

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No.: 138/MP/2012
with I.A. 26/2012**

**Coram:
Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V.S.Verma, Member
Shri M. Deena Dayalan, Member**

Date of Hearing: 26.7.2012

Date of Order: 26.12.2012

In the matter of:

Petition under Sections 79 (1) (k) of the Electricity Act, 2003 read with Regulations 14 of the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulation, 2010.

And

In the matter of:

M/s Dalmia Bharat Sugar and Industries Limited (DBSIL)**Petitioner**

Vs

Uttar Pradesh New and Renewable Energy Development Agency, Lucknow
National Load Despatch Centre, New Delhi**Respondents**

Following were present:

Shri M.G. Ramachandran, Advocate for the petitioner
Miss Ranjitha Ramachandran, Advocate for the petitioner
Shri Pankaj Rastogi, DBSIL
Shri R.S.Rana, DBSIL
Shri Neeraj Kumar, GEPL
Shri R.K.Dubey, Advocate
Miss Minaxi Garg, NLDC



Miss Joyti Prasad, NLDC
Shri Satya Prakesh, NLDC

ORDER

The petitioner, Dalmia Bharat Sugar and Industries Limited (DBSIL) being aggrieved by the show cause notice dated 16.3.2012 issued by the Uttar Pradesh New and Renewable Energy Development Agency (UPNEDA) for revocation of the accreditation of the petitioner under the Renewable Energy Certificate (REC) mechanism has filed the present petition with the following prayers:

- (a) Direct and hold that the petitioner is an eligible entity for participation in REC Mechanism and is entitled to accreditation under the REC Regulations for 10 MW (used for self/captive consumption) for each of its unit.
- (b) Direct the UPNEDA not to reduce or cancel the accreditation dated 19.8.2011 of the petitioner and set aside the Letters dated 16.3.2012 and 20.4.2012 issued by UPNEDA.
- (c) Direct the UPNEDA to accept the declaration already submitted by the petitioner at the time of accreditation as being in order.
- (d) Set aside the Show Cause Notice dated 5.6.2012 issued by UPNEDA as being arbitrary and illegal and



(e) Pass such other of further order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the cause.

2. The facts leading to the filing of the present petition are that the petitioner is engaged in the business of manufacture of sugar and owns, maintains and operates biomass (bagasse) based cogeneration power plants in its sugar mills. The petitioner has three bagasse based co-generation plants, namely, Ramgarh Unit with installed capacity of 25 MW, Jawaharpur Unit with installed capacity of 26 MW and Neogi Unit with installed capacity of 26 MW which were commissioned on 16.10.2007, 13.2.2007 and 24.4.2007. The petitioner has a self/captive consumption of 10 MW for each sugar mill. Since the installed capacity of the petitioner exceeds the captive/self consumption, the petitioner sought to sell such surplus power to the Madhyanchal Vidyut Vitran Nigam Ltd (MVVNL) which is a distribution company in the State of Uttar Pradesh. The petitioner entered into Power Purchase Agreements (PPA) dated 5.4.2009 with MVVNL for sale of surplus power with respect to each of the 3 units at the tariff specified for such plants by the Uttar Pradesh Electricity Regulatory Commission (UPERC). The PPAs provided that the petitioner would only sell the surplus generating in the co-generation plant after its captive use to the distribution licensee upto 25 MW. The PPAs further recognized that each Unit of the petitioner has a contract load of 10 MW. The UPERC (Captive and non-conventional energy generating plants) Regulations, 2005 (CNCE Regulations)



provides that the distribution licensees are obliged to purchase of surplus power from the non-conventional and cogeneration plant in the State of Uttar Pradesh. In accordance with the obligations under the PPA and under the CNCE Regulations, MVVNL has been purchasing surplus power from the cogenerating units of the petitioner over and above the captive/self consumption. After notification of the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (hereinafter "REC Regulations") as amended vide notification dated 29.9.2010 and subsequent clarification vide order dated 21.6.2011, the petitioner applied for accreditation to UPNEDA for its captive/self consumption in the three units for the contracted load of 10 MW each. UPNEDA after verification has granted Certificates of Accreditation dated 19.7.2011 for the three Units for 10 MW each which are valid till 18.7.2016. Thereafter, the petitioner applied for registration to Central Agency which has been granted vide registration dated 19.8.2011 valid upto 18.8.2016 for Ramgarh and Jawaharpur units and registration dated 26.8.2011 valid upto 25.8.2016 for Nigohi unit. Subsequent to the accreditation and registration, the petitioner in accordance with the REC Procedure applied for issuance of REC for the month of November 2011 onwards and submitted its Energy Injection Report as verified by MVVNL with regard to the eligible units claimed. In the meeting on implementation of REC framework held at NLDC on 22.2.2012, it was clarified that the capacity of power tied up under preferential tariff even for a certain



period in a year would be ineligible under REC mechanism and the State Agencies were directed to recheck the accredited projects. Consequently, UPNEDA in its letter dated 16.2.2012 informed by RE generators in the State of Uttar Pradesh including the petitioner that the sum of capacity under the REC mechanism and the capacity under preferential tariff should not exceed the installed capacity of the project and the capacity tied up under preferential tariff even for shorter period in a year would be ineligible under REC Mechanism. UPNEDA also sought declaration from the petitioner that it has not exceeded the difference between the installed capacity and the capacity under preferential tariff while applying for REC. The petitioner sought time for submitting the declaration on the ground that it made representation to the Commission vide letter dated 29.3.2012 and requested UPNEDA to await the directions of the Commission. UPNEDA has issued a show cause notice dated 5.6.2012 to the petitioner for willfully defaulting in submission of declaration required under letter dated 16.3.2012 and has sought to revoke the accreditation of the cogeneration plant of the petitioner. It is against the above background, the petitioner has filed the present petition for directions to UPNEDA for not revoking or cancelling the petitioner's accreditation and for a declaration that the petitioner is entitled to accreditation for 10 MW being the connected loads of its sugar mills and no further declaration is required to be submitted.

3. The petitioner has submitted that the petitioner is an eligible entity for issuance of REC in accordance with the REC Regulations and is entitled to



accreditation and registration for 10 MW being its self consumption for each of its units due to the following reasons:

(a) REC Regulations, 2010 as amended by the Notification dated 29.9.2010 have to be read in a combined manner, and in the context, purpose and objective sought to be achieved by the Regulations. The REC Regulations cannot be read in a narrow and pedantic manner by interpreting some words out of context. By the amendment made on 29.9.2010, the Regulation 5 (1) of the REC Regulations permit a generating company to partly use the electricity generated by it for its own purpose and be entitled to the benefits of REC, while selling the surplus capacity to the distribution licensee in the area where the generating station is situated. Regulation 5(1)(b) of the REC Regulations providing for the condition that the generating company does not have any Power Purchase Agreement for the capacity related to such generation of electricity at a preferential tariff, cannot be interpreted to say that the self consumption will not be eligible for REC benefits if there is a Power Purchase Agreement for the surplus capacity.

(b) Regulation 5(1) of the REC Regulations read with the proviso indicates that the self consumption recognized in the proviso should be taken as an exception to the main provision which deals with the contracted capacity being sold at a preferential tariff. The very purpose of the proviso is to carve out certain exceptions. If the main provision is continued to be read as prohibiting

the REC benefits to any part of the self consumption, the purpose of the Proviso will get defeated.

(c) The term `capacity' used in Regulation 5 (1) (b) of the REC Regulations read with the proviso as incorporated by the amendment on 29.9.2010 relates to the contracted capacity and not the physical capacity of the generating station. The capacity is with reference to the Power Purchase Agreement, namely, a contract entered into between the generator and the distribution licensee. The contracted capacity could be either a fixed capacity throughout the year or part of the year with the remaining being consumed by the generating company for its own self use or could be the surplus capacity that is available from time to time for sale to the distribution licensee with self consumption being flexible.

(d) The captive power requirement of the sugar mills varies from time to time based on the availability of cane for crushing and on the operating conditions at various points of time. During the crushing season, the self consumption would be 10 MW. During non-crushing season, the self consumption is negligible and almost entire power generated would be available for sale to distribution licensee under tariff determined by the State Commission. Therefore, bio fuel co-generation project has been registered under REC framework for 10 MW capacity equivalent to self consumption.

(e) The petitioner's co-generation plants have been established primarily to meet their own power requirement (self consumption). Therefore, the PPA has been signed with distribution utility with the sole intention of only to sell surplus power up to 25 MW to distribution companies. Since the said PPA is only with respect to the surplus power over and above the actual captive consumption by the petitioner, the captive/self consumption is not covered under the PPA and the conditions specified under Regulation 5 (1) (b) of the REC Regulations are fulfilled. The petitioner does not avail of any benefit in the form of concessional/promotional transmission charges or wheeling charges, banking facility benefit within the meaning of the REC Regulations and waiver of electricity duty.

(f) The PPA executed with the distribution company is with regard to sale of surplus power generated after the self consumption. Therefore, sum of total capacity under PPA and capacity under REC for self-consumption may not match the total capacity. However, RECs are claimed only for the measured energy used for self consumption calculated by deducting from gross generation metered quantum sold to distribution company and auxiliary consumption.

(g) The declaration submitted by the petitioner provides that the DBSIL has not entered into any PPA for the capacity sought under the REC Scheme i.e. the self consumption of DBSIL is not covered by the PPAs and hence, the declaration is in accordance with the REC scheme. It has been submitted that

the declaration has to be read as per Regulation 5(1)(b) of the REC Regulations and has to be interpreted in the context of the intent and purpose of the REC scheme. The intent of such a declaration is to ensure that the renewable generators do not avail of the REC Scheme and the promotional benefits of preferential tariff simultaneously. The petitioner has submitted that RECs are claimed with regard to the self consumption only and not with regard to any power exported to the distribution licensee under tariff determined by the State Commission.

(h) The method of calculation of RECs by NLDC as well as the energy injection reports verified by the distribution licensee ensures that there is no overlap between the self consumption and the export of power by DBSIL. Therefore, the sum of power under REC mechanism and power under preferential tariff in actual energy terms would never exceed the installed capacity and there is no case for reduction of the capacity under the REC mechanism.

4. National Load Despatch Centre (NLDC), the Central Agency, in its reply has submitted that as per Regulation 5 of the REC Regulations, the capacity tied up under REC mechanism even for a certain period in a year is not eligible to participate under REC Mechanism. NLDC has submitted that the project was erroneously accredited by UPNEDA and subsequently registered by the Central Agency. NLDC has further submitted that as per REC Regulations, the eligible capacity under REC mechanism is the difference between the installed capacity and the maximum capacity tied under preferential tariff and the REC



Regulations do not envisage seasonal eligibility criterion for participation under REC mechanism.

5. Uttar Pradesh New and Renewable Energy Development Agency (UPNEDA) vide its reply has submitted that Regulation 5 of the REC Regulations makes provision to participate under REC Mechanism for sale of the electricity generated either (i) to the distribution licensee of the area in which the eligibility entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price. UPNEDA has further submitted that a RE generator is required to furnish 'declaration', clearly specifying the quantity for which it does not have PPA at preferential tariff for entire validity period of accreditation/registration. REC Regulations do not provide for any provision with regard to flexibility of interchange of capacity registered under REC mechanism with the capacity tied up under preferential tariff during the entire validity period of accreditation/registration.

7. During the course of hearing on 19.6.2012, the petitioner was directed to file the data/information, on affidavit, to substantiate its contention that the energy recorded under captive consumption can never be claimed as sale of power to distribution company under preferential tariff and RECs cannot be

claimed on the energy exported to distribution companies. The petitioner vide its affidavit dated 13.7.2012 has furnished the requisite data.

8. During the course of hearing on 26.7.2012, learned counsel for the petitioner referred the second proviso to the Regulation 5 of the REC Regulations and submitted that the intent of the said regulations is that a renewable generator does not simultaneously participate in the REC mechanism and avail promotional benefits in the form of preferential tariff. However, the petitioner is not claiming REC for that part of generation, which is being sold to the Distribution Company at preferential tariff. Learned counsel for the petitioner further submitted that the data and information submitted to the Commission also shows that petitioner can claim RECs only on the basis of duly verified Energy Injection Report which is based on the basis of the separate meters installed for self-consumption, Auxiliary Consumption, Grid export, in accordance with the relevant Regulations.

9. The representative of NLDC referring to Para 8 (vii) of the Statement of Objects and Reasons to the REC Regulations submitted that REC Regulations do not envisage seasonal eligibility and the RE generators need to clearly demarcate and declare their capacity separately under preferential tariff and REC mechanism.

10. We have considered the submissions of the petitioner and the respondents and perused the material on record. The main grievance of the petitioner is that it should not be disentitled for REC on the ground that it has got a PPA with the distribution company for the entire installed capacity as the petitioner at no time is surpassing the installed capacity after taking into account the power used for self-consumption and power sold at preferential tariff. The petitioner has submitted that the capacity mentioned in the PPA is infirm in nature as supply under the PPA can only be for generation over and above the self-consumption. Since the power supplied under preferential tariff and power used for self consumption can be metered and accounted for, there is no possibility of the petitioner claiming RECs for the same power which is being sold under preferential tariff. The petitioner has accordingly denied that it has ever made false declaration to the State Agency or Central Agency and therefore, there is no valid reason for the State Agency to initiate action for cancellation of its accreditation.

11. Regulation 5 of the REC Regulations as amended by notification dated 29.9.2010 provides as under:

"5. Eligibility and Registration for Certificates:

(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfills the following conditions:

- a. it has obtained accreditation from the State Agency;
- b. it does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate Commission; and



c. it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.

Explanation.- for the purpose of these regulations 'Pooled Cost of Purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.

Provided that such a generating company having entered into a power purchase agreement for sale of electricity at a preferential tariff shall not, in case of pre-mature termination of the agreement, be eligible for participating in the Renewable Energy Certificate (REC) scheme for a period of three years from the date of termination of such agreement or till the scheduled date of expiry of power purchase agreement whichever is earlier, if any order or ruling is found to have been passed by an Appropriate Commission or a competent court against the generating company for material breach of the terms and conditions of the said power purchase agreement.

Provided further that a Captive Power Producer (CPP) based on renewable energy sources shall be eligible for the entire energy generated from such plant including self consumption for participating in the REC scheme subject to the condition that such CPP has not availed or does not propose to avail any benefit in the form of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty.

Provided also that if such a CPP forgoes on its own, the benefits of concessional transmission or wheeling charges, banking facility benefit and waiver of electricity duty, it shall become eligible for participating in the REC scheme only"

12. The petitioner has extensively argued that the benefit of REC for self consumption conferred upon it by second proviso to Regulation 5(1) cannot be taken away by virtue of Regulation 5(1)(b) of the REC Regulations. This argument of the petitioner is unfounded as the second proviso does not vest any right on the petitioner to claim REC for self-consumption. Evidently, the petitioner is not a captive power plant or a captive generating plant as defined in

the Electricity Rules since it does not consume 51% of the electricity generated by it for self use. The petitioner as also the other RE generators have been allowed the benefits of self-consumption on the fiction of law that their self-consumptions are deemed to be supply of electricity by a generating company which is eligible for grant of REC in terms of Regulation 5(1)(c) of REC Regulations. In this connection, it will be of use to quote from our order dated 18.10.2012 in Petition No.34/MP/2012 and other related petitions which is as under:

“25. In the light of the above discussion, we are of the view that the self consumption of electricity by co-generation plants not meeting the requirement of a CGP under the Electricity Rules, 2005, shall be deemed to be supply of electricity by a generating company which can either be to a licensee or to an open access consumer. Once, a co-generation plant is considered as any other RE Generator and its captive consumption is deemed to be supply of electricity by a generating company, it follows that its captive consumption can be counted towards issuance of REC subject to fulfilment of the conditions laid down in Regulations 5 (1) (a) to (c) of the REC Regulations. Such a plant not being a CPP will not be entitled to any of the benefits available to the CPP and in case, any co-generation plant is availing any concessional benefits or banking facility or waiver of electricity duty etc, it shall be required to forgo these benefits before availing the RECs for the entire generation from the plant including self consumption.”

Therefore, the eligibility of the petitioner for REC shall have to be determined in accordance with the Regulation 5(1)(a) to (c) only. The petitioner fulfills the conditions of Regulation 5(1)(a) as it has been accredited by the State Agency. Regulation 5(1)(b) of REC Regulations provides that the RE generator should “not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate



Commission.” Under Regulation 5(1)(c), a RE generator is eligible for REC if it is selling power to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee or to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price. Both Regulation 5(1)(b) and Regulation 5(1)(c) are mutually exclusive. If certain capacity of a RE generator is tied up under preferential tariff, the same capacity cannot be used for sale of power under pooled price to the distribution company or at the mutually agreed price to an open access consumer or licensee or at the power exchange. Therefore, the capacity referred to Regulation 5(1)(b) is contract capacity which has to be excluded from the capacity of the generating plant to arrive at the capacity for which a RE generator can be entitled for REC if it is selling power to the entities mentioned in Regulation 5(1)(c) of REC Regulations. For the sake of certainty, the capacity covered under the preferential tariff is expected to be fixed and the supply of power firm. Beyond the capacity covered under preferential tariff, the RE generator can sell its power to the distribution company at pooled price or to any open access consumer or at the power exchange depending its convenience. The intent of Regulation 5(1)(b) is that a renewable generator does not simultaneously participate in the REC mechanism and avail promotional benefits in the form of preferential tariff for the same capacity.

19. In case of the petitioner, there is no firm supply of power under preferential tariff as the petitioner is required supply surplus power over and above its captive consumption. The relevant provision of the PPA between Uttar Pradesh Power Corporation Ltd and the petitioner in respect of its Ramgarh unit reads as under:

*“ Whereas, the Generating Company has now desired to sell entire surplus Power generated in the proposed facility after its own captive use, and Discom agrees to purchase all such power i.e. **upto total 25 MW** offered for sale under the terms and conditions set herein.....*

Whereas, the Generating Company declares the load of 10 MW power for its such plant and Discom agrees to supply power as per its requirement to such plant at retail tariff as per Regulations specified by the Commission and.....

2.1 UPPCL on behalf of DISCOM shall accept and purchase upto 25 MW of power made available to Discom/STU's system from the Generating Plant's bagasse based cogeneration in accordance with the terms and conditions of this Agreement, at the rate specified for such plant in Schedule II of Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Supply of Power and Fixation of Tariff for Sale of Power from Captive Generating Plants, Co-generation, Renewable Sources of Energy and Other Non-Conventional Sources of Energy based Plants to a Distribution Licensee) Regulations, 2005 as amended from time to time.”

The PPA does not have a fixed capacity for sale of power under preferential tariff. The PPA provides that the petitioner would sell its entire surplus power after its captive use and the Discom has agreed to purchase all such power. If its self-consumption is zero, it can sell upto 25 MW and if its self consumption is say 8 MW, it can sell upto 17 MW under preferential tariff. In other words, generation from the same capacity can be used for sale under the preferential tariff as well as the REC mechanism, depending on the quantum of captive



consumption. Since the power to be sold under the preferential tariff is over and above the captive consumption, it is unlikely that the same power will be sold under preferential tariff as well as used for claiming REC for self consumption. The PPA has been so made keeping in view the seasonal variation in the production of power and self consumption by these co-generating plants. Therefore, in cases of RE generators like the bagasse based co-generating plant, it is difficult to get a firm capacity under preferential tariff as the captive consumption of power varies from season to season. Only because, there is no firm capacity in the PPA for these generators, the benefits of the promotional schemes like the REC cannot be denied to them. Therefore, the REC Regulations would need to be interpreted in such a manner which advances the purpose of the regulations and does not defeat it. The moot point is determination of the capacity for which a RE generator is required to be registered after excluding the capacity covered under preferential tariff. In our view, in cases of PPAs of such flexible character, the maximum assessed load for self consumption by the RE generator should be considered for registration under REC mechanism. This is because the co-generation plant is not expected to exceed the assessed load for self consumption at any point of time. In the present case, we notice that as per the PPA, the generating company has declared a load of 10 MW power for its plant and the Discom has agreed to supply the same as per requirement at retail tariff determined by the State Commission. In our view, this declared/accepted load of the co-generation plant

should be taken as the maximum capacity for the purpose of registration REC for self consumption. The RE generator can claim REC upto the maximum of 10 MW for captive consumption, subject to actual metered consumption.

20. It is not in dispute that the power used for captive consumption and the power sold under preferential tariff can be separately metered and accounted for. Therefore, there is no possibility of the same capacity being used for both captive consumption and for sale through preferential tariff at any particular time. The petitioner has submitted that it has got accreditation for 10 MW being a connected load of the units and the usual captive/self consumption by units during the crushing season. The capacity under preferential tariff is the surplus power left by the captive/self consumption by the units and varies from time to time depending upon the availability of cane for crushing and the operating conditions. In our view, the petitioner is correctly accredited and registered for 10 MW for each of its 3 units for RECs being the connected load of the units.

21. The Commission is aware of the seasonal variation in self-consumption in the co-generation plants like that of the petitioner. After considering the provisions of the UPERC Regulations and the PPAs entered into by the UPPCL with the RE Generators in the State of Uttar Pradesh, we are of the view that a separate dispensation is required to be provided for the cogeneration plants for

the purpose of accreditation and registration of their capacity on account of captive consumption. We consider it an appropriate case to exercise our power to remove difficulty to facilitate accreditation and registration of the co-generation plants for the purpose of REC. Accordingly, in exercise of the power under Regulation 14 of REC Regulations, we direct **that in so far as eligibility under Regulation 5(1)(b) of REC Regulations is concerned, the connected load capacity of the co-generation plants as assessed/sanctioned by the concerned distribution licensee shall be considered as the capacity for captive consumption for the purpose of accreditation and registration irrespective of the capacity tied up under the preferential tariff.** We also direct the staff to process the case for making appropriate provisions in the REC Regulations through amendment in the light of our decision above.

22. As the units of the co-generation plants of the petitioner are accredited and registered for 10 MW each which corresponds to the connected load as accepted by MVVNL, we direct the State Agency to withdraw the show cause notices and continue to consider the accreditation dated 19.8.2011 as valid and subsisting. Consequently, the Central Agency is directed to accept and consider the applications of the petitioner for issue of RECs for the months of November 2011 till November 2012 if the applications are received by 28.2.2013 supported by duly verified energy injection reports.



23. The petition is disposed of in terms of the above.

Sd/-
(M.Deena Dayalan)
Member

sd/-
(V.S.Verma)
Member

sd/-
(S.Jayaraman)
Member

sd/-
(Dr. Pramod Deo)
Chairperson

