Before the

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade,
Mumbai 400005 Tel. 022 22163964/65/69
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Case No. 125 of 2023

Petition of M/s. Tata Steel Ltd. seeking a declaration that it is exempt from the RPO targets in relation to its Khopoli Unit for the period FY 2018 onwards till date as long as its cogeneration is in excess of presumptive RPO targets and quashing of MEDA's letters seeking deposit of amount towards alleged RPO's shortfall for FY 2021-2022, FY 2020-2021 and FY 2016-2020 and RPO compliance report for the aforementioned periods along with other allied reliefs.

M/s. Tata Steel Limited (TSL)… Petitioner

Maharashtra Energy Development Agency (MEDA)… Respondent

Coram

Sanjay Kumar, Chairperson
Anand M. Limaye, Member
Surendra J. Biyani, Member

Appearance:

For the Petitioner	:	Ms. Mandakini Ghosh (Adv.)
For the Respondent	:	Mr. Anand Raidurg (Rep.)

ORDER

Date: 12 April 2024

1. M/s. Tata Steel Ltd. (TSL) has filed present Petition on 15 March 2023 under Section 86 (1)(e) of the Electricity Act, 2003, Regulations 16 and 19 of the MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 and 2019 seeking a declaration that TSL is exempted from the RPO targets in relation to its Khopoli Unit for the period FY 2018 onwards till date as long as the cogeneration from its Captive Co-Generation Plant/ units at Khopoli

(Maharashtra) & Meramandali (Odisha) are in excess of its RPO requirements for the period from 2018 till date. TSL also seeking quashing of MEDA's letters dated 22 September 2022, 25 March 2022, 21 September 2021 and 8 March 2021 directing to deposit of amount towards alleged RPO's shortfall for FY 2021-2022, FY 2020-2021 and FY 2016-2020 and RPO compliance report for the aforementioned periods. Further, TSL is seeking refund of amount of Rs. 75,93,633/- paid on 31 March 2021 under protest towards alleged RPO shortfall for FY 2018-2020 pursuant to MEDA's letter dated 8 March 2021.

2. **TSL's main prayers are as follows:**

"

(a) Allow the present petition;

(b) Hold and declare that the Petitioner, being a co-generator of electricity, is not required to fulfill its RPOs from 2018 onwards and even for subsequent years as long as the cogeneration is in excess of presumptive RPO targets, dehors the provisions of the relevant regulations;

(c) Quash and set aside the Respondent's letter dated 8.03.2021 demanding that Petitioner deposit amounts towards alleged shortfall of RPOs for FY 2016-17 and 2017-18 and for future period;

(d) Direct Respondent to refund the money paid to it by Petitioner on 31.03.2021 alongwith interest within one month from the date of such direction;

(e) Quash and set aside the Respondent's letter dated 21.09.2021 demanding that Petitioner submit compliance report for fulfilment of RPOs for FY 2020-21;

(f) Quash and set aside the Respondent's letter dated 25.03.2022 demanding that Petitioner deposit amounts towards alleged shortfall of RPOs for FY 2020-22;

(g) Quash and set aside the Respondent's letter dated 22.09.2022 demanding that Petitioner submit compliance report for fulfilment of RPOs for FY 2021-22;"

3. **TSL in its Case stated as follows:**

3.1. M/s. Tata Steel Ltd (TSL) is a Public Limited Company with an annual crude steel capacity of 34 million tonnes per annum. TSL owns and operates (i) 258 MW captive co-generation plant at the Meramandali, District Dhenkanal, Odisha and (ii) 24 MW captive co-generation plant at Khopoli.

3.2. The captive co-generating plants of TSL produce both electrical energy and thermal energy (steam). TSL has a manufacturing unit at Village Nifan, Sarvoli, Kharpada Road Taluka-Khalapur, Near Khopoli District Raigad, Maharashtra.

3.3. The power requirement of TSL's manufacturing/industrial unit at Khopoli is around 30MW, out of which around 12 MW is sourced through open access from the captive cogeneration facilities of 258MW at Meramandali, Odisha (from 2019 onwards), 8 MW from MSEDCL and remaining power consumption of 10 MW is met from TSL's co-generation plant at

Khopli (2 x 12 MW). The 12 MW + 10 MW of power sourced by TSL from its fossil-fuel based captive co-generating plants in Meramandli, Odisha and Khopoli, Maharashtra; is under captive mode as provided under Section 9 of the Electricity Act, 2003.

3.4. The 8 MW power consumed by TSL from the MSEDCL is as per HT-Industry category. Therefore, in view of the established law, TSL w.r.t its Khopoli Industrial Unit, is already fulfilling its presumptive renewable purchase obligation under the RPO Regulations to the extent of its consumption from the captive co-generating plant at Odisha and Khopoli. It is submitted that TSL is not required to purchase any further renewable energy to fulfil its presumptive RPOs. TSL is also a member of the Captive Power Producer's Association, Maharashtra.

3.5. Insolvency proceedings:

3.5.1 On 18 May 2018, TSL through its a wholly owned subsidiary namely Bamnipal Steel Limited, had acquired, control and management of the erstwhile Bhushan Steel Ltd, pursuant to approval of Resolution Plan as approved by NCLT (Principal Bench, New Delhi) vide its Order dated 15 May 2018 under the provisions of Insolvency & Bankruptcy Code, 2016 (IBC).In terms of Approved Resolution plan, TSL shall have no liability towards any dues/claim prior to approval of Resolution Plan, save and except those provided for in the Resolution plan itself.

3.5.2 Thereafter name of Bhushan Steel Ltd (BSL) changed to Tata Steel BSL Ltd (TSBSL). Subsequently w.e.f 11 November 2021, TSBSL stands amalgamated into and with TSL in accordance with the Order of the NCLT, Mumbai dated 29 October 2021.

3.5.3 Since, TSBSL has now amalgamated into TSL, it stands dissolved without winding-up, in terms of the scheme of amalgamation which has been approved as per Order dated 29 October 2021.

3.6. Description of Co-Generation units of TSL:

3.6.1 Khopoli Unit:

- TSL has two numbers of 12 MW DG set (24 MW) which uses fossil fuel to generate power and simultaneously generates steam energy from waste heat of the DG.
- Two waste heat recovery boilers (4.2 TPH each) are installed on the DG set to produce steam energy from the waste heat exhausted from the DG set. In the event, the waste heat energy was not employed to produce steam, the waste heat energy of DG set would be released into atmosphere causing damage to environment and the equivalent power requirement would be met through fossil fuel-based steam boiler.
- It is pertinent to mention that MSEDCL vide its letter dated 12 June 2013 has recognised TSL's 2 x 12 MW unit to be a co-generation plant.

3.6.2 Meramandali Unit:

- TSL also has a 258 MW captive generation plant at the Meramandali, District Dhenkanal, Odisha. Out of the 258 MW, 12 MW is consumed by TSL at Khopoli. The configuration of the 258 MW captive co-generating plant at Meramandli is as follows:
    1. Blast Furnace + Coke Oven Gas Generation and Usage in BFPP 2 (165 MW) for generating 132 MW non fossil fuel based power;
    2. TRT (Top gas recovery Turbine) – 16 MW;
    3. Waste heat recovery boiler of DRI (PP 1)– 33 MW + 77 MW.
- The 258 MW captive co-generation unit captures the waste heat released from the various iron & steel making processes and converts it into electricity thereby adequately and sufficiently minimizing the huge amount of pollution causing waste heat that would have released into atmosphere and caused concomitant effects of atmospheric warming with danger of changing the local weather conditions, other harmful pollution etc. in the atmosphere.

3.7. The Co-generating units at Khopoli & Meramandali helps in utilization of resources and minimizes use of fossil fuel for generation of power. TSL's Co-generation unit at Khopoli and Odisha falls within the definition of 'co-generation' given under Section 2(12) of the Electricity Act, 2003 which is defined as:

"2(12) Cogeneration means a process which simultaneously produces two or more forms of useful energy (including electricity)."

3.8. TSL had received a letter dated 08 March 2021 from MEDA asking to deposit amount towards RPO shortfall against the power consumption at Khopoli Industrial Unit under the RPO Regulations, 2016 for the period 2016-17 & 2017-18. The demand letter dated 08 March 2021 is in violation of the provisions of the Electricity Act, 2003, Orders of the Hon'ble Tribunal, provisions of IBC and the approved Resolution Plan of TSL. Pursuant to letter dated 08 March 2021, on 31 March 2021, TSL has made payments of Rs. 75,93,633/- to MEDA towards alleged RPO liabilities for the FY 2018-19 and 2019-20 under protest and without prejudice to its rights to pursue a legal remedy. The letter dates 08 March 2021 is liable to be quashed and MEDA is liable to repay the amount of Rs. 75,93,633/- to TSL along with interest.

3.9. Regarding the period from FY 2016-18, TSL in its reply dated 31 March 2021mentioned that it is not liable to fulfil RPOs accruing to the erstwhile M/s. Bhushan Steel Limited before May 2018 as demanded by MEDA. TSL further explained that Tata Steel took over the control of Bhushan Steel in May 2018 pursuant to submission and approval of a resolution plan under the provisions of The Insolvency and Bankruptcy Code, 2016. The alleged outstanding RPOs for 2016-17 to 2017-18 which qualifies as an operational debt as defined under Regulation 5(21) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), does not find mention in the Resolution Plan submitted by TSL, which was subsequently approved

on 15 May 2018 by the NCLT, Principal Bench. Hence, TSL is not liable to fulfil RPOs for the year 2016-17 and 2017-18. This position has been accepted by MEDA as it has made no further demand regarding RPO fulfilment by TSL for the aforementioned period.

3.10. Thereafter, the Hon'ble Tribunal by Judgment dated 02 August 2021 has held that JSW Steel, a similarly placed fossil fuel based captive cogenerating plant in Maharashtra is exempted from fulfilment of RPOs under the RPO Regulations 2016 as long as power from cogeneration is in excess of presumptive RPO targets. The Hon'ble Tribunal held that imposing RPOs on a co-generation plant would be in violation of Section 86(1)(e) of the Electricity Act, 2003. Section 86(1)(e) mandates that co-generation plants irrespective of fuel is to be treated at par with renewable energy-based plants. The Hon'ble Tribunal has passed the aforementioned Judgments by following its earlier judgments in the matters of Appeal No. 57 of 2009 (*Century Rayon vs. MERC*); Appeal No. 54 of 2012 (*Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission*); Appeal No. 59 of 2012 (*Vedanta Aluminium Ltd. Vs. Orissa Electricity Regulatory Commission*); Appeal No. 125 of 2012 (*Hindalco Industries Limited vs. Uttar Pradesh Electricity Regulatory Commission*); Appeal No. 112 of 2014 (*India Glycols Limited vs. Uttarakhand Electricity Regulatory Commission*); Appeal No. 333 of 2016 (*M/S. JSW Steel Limited v. Karnataka Electricity Regulatory Commission*); Appeal No. 278 and 293 of 2015 (*JSW Steel Limited v. Tamil Nadu Electricity Regulatory Commission*) and Appeal No. 260 & 261 of 2015 (*M/s. National Aluminium Company Limited vs. OERC & Ors*). In view of the aforementioned Judgement TSL being a fossil fuel based captive cogenerating plant is not liable to fulfil any RPOs under the RPO Regulations 2016 and 2019.

3.11. Subsequently, on 21 September 2021, MEDA has issued another demand letters to the TSBSL directing it to submit the compliance report for RPO fulfilment for FY 2020-21 as per RPO REC Regulations, 2019. On 25 March 2022, MEDA once again wrote to TSBSL directing it to deposit amount towards RPO's shortfall, as per Orders of the Commission in Case No. 65 of 2020,111 of 2020 and 130 of 2020.

3.12. On 31 March 2022, TSL replied to the aforementioned letter objecting to directions contained therein. TSL stated that being captive co-generation plant, it is not required to fulfil any RPOs under MERC RPO Regulations, 2019. This would be contrary to the settled law and Section 86(1)(e) of the Electricity Act, 2003.

3.13. On 22 September 2022, instead of replying to TSL's letter dated 31 March 2022, the MEDA has once again written to TSL directing it to submit RPO compliance report for FY 2021-22. MEDA's letters are in contravention to the established law and the Judgments of the Hon'ble Tribunal. Hence, it is liable to be quashed.

3.14. <u>TSL is not liable to be fastened with RPOs under the RPO Regulations 2016 and RPO Regulations, 2019:</u>

3.14.1 Under the Electricity Act, 2003 and the Judgments of the Hon'ble Tribunal, a captive cogeneration plant irrespective of fuel is not liable to be fastened with RPOs under the

Electricity Act, 2003 and the RPO Regulations, 2016. Therefore, TSL, being a captive co-generating plant partly using fossil fuel is not liable to be fastened with any RPOs to the extent of its consumption from cogeneration power. Therefore, this is a fit case wherein the Commission may exercise their powers of removal of difficulty and relaxation to declare that the Petitioner is not liable for fulfilment of RPOs.

3.14.2 In fact, the Hon'ble Tribunal in the matters of; JSW Steel Ltd. vs. TNERC (Appeal No. 278 of 2015 and 293 of 2015); M/s. National Aluminium Company Limited vs. OERC & Ors. [Appeal No. 260 & 261 of 2015]; and JSW Steel Ltd. vs. MERC & Ors [Appeal No. 176 of 2020] has held that even when regulations provide for fulfilment of RPOs for fossil-fuel based captive cogeneration plant, such regulation has to be read down.

3.14.3 The Electricity Act, 2003 does not distinguish between co-generation and renewable sources of energy and seeks to promote both sources. If the intention of the Electricity Act, 2003 was to promote only renewable sources of energy, there was no need to include the term 'co-generation' in Section 86(1)(e) or define the term 'co-generation' under Section 2(12). Therefore, the inclusion of the term 'co-generation' was deliberate and is required to be promoted in addition to the renewable sources of energy. Accordingly, the Commission may recognize that TSL has already fulfilled its RPOs via its consumption from captive co-generating plant, as stated above, it is actually not liable to fulfil any RPOs under the regulatory scheme.

3.14.4 To suffice arguments TSL relied upon Hon'ble Tribunal's Judgements in the matter of Century Rayon vs. Maharashtra Electricity Regulatory Commission, (Appeal No. 57 of 2009), JSW Steel Ltd. vs. TNERC (Appeal No. 278 of 2015); JSW Steel Limited vs. Karnataka Electricity Regulatory Commission, (Appeal No. 333 of 2016); M/s. National Aluminium Company Limited vs. OERC & Ors. [Appeal No. 260 & 261 of 2015]; and JSW Steel Ltd. vs. MERC & Ors [Appeal No. 176 of 2020].

3.14.5 Therefore, as is evidenced by the law laid down by the Hon'ble Tribunal in the aforementioned Judgments, no consumer, such as TSL, owning and operating a cogeneration based CGP, irrespective of fuel used is liable to be fastened with the RPOs so long as the electricity generated from its co-generation plant in in excess of the presumptive RPO target (quo its captive consumption) for the relevant years. It is submitted that the Petitioner's consumption from its cogeneration plants at Khopoli & Meramandli are in excess of its presumptive RPO targets for each of the relevant years.

3.15. Jurisdiction of the Commission

3.15.1 In light of the consistent principles laid down by the Hon'ble Tribunal, in a series of Judgements confirming exemption of cogeneration based CGPs, from liability to fulfil RPO targets in compliance with the mandate laid down in Section 86(1)(e) of the Electricity Act 2003, this is a fit case for the Commission to allow exemption from RPOs to TSL's cogeneration CPP, since they aid in protection of the environment by utilizing waste gases generated in steel making process and reduce dependence on grid-connected thermal power

plants. Therefore, the Commission may declare that TSL is not liable to fulfil any further RPOs by exercising its powers of removal of difficulties/relaxation. The Commission may also direct MEDA to refund the monies paid under protest by TSL, along with interest.

3.16. Captive Power Producers Association' (CPPA), Mumbai, an Association of Industries in Maharashtra, having captive power plants in Maharashtra, in general, has preferred Writ Petition No. 269 of 2019 and Writ Petition No 2513 of 2021 challenging the RPO Regulations, 2016 & RPO Regulations, 2019 before Hon'ble Bombay High Court. The Writs are pending adjudication.

4. MEDA in its submission dated 9 October 2023 stated as follows:

4.1. The Commission in its Orders in Case No. 68 of 2019, Case No. 65 of 2020, Case No.130 of 2020, Case No.111 of 2020 & Case No. 67 of 2021 directed that the entities shall deposit the amount equivalent to the REC floor prices of the shortfall units & further on year-to-year basis to meet its RPO with MEDA till such time Writ Petition (WP No.269 of 2019) is decided by Bombay High Court.

4.2. MEDA has corresponded with CPP entities involved in the Writ Petition No. 269 of 2019.

5. TSL in its submission dated 7 January 2024 stated as follows:

5.1. TSL re-iterated the submission made in the Petition.

5.2. The Tribunal in its various Judgements has interpreted the provisions of RPO Regulations, 2016 & 2019 to specify that no RPOs can be imposed under such regulations on captive co-generation plants irrespective of fuel. Hence, TSL is not liable to fulfil RPOs under the State Regulations. Further, the pendency of WP No. 269 of 2019 will not affect the present Petition. Under the Writ Petition, the vires of the Regulations has been challenged.

6. During the e-hearing held on 12 January 2024, the parties reiterated their submissions.

Commission's Analysis and Rulings:

7. TSL has filed present Petition under Section 86 (1)(e) of the Electricity Act, 2003, Regulations 16 & 19 of the MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 and 2019. Regulation 16 and 19 specify the powers to relax and power to remove difficulties.

8. While exercising inherent powers under provisions of 'Power to Relax' and 'Power to Remove Difficulties' certain conditionalities/principles need to be satisfied. It is important to establish the vacuum in the existing regulatory framework. The Hon'ble Tribunal vide its Judgment dated 20 September 2012 in Appeal No. 189 of 2011 on the issue of 'Power to Relax' has held as under:

"

29. The principles relating to the exercise of power of relaxation laid down in the above decisions referred to above are as follows:

(a) *The Regulation gives judicial discretion to the Commissions to relax norms based on the circumstances of the case. Such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation which has to be exercised only in the exceptional case where non-exercise of the discretion would cause hardship and injustice to a party.*

(b) *If there is a power to relax the regulation, the power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some party and to disfavour some other party.*

(c) *The party who claims relaxation of the norms shall adduce valid reasons to establish to the State Commission that it is a fit case to exercise its power to relax such Regulation. In the absence of valid reasons, the State Commission cannot relax the norms for mere asking. …"*

Further, the Tribunal vide its Judgment dated 06 May 2011 in Appeal No. 170 of 2010 on the issue of 'Power to Remove Difficulties' has held as under:

"

55. *We fail to be in agreement with Mr. Ramachandran when he says that power to remove difficulties as is ordinarily available in statute enacted by Parliament is not the same power as the power to remove difficulties as is there in a regulation available to the Commission. But Mr. Ramachandran is right when he says that such power is vested in the Commission to remove anomalies and difficulties. To our understanding, the exercise to remove difficulties cannot have different connotation in different statutes or distinguishable between statute and regulation. If we closely read Regulation 57 of the MYT Regulations, 2009 we find that power to remove difficulties which is given to the Commission is basically an administrative power not a legislative power which the Commission may by general or special order do or undertake or direct a generating Company to do or undertake things which the Commission find necessary for the purpose of removing the difficulty. This power is exercisable only to ensure that the Act is implemented and it is in furtherance of the Act that the power to remove difficulties is conferred. It is only to give effect to the provisions of the regulations that this power is exercised. It has been rightly argued by Mr. Sanjay Sen, learned Advocate for the Commission that the power to remove difficulty does not contemplate removal of hardship that may arise as a result of giving effect to the regulation. The decision in M.U.Sinai Vs Union of India (1975) 2 SCR 640 is pertinent. In this decision it has been held that in order to obviate the necessity of approaching the legislature for removal of every difficulty encountered in the enforcement of statute, the legislature some times thinks it expedient to invest the executive with a very limited power to make minor adaptations and peripheral adjustments in the statute for making its implementation effective without touching its substance."*

To decide the present case under Regulation 16 and Regulation 19 of MERC (Renewable

Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 and 2019, facts of the present case have been adjudged against the principles enumerated in above Judgements of the Tribunal.

9. TSL is seeking a following declaratory reliefs:

(a) declaration that it is exempted from the RPO targets in relation to its Khopoli Unit for the period FY 2018 onwards till date as long as the cogeneration from its Captive Co-Generation Plant/ units at Khopoli (Maharashtra) & Meramandali (Odisha) are in excess of its RPO requirements for the period from 2018 till date.

(b) Quashing of MEDA's letters dated 22 September 2022, 25 March 2022, 21 September 2021 and 8 March 2021 directing it to deposit of amount towards alleged RPO's shortfall.

(c) Refund of amount of Rs. 75,93,633/- paid on 31 March 2021 under protest towards alleged RPO shortfall for FY 2018-2020 pursuant to MEDA's letter dated 8 March 2021.

10. Before delving into the matter, it is appropriate to discuss background the matter. Following aspects are highlighted:

(a) On **18 May 2018**, TSL through its a wholly owned subsidiary namely M/s. Bamnipal Steel Limited (BSL), had acquired, control and management of the erstwhile M/s. Bhushan Steel Ltd, pursuant to approval of Resolution Plan as approved by NCLT (Principal Bench, New Delhi) vide its Order dated 15 May 2018 under the provisions of Insolvency & Bankruptcy Code, 2016 (IBC).

(b) Name of M/s. Bhushan Steel Ltd (BSL) changed to Tata Steel BSL Ltd (TSBSL). Subsequently w.e.f 11 November 2021, TSBSL stands amalgamated into and with TSL in accordance with the Order of the NCLT, Mumbai dated **29 October 2021.**

(c) TSL argued that it shall not be fastened with RPO liability of prior period i.e. before 18 May 2018.

(d) Pursuant to letter dated 08 March 2021, on 31 March 2021, TSL has made payments of Rs. 75,93,633/- to MEDA towards alleged RPO liabilities for the FY 2016-17 and 2017-18 under protest and without prejudice to its rights to pursue a legal remedy.

(e) TSL is sourcing 12 MW + 10 MW of power from its fossil-fuel based captive co-generating plants in Meramandli, Odisha and Khopoli, Maharashtra. TSL contended that captive cogeneration plant irrespective of fuel is not liable to be fastened with RPOs under the Electricity Act, 2003 and the RPO Regulations, 2016 and 2019.

(f) MEDA vide its various correspondences intimated TSL to submit RPO compliance report and to deposit amount towards RPO's shortfall. TSL argued that MEDA's letters are in contravention to the established law and the Judgments of the Hon'ble Tribunal.

11. Considering the submission placed on record, the Commission framed following issues:

(i) Whether Captive Generating Plants based on fossil fuel-based co-generation are entitled for exemption from RPO?

(ii) Can past RPO compliance be fastened upon new entrant i.e. TSL post Insolvency & Bankruptcy proceedings before NCLT?

(iii) Way Forward

The Commission is dealing with the above issues raised by TSL in the following paragraphs:

12. Issue A: Whether Captive Generating Plants based on fossil fuel-based co-generation are entitled for exemption from RPO?

12.1. TSL highlighted that the Tribunal in catena of Judgements ruled that under the scheme of Electricity Act, 2003, a captive cogeneration plant irrespective of fuel is not liable to be fastened with RPOs. TSL, being a captive co-generating plant partly using fossil fuel is not liable to be fastened with any RPOs to the extent of its consumption from cogeneration power. Therefore, this is a fit case wherein the Commission may exercise their powers of removal of difficulty and relaxation to declare that the Petitioner is not liable for fulfilment of RPOs.

12.2. The Commission notes that TSL has referred to the following among other ATE Judgments in these proceedings:

Sr.No.	Particulars	Finding of Tribunal
1	Century Rayon vs. Maharashtra Electricity Regulatory Commission, (Appeal No. 57 of 2009) dated 26.04.2010	- The intention of the legislature is to promote both co-generation irrespective of the usage of fuel as well as the generation of electricity from renewable source of energy. - The expression used in section 86(1)(e) is to promote both co-generation and generation of electricity from renewable source of energy. - Fastening of liability on one in preference to the other is totally contrary to legislative intent.
2	JSW Steel Limited vs. Tamil Nadu Electricity Regulatory Commission (Appeal No. 278 of 2015) dated 02.01.2019	- The Captive consumers having cogenerating plants cannot be fastened with the obligation to procure electricity from renewable energy sources, as that would defeat the object of section 86(1)(e) of the Electricity Act, 2003 and cogenerating plants have to be treated at par with renewable energy generating plants for the purpose of RPO obligations. - Inspite of consistent view taken by this Tribunal, the Respondent/State Regulatory Commission has failed to take note and appreciate the matter and on contrary, proceeded to pass the impugned Order without evaluation of the material available on records.
3	JSW Steel Limited vs. Karnataka Electricity Regulatory Commission, (Appeal No. 333 of 2016)	- The State Commission in the impugned order failed to appreciate the legal position that a cogeneration plant itself is to be promoted in terms of Electricity Act, 2003 and it cannot be subjected to renewable RPO.

Sr.No.	Particulars	Finding of Tribunal
		- Once Captive Power Plant generating electricity through Waste Heat Recovery, cannot be fastened with RPO liability under Section 86 (1) (e), there is no question of imposition of solar RPO also as the same falls in the category of Renewable Energy.
4	NALCO v. OERC & Ors., (Appeal No. 260 OF 2015 & Batch) dated 02.11.2020	- It is pertinent to mention that this Tribunal has further opined that even if Regulations impose renewable purchase obligation on cogeneration plants, in such a situation, those Regulations have to be read down in view of protection/special status granted to co-generation plants under statute i.e., Section 86(1)(e) of the Act.
5	JSW Steel Ltd vs. Maharashtra Electricity Regulatory Commission (Appeal No. 176 of 2020)	- Irrespective of the type of fuel utilized in the cogeneration of CPPs of the Appellant (Dolvi Unit), the Appellant is entitled to set-off its presumptive RPO obligation vis-à-vis the open access consumption against the electricity generated and consumed from its cogeneration plants

12.3. The earlier RPO Regulations, 2010 were notified on 7 June 2010, subsequent to the Tribunal Judgment dated 26 April 2010 in Appeal No. 57 of 2009 (Century Rayon).

Taking cues from Tribunal Judgement, the following proviso to Regulation 11.3 were added which exempted captive users of grid-connected fossil fuel-based Co-generation Plants from RPO:

"

11.3 If the Captive User(s) and Open Access consumer(s) are unable to fulfil their obligation, they shall be liable to pay RPO Regulatory Charges as specified in Regulation 12.1.

***Provided further that captive user(s) consuming power from grid connected fossil fuel based co-generation plants, are exempted from applicability of RPO target and other related conditions as specified in these Regulations**."* (Emphasis added)

12.4. On 24 December 2015, the Commission issued a Public Notice inviting comments on the draft of the new RPO Regulations proposed for FY 2016-17 to FY 2019-20. The draft Regulations retained the RPO exemption provided in the 2010 Regulations to captive users of grid-connected fossil fuel-based Cogeneration CGP. Comments on the draft Regulations were invited were invited by 19 January 2016.

12.5. In the meantime, the MoP, Govt. of India, vide Resolution dated 28 January 2016, notified the revised Tariff Policy, 2016 in pursuance of Section 3(3) of the EA, 2003. With regard to RPO, the Proviso to Clause 6.4 (1) reads as follows:

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

12.6. Section 86(4) of the Electricity Act, 2003 requires that, in the discharge of its functions, the Commission shall be 'guided', inter alia, by the Tariff Policy. Under Section 61 (h) also, the Commission is to be 'guided' by the Tariff Policy, among others, while specifying the terms and conditions for the determination of tariff. Thus, while finalizing the draft Regulations following the public consultation process, the Commission took into consideration the above provision of the revised Tariff Policy, 2016 which was notified after the draft Regulations and was already in the public domain for some time during the period of public consultation. The final RPO Regulations, 2016, notified on 30 March 2016 do not exempt captive users of fossil-fuel based CGPs from RPO. The Statement of Reasons published by the Commission expressly refers to the above provision of the revised Tariff Policy, 2016 in this regard.

12.7. Same dispensation is carried forward while notifying RPO Regulations, 2019.

12.8. At this stage it is relevant to referred to the Judgment dated 12 March 2015 in Special Civil Application No. 171 of 2011 with Civil Application no. 11627 of 2011 in the High Court of Gujarat at Ahmedabad in the matter of *Hindalco Industries Limited (Unit : Birla Copper) Vs. Gujarat Electricity Regulatory Commission*. The common issue raised in Petition is interpretation of Section 86(1) (e) with other provisions of the Electricity Act,2003 and applicability of RPO to CPP and Co-generators.

The relevant extract and discussion are as follows:

"

22. That contention of Mr. S.N. Soparkar that co−generation plant of petitioners of Special Civil Application No.791 of 2011 that it is based on fossil fuel and is non−conventional in view of decision in the case of Lloyds Metal & Energy Ltd. [supra] of APTEL, though appears to be attractive on first blush but non−conventional energy cannot be equated always with renewable source of energy. That co−generation is a process simultaneously producing two or more forms of useful energy though never defines type of input or source of fuel to be used, but co−generation provided under Section 86(1)(e) of the Act, 2003 is not co−generation stand alone, but it is co−generation and generation of electricity from renewable sources of energy. ***Thus, a source or input of energy may be non−conventional in the sense that CGP or co−generation following innovative or advanced technology, which may be eco−friendly and reducing carbon credit, but only on that ground is not the same renewable source of energy like hydro, wind, solar, biomass, bagasse, etc. That non−conventional energy always and for all purposes cannot be equated with non−renewable sources of energy.***

22.1 That the judgment dated 26.04.2010 of the APTEL in Appeal No. 57 of 2009 in the matter of Century Rayon Ltd. vs. Maharashtra Electricity Regulatory Commissioner & Ors. fell into consideration in Appeal No. 53 of 2012 and by order dated 29.12.2011 interim relief to enable sale of electricity from co- generation plant based on industrial waste heat generated by the sponge iron plant with the use of fossil fuel [coal] and directions to be issued to the distribution licensee came to be rejected, but the issue that whether the distribution licensee would be fastened with the obligation to purchase a percentage of its source from co−generation irrespective of fuel use being important issue came to be re−examined by the Full Bench and accordingly, upon an exercise undertaken about finality of the judgment dated 26.04.2010 in Appeal No.57 of 2009, it appears that the Full Bench of Appellate Tribunal for Electricity [Appellate Jurisdiction] in the case of Lloyds Metal & Energy Ltd. vs. Maharashtra State Electricity Distribution Company Limited in Appeal No.53 of 2012 considered the order dated 29.12.2011 rendered by the Division Bench of APTEL in Appeal No.57 of 2009 in the matter of Century Rayon Ltd. vs. Maharashtra Electricity Regulatory Commission and others and framed the following question:

"

Whether the Distribution Licensees could be fastened with the obligation to purchase a percentage of its consumption from co−generation irrespective of the fuel used under Section 86(1)(e) of the Act 2003".

The Full Bench of APTEL vide order dated 02.12.2013 passed in Appeal No.53 of 2012, held in para 39, as under:

"

39. Summary of our 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 pursue a percentage of its consumption from fossil fuel based co−generation under Section 86(1)(e) of the Electricity Act, 2003. Such purchase obligation 86(1)(e) can be fastened only from electricity generated from renewal 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."

Thus, judgment dated 26.04.2010 in Century Rayon [supra] [Appeal No.57 of 209]; judgment dated 17.04.2013 in IA 262 of 2012 in RP (DFR) No.1311 of 2012 in Appeal NO.57 of 2009 filed by Gujarat Electricity Regulatory Commission; judgment dated 30.01.2013 in Appeal No.54 of 2012 filed by M/s. Emami Paper Mills; judgment dated 31.01.2013 in Appeal no.59 of 2012 filed by M/s. Vedanta Aluminium Ltd. [VA]; and judgment dated 10.04.2013 in Appeal NO.125 of 2012 filed by M/s. Hindalco Industries Limited, ***all delivered by the APTEL have***

no significance and force of law in view of judgment dated 02.12.2013 rendered by the Full Bench of the APTEL in Appeal No. 53 of 2012*…*

24. The GERC did keep in mind all the representations submitted by the objectors before determining renewable purchase obligation [RPO] and, while doing so, the GERC also provided production capacity of electricity of CPPs and only those CPPs, who produce more than 5 MV of electricity, are brought within the purview of the RPO and, therefore, it would not hit or create imbalance in the functioning of the CPPs. The Commission also applied all the criteria including technical parameters and functioning capacity of CPP vis−à−vis interest of power generating plant in renewable source of energy and their survival in consonance with National Electricity Plan and Tariff Policy. ***Section 86(1)(e) of the Act is not only for promoting co−generation stand alone system, but, it is for promotion of co−generation and generation from renewable source of energy.*** *In this context, if the definition contained in Section 2(12) of the Act is seen, it is clear that 'co−generation' means a process which simultaneously produces two or more forms of useful energy (including electricity). In the above process, excess energy is harnessed by a particular process and electricity is generated." (Emphasis Added)*

In view of above Judgement of Hon'ble Gujarat High Court; it is clear that earlier Judgement of APTEL in Appeal No. 57 of 2009 (Century Rayon vs. MERC) have no significance and force of law in view of Judgment dated 02 December 2013 rendered by the Full Bench of the APTEL in Appeal No. 53 of 2012. Judgement of Hon'ble Gujarat High Court righteously applicable "*Mutatis Mudandis*" in this case also.

12.9. The Hon'ble Supreme Court in Civil Appeal No.4417 of 2015 in the matter of *Hindustan Zinc Ltd. vs Rajasthan Electricity Regulatory Commission* dated 13 May 2015 has decided the similar issue of applicability of RPO upon captive electricity generating companies. The Supreme Court in said matter viewed that the Regulations framed by Rajasthan Electricity Regulatory Commission (For short RERC) in exercise of its power under Section 86 (1) (e) read with Section 181 of the Electricity Act-2003 are reasonable and consistent with constitutional and statutory mandate. The relevant para is reproduced below:

"50. ***Article 51A(g) of the Constitution of India cast a fundamental duty on the citizen to protect and improve the natural environment. Considering the global warming, mandate of Articles 21 and 51A(g) of the Constitution, provisions for the Act of 2003, the National Electricity Policy of 2005 and the Tariff Policy of 2006 is in the larger public interest, Regulations have been framed by RERC imposing obligation upon captive power plants*** *and open access consumers to purchase electricity from renewable sources.* ***The RE obligation imposed upon captive power plants and open consumers through impugned Regulation cannot in any manner be said to be restrictive or violative of the fundamental rights conferred on the appellants under Articles 14 and 19(1)(g) of the Constitution of India.*** *Upon consideration of the rival submissions by the well-reasoned order, the High Court has rightly upheld the validity of the impugned Regulation and we do not find any reason to interfere with the impugned judgment. All the appeals are dismissed as the same*

are devoid of merit.” ***(Emphasis supplied)***

Although, above Judgment is applicable for Captive Power Plants, considering constitutional provisions (fundamental duty of every citizen to protect and improve natural environment) cited in above judgment by the Hon'ble Supreme Court, said Judgment can be made equally applicable to co-generation captive power plant who are using fossil fuel as a source of fuel for its co-generation plant.

12.10. Further, it is important to note that Hon'ble APTEL in its judgment dated 28 January 2020 in Appeal No 252 of 2018 (Century Rayon Vs MERC) has considered the fact that the Commission has notified its RPO Regulations based on provisions of Tariff Policy and further noted that such Regulations cannot be read down by the Appellate Court. Relevant part of the APTEL Judgment is reproduced below:

“4. The Appellant, feeling aggrieved by removal of the proviso (and consequent denial of exemption) made the following prayers before MERC:

a. This Hon'ble Commission be pleased to suitably modify the RPO Regulations to maintain status quo and exempt captive user(s) consuming power from grid connected fossil fuel based cogeneration plants, from applicability of Renewable Purchase Obligation target and other related conditions as specified in these Regulations and make suitable and consequential modifications to the said Regulations;

b. In the alternate, this Hon'ble Commission be pleased to exercise the power under Regulation 16 to relax/waive Renewable Purchase Obligation for captive users consuming power from co-generation having capacity of more than 5 MW generating electricity based on conventional fossil fuel...

5. The said petition of the Appellant, as indeed of the other entities seeking similar review or modification of MERC (RPO) Regulations 2016, was dismissed by MERC, by Order dated 28.03.2018, rejecting the contentions though granting some relief by observations in concluding para (no. 23) reading thus:

> *“23. However, having due regard to the pendency of these Petitions, the circumstances of the matter and the issues involved, the Commission may consider any consequent shortfall of such captive users of non-fossil fuel based CGPs in meeting their RPO targets in FY 2016-17 and FY 2017-18 to be met to FY 2018-19 in its compliance verification proceedings for those years.”*

………….

35. The prerogative to formulate, notify and enforce the National Electricity Policy, National Electricity Plan and Tariff Policy is within the domain and prerogative of the Central Government in terms of Section 3 of the Electricity Act, 2003. It is not for such adjudicatory authority as this Tribunal to sit in judgment on correctness of “policy” which subject is delineated and reserved for the executive branch of the State, also for the reason that this Tribunal does not have any advisory role. The State Electricity

Regulatory Commission carries and discharges multifarious responsibilities and functions, one of which – under Section 86(1)(f) – is to "adjudicate upon the disputes". In that sense of the frame work, the Electricity Regulatory Commission is an adjudicatory forum whose decisions are subject to correction in appeal by this Tribunal. But, it has to be remembered that State Electricity Regulatory Commissions, as indeed the Central Electricity Regulatory Commission, also perform (besides others) legislative functions. To frame and notify Regulations is a legislative function. ***The Regulations framed by the State Electricity Regulatory Commissions in exercise of the power vested in them by Section 181, are in a nature of subordinate legislation and thus have the force of law****. It is well settled that challenge to the vires of the Regulations is not permitted before this Tribunal, it being a subject of judicial review, which power is vested elsewhere. For this, we only need to quote the decision of the Hon'ble Supreme Court reported as PTC India Limited v Central Electricity Regulatory Commission (2010) 4 SCC 603.*

36. ***We are not impressed by the submissions that the modified Regulations, 2016 being in teeth of the 2010 decision of this Tribunal in the case of Century Rayon (supra), the modification brought about by omission of the proviso existing in the preceding regulations be ignored or modified so as to have clause (b) "read down". The decision of an adjudicatory authority cannot impinge upon power and prerogative of the statutory authority vested with the competence to lay down modified State Policy****.* ***The State Regulatory Commission while framing the regulations in discharge of its functions under Section 86 is statutorily "guided by" the National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3. If the said Policies, or Plan or the Regulations framed by the State Electricity Regulatory Commission under such guidance, fall foul of the letter and spirit of the statutory scheme, the validity can be challenged but only by way of judicial review before the appropriate Court of competence****, definitely not before this Tribunal.*

37. ***We are not persuaded in the present case to read down the modified regulations. So long as the modified Regulations of 2016 stand, no relief can be granted to the Appellant in terms of prayer clauses (a) & (b)*** *in the appeal as quoted above.*

…………….

39. At the hearing, it was pointed out that by prayer clause (b) in the petition before MERC, the Appellant had also requested for the power to relax/waive to be exercised by the State Commission in terms of Regulations, 2016. We note that the door for granting some relief has been opened by the Commission by observations in (para 23) the impugned decision as has been quoted earlier. We do not wish to interfere in the discretion exercised by the Commission in such regard by bringing in any further modification on that score."

Thus, Hon'ble APTEL has clearly ruled that till RPO Regulations 2016 stands valid, no relaxation to fossil fuel based cogeneration units from meeting RPO stipulated in the

Regulations can be granted. Above judgment of the APTEL was challenged by Century Rayon before the Hon'ble Supreme Court, but Supreme Court has refused to intervene in APTEL judgment. Thereafter, M/s Century Rayon filed Writ Petition before the Bombay High Court challenging validity of the RPO Regulations framed by MERC. Said Writ Petition is pending before the High Court without any stay which means MERC RPO Regulations are in force.

12.11. In subsequent judgment dated 2 August 2021 in Appeal No 176 of 2020 (JSW Steel Vs MERC), the Hon'ble APTEL has ruled that JSW Steel is exempted from RPO as long as power from cogeneration is in excess of presumptive RPO. In that judgment, Hon'ble APTEL has also considered its above quoted judgment (Century Rayon Vs MERC) and differentiated it based on the fact that in that judgment, appellant has challenged Regulations framed by the Commission whereas exemption granted in JSW Steel Vs MERC matter is based on provisions of electricity act.

12.12. The Commission notes that TSL is relying on above judgment (Century Rayon Vs MERC) of the Hon'ble APTEL for seeking relief under present matter. However, as explain above, once Regulations have been framed which has not been set-aside by Competent Court, the Commission cannot go beyond the provisions of such Regulations.

12.13. It is also pertinent to note that provisions of the RPO and REC Regulations, 2016 on issue of applicability of RPO targets to fossil fuel-based cogeneration plants have been challenged by Captive Power Producers Association under WP No.269 of 2019 and the matter is still sub-judice. TSL is also a member of Captive Power Producers Association. In the light of the above-mentioned facts including the provisions of the Regulations and since no stay is granted by the High Court, the Commission is of the opinion that TSL is bound to follow the prevailing Regulations.

12.14. Based on the above settings, the Commission does not find any regulatory vacuum in Regulations which can be addressed by invoking the provisions under Power to Relax and Powers under Removal of Difficulties. The Commission concludes that the claim of TSL for relaxation in RPO has no merit.

13. Issue B: Can past RPO compliance be fastened upon new entrant i.e. TSL post Insolvency & Bankruptcy proceedings before NCLT?

13.1 On 18 May 2018, TSL through its a wholly owned subsidiary namely Bamnipal Steel Limited, had acquired, control and management of the erstwhile Bhushan Steel Ltd, pursuant to approval of Resolution Plan as approved by NCLT (Principal Bench, New Delhi) vide its Order dated 15 May 2018 under the provisions of Insolvency & Bankruptcy Code, 2016 (IBC).

13.2 It is stated that in terms of Approved Resolution plan, TSL shall have no liability towards any dues/claim prior to approval of Resolution Plan.

13.3 Thereafter name of Bhushan Steel Ltd (BSL) changed to Tata Steel BSL Ltd (TSBSL).

Subsequently w.e.f 11 November 2021, TSBSL stands amalgamated into and with TSL in accordance with the Order of the NCLT, Mumbai dated 29 October 2021.

13.4 The Commission notes that TSL has categorically submitted that the alleged outstanding RPOs for 2016-17 to 2017-18 qualifies as an operational debt as defined under Regulation 5(21) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), does not find mention in the approved Resolution Plan.

13.5 In Petition, TSL is seeking a refund of the payments of Rs. 75,93,633/- (with interest) which has been made to MEDA towards alleged RPO liabilities for the FY 2016-17 and 2017-18. But after perusal of the Petition, the Commission note that NCLT Orders dated 15 May 2018 and 29 October 2021 have not been furnished by the TSL. In the absence of documentary evidence and NCLT Orders on record, it is difficult to ascertain this aspect at this stage.

13.6 Although, the Commission is aware of the judgment of the Supreme Court which has ruled that IBC Law will have overriding effect on the Electricity Act 2003, in absence of necessary document as stated above, the Commission is not able to decide the issue of refund. At the same time, it is to note that the Commission has already initiated process for verification of RPO of obligated entities (other than Distribution Licensees), in that process, TSL may file these documents and request for refund of permissible amount.

14. Issue C: Way Forward

14.1 As far as reporting of RPO compliance is concerned, MEDA has been designated as State Agency for securing RPO compliance and reporting. It is mandatory on all obligated entities to furnish the RE/REC purchase data to the State Agency. Being an Obligated entity, TSL is required to furnish the relevant data in stipulated format. If it has reservation on certain procedural aspects, then it may approach the Commission, but non- furnishing of relevant data is against the Regulatory mandate.

14.2 The Commission has already initiated the procedure for verification of RPO compliance for Open Access and CPP consumers for the period of FY 2014-15 to FY 2019-20. During the said proceedings, compliance status will be verified.

15. Hence, the following Order.

ORDER

1. **The Petition in Case No. 125 of 2023 is disposed of in accordance with directive as stated in Para (13.6) of the Order.**

Sd/-	Sd/-	Sd/-
(Surendra J. Biyani)	**(Anand M. Limaye)**	**(Sanjay Kumar)**
Member	**Member**	**Chairperson**