*
- (ii) *In this regard, it is most respectfully submitted that the issue whether WHRB based power plants are co-generation plants or not was decided vide judgement dated 27.09.2017 by the Hon'ble Appellate Tribunal for Electricity in Appeal No.5/2015 and other batch matters and the Hon'ble Appellate Tribunal also referred to its earlier*

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judgment in Century Rayon Case passed in Appeal No.57/2009 dated 26.04.2010 and in page 86 to 89 of the judgment held that WHRB based plants are co-generation plants, however, it is pertinent to note that the judgment dated 27.09.2017 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No.5/2015 and other batch matters was challenged before the Hon'ble Supreme Court in Civil Appeal Diary No.2647/2018 and the Hon'ble Supreme Court vide order dated 23.02.2018 stayed the operation of the Aptel judgment dated 27.09.2017. Therefore, as on date WHRB based power plants are not to be treated as co-generation plants and, therefore, it is incorrect on the part of the petitioner to aver that it's WHRB plants which qualifies as co-generation plants, shall be exempted from RPO obligations.

- (iii) *The petitioner in its rejoinder has relied on a judgment passed by Appellate Tribunal for Electricity in Appeal No.322/2016 passed on 09.04.2019 to aver that the Appellate Tribunal for Electricity has accepted its claim that it's WHRB plant, is a co-generation plant. It is to be mentioned at the outset that the entire judgment passed by the Appellate tribunal for Electricity in Appeal No.322/2016 does not refer at all to the earlier judgment passed by it in Appeal No.5/2015 and consequent stay order passed by the Hon'ble Apex Court in Diary No. No.2647/2018 on 23.02.2018 and, therefore, it is submitted that the instant judgment passed in Appeal No.322/2016 is of no avail to the petitioner as the same is "per incuriam". This is because the Hon'ble Appellate Tribunal for Electricity has passed the judgment in ignorance of its earlier judgments and the consequent stay passed by the Hon'ble Supreme Court.*
- (iv) *It is submitted that the law of per incuriam is well settled by the Hon'ble Apex Court in Punjab Land Development case reported in (1990) 3 SCC 682 (para 40 onwards) and also in several other cases. It has been decided by the Hon'ble Supreme Court that a decision is "per incuriam" when a High Court has acted in ignorance of the decision of the Supreme Court. It is submitted that in the instant case also the Ld' APTEL was not made aware of the stay granted by the Hon'ble Apex Court.*
- (v) *It is submitted that the Hon'ble Appellate Tribunal for Electricity was not aware of the stay granted by the Hon'ble Supreme Court and, therefore, the decision in Appeal in 322/2016 is per incuriam and not applicable.*
- (vi) *In view of the submissions made hereinabove, the instant petition may kindly be dismissed.*

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7. Having heard the parties and on perusal of the documents filed on record in the subject matter, the Commission has observed the following:
- (i) The subject petition is primarily based on the order dated 26th April' 2010 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 57 of 2009. The petitioner has relied on MPERC's order dated 17.02.2012 in Petition No. 2 of 2012 which was also passed after considering the aforesaid order passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 57 of 2009.
 - (ii) The issue of whether the WHRS based power plant are "Co-Generation" or not was recently re-considered by the Hon'ble Tribunal in a batch of matters being Appeal no. 44 of 2015 and ors and the Hon'ble Tribunal vide order dated 27.09.2017 held, inter-alia, that WHRB based power plants are "Cogeneration" plants. It is specifically noted that in Para (C)(3)(v) of aforesaid order, the Hon'ble Appellate Tribunal for Electricity while dealing with the issue regarding treatment of "waste heat recovery boilers (WHRB) as Co-generation" had relied on its same judgement dated 26.04.2010 passed by it in Appeal No. 57 of 2009 based on which the subject petition has been filed by the petitioner.
 - (iii) Further, the Judgement and order dated 27.09.2017 passed by Hon'ble Appellate Tribunal for Electricity was challenged by one of the parties to Appeal no. 44 of 2015 before the Hon'ble Supreme Court in Civil Appeal Diary No. 2647 of 2018 and the Hon'ble Supreme Court vide order dated 23.2.2018 has admitted the appeals and stayed the operation of the said judgement dated 27.09.2017 passed by Hon'ble Appellate Tribunal for Electricity.
 - (iv) Accordingly, in light of the stay granted by the Hon'ble Supreme Court vide its order dated 23.2.2018, as on date Waste Heat Recovery based power plants are not considered as "Cogeneration" based plants. Since the status of WHRS based plant for consideration as a "Cogeneration" based plant is *sub-judice* before the Hon'ble Supreme Court therefore, the question of it being treated as renewable power does not arise for adjudication/clarification in the subject petition till the aforesaid Civil Appeal is decided.
 - (v) Apart from above status, the Commission has also observed that it is provided in Para 6.4(1) of Tariff Policy issued on 28th January'2016 that **"cogeneration from sources other than renewable sources shall not be excluded from the applicability of RPOs"**

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8. In view of all aforesaid observations, the prayer made in the subject petition is not considered by the Commission since the issues in this matter are *sub-judice* before the Hon'ble Supreme Court. However, the petitioner shall be at liberty to approach the Commission as and when the aforesaid Civil Appeal is decided by the Hon'ble Supreme Court. With the above observations and finding, the subject petition is disposed of.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(Dr. Dev Raj Birdi)
Chairman