Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal no. 53 of 2012

Dated: 23rd September, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Lloyds Metal & Energy Ltd. …Appellant(s)
Trade World, 'C' Wing, 16th Floor
Kamala City, Senapati Bapat Marg
Lower Parel (W), Mumbai – 400 013

Versus

1. **Maharashtra Electricity Regulatory Commission …Respondent(s)**
13th Floor, World Trade Centre
Cuffe Parade
Mumbai - 400 005

2. **Maharashtra State Electricity Distribution Company Limited**
Plot No. G-9, Prakashgad, Prof Anant Kanekar Marg
Bandra (E), Mumbai 400 051

3. **Tata Power Company Limited (Distribution)**
Corporate Centre, 'B' 34, Sant Tukaram Road
Carnac Bunder, Mumbai - 400 009

4. Reliance Infrastructure Limited (Distribution)
Reliance Energy Centre
Santacruz (E), Mumbai - 400 055

5. The B.E.S & T Undertaking
BEST Bhavan, BEST Marg
Fort, Mumbai 400 001

Counsel for the Appellant (s) :	**Mr. M.G. Ramachandran** **Mr. Anand K. Ganesan** **Ms. Swapna Seshadri** **Mr. Abhishek Khare** **Mr. Prashant Puri (Rep.)**
Counsel for the Respondent(s):	**Mr. Buddy A. Ranganadhan** **Mr. Arijit Maitra** **Ms. Richa Bharadwaja** **Mr. Abhishek Mitra** **Ms. Puja Priyadarshini** **Mr. Ravi Prakash**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

M/s. Lloyds Metal & Energy Ltd. is the Appellant herein. This Appeal has been filed by the Appellant against the impugned order dated 29.12.2011 passed by the

Maharashtra Electricity Regulatory Commission ("State Commission") for not determining the tariff for the coal based co-generation plant of the Appellant and purchase obligation of the Distribution Licensees from the co-generation plant under Section 86(1)(e) of the Electricity Act, 2003.

2. The State Commission is the Respondent no.1. The Respondent nos. 2 to 4 are the Distribution Licensees in the State of Maharashtra.

3. The brief facts of the case are as under.

a) The Appellant is a steel manufacturing company which has commissioned a 30 MW capacity co-generation power plant. The co-generation plant is based on the industrial waste heat generated by the sponge iron plant of the Appellant. The fuel used in the plant is fossil fuel (coal). The co-

generation plant was commissioned in October, 2010.

b) Presently there is no tariff prescribed by the State Commission for the co-generation plant based on fossil fuel. In view of this, the Appellant filed a petition before the State Commission for determination of tariff for supply of electricity from its fossil fuel based co-generation plant to the Distribution Licensees in Maharashtra and for fixation of purchase obligation for electricity produced from fossil fuel based co-generation plant under Section 86(1)(e) of the Electricity Act, 2003. The Appellant also prayed for issuance of an interim tariff to enable the sale of electricity from the Appellant's co-generation plant to the Distribution Licensees.

c) The State Commission passed the impugned order dated 29.12.2011, *interalia, not granting* the reliefs sought for by the Appellant including the interim reliefs.

d) Aggrieved by the impugned order the Appellant has filed this Appeal.

4. The Learned Counsel for the Appellant submits the following:-

The prayer, sought for by the Appellant for specifying purchase obligation for waste heat recovery based co-generation power plant is in line with Section 86(1)(e) of the Electricity Act, 2003 and as per the Tribunal's ruling in Century Rayon case in Appeal no. 57 of 2009. Therefore, the State Commission ought to have determined the tariff for the Appellant's fossil fuel based co-generation plant and specified the purchase

obligation of the Distribution Licensees from fossil fuel based co-generation power plant.

5. Learned Counsel for the State Commission made elaborate submissions in support of the findings of the State Commission in the impugned order. The same is as follows:-

"The directions of the Tribunal in Century Rayon case would not apply for specifying purchase obligation of the Distribution Licensee from fossil fuel based co-generation plant under Section 86(1)(e) of the 2003 Act. The Tribunal's directions in the Century Rayon case were that a consumer meeting its electricity requirement from its captive fossil fuel based co-generation plant could not be compelled to buy electricity from renewable sources of energy against the Renewable Purchase Obligation specified by the State Commission for the obligated entities. The directions of

the Tribunal in Century Rayon case have already been implemented by the State Commission."

The Learned Counsel for the State Commission further made submissions relating to the law governing the Renewable Purchase Obligation to be specified by the State Commission under Section 86(1)(e) of the Electricity Act.

6. In the light of the rival contentions urged by the parties, only question that arises for our consideration is as follows:

"Whether the fossil fuel based co-generation could be included as a source for meeting the Purchase Obligation of Distribution Licensee specified by the State Commission under Section 86(1)(e) of the Act?"

7. The gist of the discussions and the findings of the State Commission in the impugned order are summarized as under:

(a) The State Commission has noted the judgment of the Tribunal in Century Rayon case in which the Tribunal held that the cogeneration plants irrespective of the fuel used are to be promoted under Section 86(1)(e). However, on the basis of the above judgment, a Writ Petition has been filed by Reliance Industries Ltd. before High Court of Gujarat challenging the Regulation notified by Gujarat Commission which casts obligation on co-generation power plants to procure electricity from renewable sources of energy.

(b) If the petitioner wishes to supply electricity from its fossil fuel based co-generation plant to the Distribution Licensee, the tariff will have to be determined by the State Commission under Section 62(1)(a) of the Electricity Act, 2003. However, whether the said tariff has to be preferential tariff under Section 86(1)(e) will depend on the findings of the Higher Courts on the aspect as to whether the co-generation irrespective fuel used is to be promoted under Section 86(1)(e).

(c) According to the Renewable Purchase Obligation Regulations of 2010, the preferential tariff means the tariff fixed by the State Commission for sale of electricity for the generating station based on renewable energy sources. The definition of Renewable energy sources does not include fossil

fuel based co-generation plant. However, the Regulation exempt the captive users consuming power from fossil fuel based co-generation plants from applicability of RPO target.

(d) Similar Petition has been filed by M/s Reliance Industries Ltd. regarding amendment and review of the Renewable Purchase Obligation Regulations and is pending before the State Commission.

(e) The methodology for promoting fossil fuel based co-generation needs to the formulated and alternative methodology for encouraging such co-generation such as PAT scheme should be considered.

(f) According to the Renewable Purchase Obligation Regulations and Renewable Energy Tariff Regulations, in order to approve the fossil fuel based co-generation as “qualified renewable energy sources”, the same has to be approved by the Ministry of New and Renewable Energy (“MNRE”). Accordingly, the Petitioner has been directed to implead MNRE as a party to the petition.

(g) State Commission does not have enough information about the fossil fuel based co-generation plants to determine their generic tariff. The matter needs to be discussed in the Forum of Regulator in order to form an efficient methodology for evaluation of operations of the fossil fuel based co-generation plant on common basis.

(h) The fossil fuel based co-generation plants may at a common platform prepare a common report and proposal and make a presentation before the Forum of Regulators who will be able to approach the Central Electricity Authority for taking action for determination of operational norms at the national level.

(i) The Commission is not in a position to determine the tariff of co-generation plants on case to case basis till the normative parameters are established by the Central Electricity Authority.

8. The crux of the finding of the State Commission is this: According to the Regulations only energy from renewable sources of energy is eligible for meeting the Renewable Energy Purchase Obligation of the

Distribution Licensee. However, the Regulations exempt the persons using electricity from their captive co-generation plant irrespective of fuel used from renewable purchase obligation. The State Commission also feels that the co-generation based on fossil fuel could be encouraged by alternate methodology such as PAT.

9. Let us now examine the Tariff Regulations of 2010 of the State Commission for the Renewable Energy Tariff.

(a) The Renewable Energy Sources are defined as Renewable sources such as mini, micro and small hydro, wind, solar, biomass including bagasse, bio fuel co-generation, urban or municipal waste and such sources as recognized or approved by the MNRE.

(b) Fossil fuel based co-generation plants are not covered in the eligible entities.

(c) Accordingly, tariff norms have not been specified for fossil fuel based co-generation plants.

10. Let us now examine the Renewable Purchase Obligation Regulations of 2010 of the State Commission.

(a) The preferential tariff has been defined to mean the tariff fixed by the State Commission for sale of energy from a generating station based on renewable energy sources to the distribution licensee in accordance with Tariff Regulations for Renewable Energy Sources of 2010.

(b) Fossil fuel based co-generation is not included in the eligible generation sources for meeting Renewable Purchase Obligation of the obligated entities who have to mandatorily comply with Renewable Purchase Obligation ("RPO") under these Regulations.

(c) However, the captive users consuming power from grid connected fossil fuel based co-generation plants would be exempted from applicability of RPO target.

11. Let us now examine the findings of the Tribunal in its judgment dated 26.4.2010 in Appeal no. 57 of 2009 referred to as Century Rayon case.

(a) The main issue in the above Appeal was as to whether a person consuming energy from its

captive fossil fuel based co-generation plant could be compelled to purchase energy from renewable sources of energy against the Renewable Purchase Obligation specified by the State Commission for the obligated entities under Section 86(1)(e) of the Act.

(b) The Tribunal came to the conclusion that both the renewable energy sources as well as co-generation irrespective of the fuel used in the co-generation plant need to be promoted under Section 86(1)(e) of the Act. Thus, a person consuming energy from its captive fossil fuel based co-generation plant could not be compelled to purchase electricity from renewable energy sources.

(c) Let us quote the conclusion arrived at by the Tribunal in the Century Rayon case. They are as follows:

"(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration from renewable sources alone. The meaning of the term 'co- generation' has to be understood as defined in definition Section 2 (12) of the Act.

(II) As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.

46. In view of the above conclusions, we are of the considered opinion that the finding rendered by the Commission suffers from infirmity. Therefore, the same is liable to be set side. Accordingly, the same is set aside. Appeal is allowed in terms of the above conclusions as well as the findings referred to in aforesaid paras 16,17,22 and 44. While concluding, we must make it clear that the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all co-generation based captive consumers who may be using any fuel. We order accordingly. No costs."

12. Thus the Tribunal not only went into the question of fastening of Renewable Purchase Obligation on the persons consuming energy from their captive fossil fuel

based co-generation plants but also decided that under Section 86(1)(e) of the Act, co-generators irrespective of fuel used and generators of electricity through renewable sources of energy have to be promoted by the State Commission by directing the Distribution Licensees to purchase electricity from both these categories. The Tribunal also decided that the conclusion arrived at in the Appeal would also be equally applicable to all co-generation based captive consumers irrespective of type of fuel used.

13. Learned Counsel for the Appellant on the basis of the Century Rayon case argued that the State Commission has not given effect to the same. The Tribunal has referred to the intention of the Parliament and has ruled that Section 86(1)(e) identifies co-generation from fossil fuel also as a source to be promoted and, therefore, it is not open to the State Commission to proceed on the

basis that it has discretion not to identify co-generation based on fossil fuel as source of energy to be promoted or to defer such promotion to a later date. He further argued that the course adopted by the State Commission in not giving effect to the judgment is contrary to the well established principle of judicial precedents of Higher court to be followed. In this regard he also referred to the judgments of the Hon'ble Supreme Court reported as 2004(5)SCC1 in the matter of Tirupati Balaji Developers (P) Ltd. V/s State of Bihar and 1992 Supp(1)SCC648 in the matter of Union of India & Ors. Vs. Kamlakshi Finance Corporation Ltd.

14. According to the Learned Counsel for the State Commission the Appellant had sought fixation of preferential tariff. However, the preferential tariff could be fixed only for the specified types of generation and co-generation as mandated in the Regulations which do

not include fossil fuel based co-generation. If any other technology which is not specified in the said Regulations seeks a preferential tariff, such technology has to be approved by the Ministry of New and Renewable Energy. Thus, the State Commission in accordance with the Regulations has directed the Appellant to implead the MNRE as a party in the case.

15. Learned Counsel for the State Commission further submitted that the only question that arose for the consideration of this Tribunal in Century Rayon case was as to whether a fossil fuel based co-generation could be fastened with an obligation to purchase renewable energy from the renewable energy sources such as wind, solar, biomass, etc. No question ever arose in the Appeal filed by Century Rayon whether a fossil fuel based co-generator could also be a source of Renewable energy under Section 86(1)(e). No material

of any kind was placed for the consideration of the Tribunal on whether a fossil fuel based co-generator could be treated at par with generators from renewable sources so as to be made a source of energy procurement by an obligated entity under Section 86(1)(e). No argument or contention was ever raised in this regard in the said Appeal. The findings of the Tribunal on the parity between co-generation from fossil fuels and generation from renewable sources were all only in their context and for the limited purpose of testing whether a fossil fuel based co-generation could be fastened with a Renewable Purchase Obligation under Section 86(1)(e). No material or contention was placed before the Tribunal as to which type of co-generator would qualify as a source of energy under Section 86(1)(e). For example if a co-generator uses a very minute quantity of steam for its industrial purposes but the entire plant having generation from fossil fuel is

to be treated under Section 86(1)(e) as a source of energy for getting a preferential tariff then the intent behind Section 86(1)(e) would become susceptible to gross misuse by the co-generator. Further, "co-generation and non-conventional energy sources" has been covered in paragraph 5.12 of the National Electricity Policy but the same does not state that co-generation irrespective of whether it uses fossil fuel or non-fossil fuel is to be promoted.

16. Learned Counsel for the State Commission has further stated that any finding in the said judgment, as relied upon by the Appellant such as last line of para 45(II) of the judgment, could if at all, have *crept in sub-silentio* in the said judgment. Hence the same could not be said to be law declared by the Tribunal. He also referred to the following judgments of the Hon'ble Supreme Court where it decided and described the boundaries of the

binding nature of judgments as also the *doctrine of obiter dicta and sub-silentio.*

i) (2004) 8 SCC 579 in the matter of Bharat Petroleum Corporation Vs. N.R. Vairmani.

ii) (2006) SCC 167 in the matter of State of Haryana Vs. Ranbir.

iii) (2003) 7 SCC 197 in the matter of Divisional Controller KSRTC Vs Mahadeva Shetty.

iv) (1991) 4 SCC 139 in the matter of State of UP Vs Synthetics & Chemicals.

v) (2000) 5 SCC 488 in the matter of Arnit Das Vs State of Bihar.

vi) (1989) 1 SCC 101 in the matter of MCD Vs Gurnam Kaur.

17. It is very clear from the Regulations of the State Commission that co-generation based on fossil fuel is not included as a source from which the Distribution Licensee could purchase energy to meet its Renewable Purchase Obligation and accordingly, the State Commission has not determined preferential tariff for

co-generation plant using fossil fuel. The question that arises here is as to whether the State Commission should have allowed the preferential tariff for the fossil fuel based co-generation plant for supply to the Distribution Licensee against the Renewable Purchase Obligation specified under Section 86(1)(e) of the Act.

18. The issue before the Tribunal in the Century Rayon case was whether the State Commission could fasten Renewable Purchase Obligation on a person using electricity from its captive co-generation plant based on fossil fuel. The Tribunal went into the interpretation of Section 86(1)(e) to decide that the State Commission has to promote both co-generation irrespective of the fuel used and generation of electricity from renewable energy sources by directing the Distribution Licensee to purchase electricity from both the categories of generation.

19. To go into the issue raised by the Ld. Counsel for the State Commission whether the Distribution Licensee could be fastened with purchase obligation from co-generation irrespective of fuel used, we shall first examine the Report of the Standing Committee of Energy on the Electricity Bill presented to Lok Sabha on 19.12.2002. The relevant portion of salient features of the Bill described in the Standing Committee Report is as under:

"I. Generation

(i) Generation would be free from licensing. Generation would need to conform to technical standards for grid connectivity and co-ordinate with the transmission utility for evacuation of power.
(ii) Hydel projects above a prescribed size would, however, need prior approval of the State Government and clearance from the Central Electricity Authority.
(iii) Captive generation is being made fully free. Captive generation would also have open access through the grid to its own premises subject to availability of adequate transmission facilities. Surplus power

from captive power plants can be supplied through the grid subject to normal regulatory control.

(iv) The tariffs at which generators would sell electricity to licensees through contracts extending beyond one year would be determined by the Regulatory Commissions.

(v) Generation from non-conventional and renewable sources is to be promoted and Regulatory Commissions may from time to time prescribe a minimum percentage of power to be purchased from such sources."

20. The above report of the Standing Committee on energy clearly indicates that the intent of the Parliament while passing the bill was that the Regulatory Commissions were to prescribe a minimum percentage of power to be purchased from non-conventional and renewable energy sources. It is not intended that such purchase obligation has to be given from co-generation based on fossil fuel.

21. Let us now examine the National Electricity Policy ("NEP"). The relevant paragraph is 5.12 of the NEP.

"5.12 COGENERATION AND NON-CONVENTIONAL ENERGY SOURCES

5.12.1 Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy. For this purpose, efforts need to be made to reduce the capital cost of projects based on non-conventional and renewable sources of energy. Cost of energy can also be reduced by promoting competition within such projects. At the same time, adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.

5.12.2 The Electricity Act 2003 provides that co-generation and generation of electricity from non-conventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. Such percentage for purchase of power from non-conventional sources should be made applicable for the tariffs to be determined by the SERCs at the earliest. Progressively the share of electricity from non-conventional sources would need to be increased as prescribed by

State Electricity Regulatory Commissions. Such purchase by distribution companies shall be through competitive bidding process. Considering the fact that it will take some time before non-conventional technologies compete, in terms of cost, with conventional sources, the Commission may determine an appropriate differential in prices to promote these technologies.

5.12.3 Industries in which both process heat and electricity are needed are well suited for cogeneration of electricity. A significant potential for cogeneration exists in the country, particularly in the sugar industry. SERCs may promote arrangements between the co-generator and the concerned distribution licensee for purchase of surplus power from such plants. Cogeneration system also needs to be encouraged in the overall interest of energy efficiency and also grid stability."

22. The paragraphs 5.12.1 and 5.12.2 of the NEP clearly indicate that the State Commissions have to specify the percentage of total consumption of electricity in the area of a distribution licensee from non-conventional sources energy only. Electricity generation from co-generation based on fossil fuel cannot be classified as

generation from non-conventional sources of energy. The Policy mentions that it will take some time before non-conventional technologies compete, in terms of cost, sources and therefore the Commission may determine an appropriate differential in prices to promote these technologies. This clearly indicates that the intention is to give differential in prices for energy supplied from non-conventional and renewable sources of energy sources which could not compete with conventional sources of energy. The co-generation based on fossil fuel is not based on non-conventional source of energy as fossil fuel is a conventional fuel. The technology used in co-generation plant based on fossil fuel is also a conventional technology and has been in use since ages in the industries which require process steam or heat for their industrial process. The efficiency of the co-generation based on fossil fuel is higher than a similar size generating station which only

produces electricity. Therefore, the cost of generation at the fossil fuel based co-generation plant is expected to be more competitive than a similar size generating station using same fossil fuel producing only electricity. Thus, a co-generation plant based on fossil fuel would not require a preferential tariff as it can compete with advantage with a similar fossil fuel based generating station producing only electricity. In view of above, the purchase obligation of a Distribution Licensee from non-conventional and renewable energy indicated in paragraph 5.12.2 of the NEP could not be meant to indicate fossil fuel based co-generation plant.

23. The promotion of arrangement between cogenerator and Distribution Licnesee referred to in paragraph 5.12.3 of the NEP is in the context of utilizing the surplus available in co-generation plants in the interest of energy efficiency and grid stability and not against

purchase obligation of the Distribution Licensee under Section 86(1)(e) of the Act.

24. The judgment of the Tribunal in Century Rayon did not refer to all the sub-paras of paragraph 5.12 of the NEP and only referred to sub-paragraph 5.12.3. Sub-para 5.12.3 only refers to promoting arrangements between the co-generator and the concerned distribution licensee for purchase of surplus power from such plants in the interest of energy efficiency and grid stability. This is more for utilizing the surplus capacity at the captive power stations which could be gainfully utilized for meeting the electricity requirement of the consumers of the distribution licensee and not against the minimum purchase obligation from energy sources under Section 86(1)(e) of the Act.

25. This will be more clear from paragraphs 5.2.24 to 5.2.26 of the NEP under the head “Captive Generation.”

“Captive Generation

5.2.24 The liberal provision in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.

5.2.25 The provision relating to captive power plants to be set up by group of consumers is primarily aimed at enabling small and medium industries or other consumers that may not individually be in a position to set up plant of optimal size in a cost effective manner. It needs to be noted that efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities.

5.2.26 A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods. These plants offer a sizeable and potentially competitive capacity that could be harnessed

for meeting demand for power. Under the Act, captive generators have access to licensees and would get access to consumers who are allowed open access. Grid inter-connections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to enable captive generation to become available as distributed generation along the grid. Towards this end, non-conventional energy sources including co-generation could also play a role. Appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant."

26. The above paragraphs of the NEP stipulate that the Regulatory Commissions shall facilitate commercial arrangement between captive generators including co-generators and licensee for supply of the surplus power from the captive generation including co-generation so as to gainfully harnessing the surplus capacity of the

captive power plants/co-generation plants. Thus, if a distribution licensee or a captive power plant approaches the State Commission for determination of tariff and approval of PPA, the State Commission shall decide the same under Section 62 and 86(1)(b) of the Act.

27. Therefore, if the Appellant and the distribution licensee want to enter into an agreement for supply of surplus power of the Appellant they could approach the State Commission and the Commission would decide the tariff and approve the PPA.

28. Let us now examine the Tariff Policy. The relevant paragraphs are reproduced below.

"6.4 Non-conventional sources of energy generation including Co-generation:

(1) Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage for purchase of energy from such sources taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by the SERCs latest by April 1, 2006. It will take some time before non-conventional technologies can compete with conventional sources in terms of cost of electricity. Therefore, procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission.

(2) Such procurement by Distribution Licensees for future requirements shall be done, as far as possible, through competitive bidding process under Section 63 of the Act within suppliers offering energy from same type of non-conventional sources. In the long-term, these technologies would need to compete with other sources in terms of full costs.

(3) The Central Commission should lay down guidelines within three months for pricing non-firm power, especially from non–conventional sources, to be followed in cases where such procurement is not through competitive bidding."

29. The tariff Policy stipulates specifying purchase obligation of the distribution licensee from non-

conventional sources of energy and co-generation from non-conventional sources of energy only. It is stated that it will take some time before the non-conventional technologies can compete with conventional sources in terms of cost of electricity and, therefore, the procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission. Admittedly the efficiency of a co-generation plant based on fossil fuel is higher than similar size fossil fuel based generating station producing only electricity. Thus, there is no such requirement for preferential tariff for a fossil fuel based co-generation where the tariff is expected to be lower than a similar size fossil fuel based generating station producing only electricity due to higher efficiency and apportionment of capital cost to industrial process for use of process steam or heat.

30. The above paragraph of the Tariff Policy has since been amended by the Government of India by its Resolution dated 20.1.2011. The revised provision is as under:

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

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

(i) Within the percentage so made applicable, to start with, the SERCs shall also reserve a minimum percentage for purchase of solar energy from the date of notification in the Official Gazette which will go up to 0.25% by the end of 2012-13 and further up to 3% by 2022.

(ii) It is desirable that purchase of energy from non-conventional sources of energy takes place more or less in the same proportion in different States. To achieve this objective in the current scenario of

large availability of such resources only in certain parts of the country, an appropriate mechanism such as Renewable Energy Certificate (REC) would need to be evolved. Through such a mechanism, the renewable energy based generation companies can sell the electricity to local distribution licensee at the rates for conventional power and can recover the balance cost by selling certificates to other distribution companies and obligated entities enabling the latter to meet their renewable power purchase obligations. In view of the comparatively higher cost of electricity from solar energy currently, the REC mechanism should also have a solar specific REC.

(iii) It will take some time before non-conventional technologies can compete with conventional sources in terms of cost of electricity. Therefore, procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission."

31. The Government of India by the above amendment has introduced a new provision regarding minimum purchase obligation from solar energy and Renewable Energy Certificate to facilitate the distribution licensee to meet their renewable purchase obligations from renewable sources of energy in another State. The

amended provision in the Tariff Policy clearly indicates the intent of purchase obligation of the distribution licensee under Section 86(1)(e) is only from the non-conventional and renewable source of energy including co-generation from such sources of energy.

32. One reason for which the Tribunal in Century Rayon case came to the conclusion that the State Commission has to specify the purchase obligation for co-generation irrespective of fuel used for the distribution licensee is interpretation of definition of co-generation in the Electricity Act, 2003 which does not indicate the fuel and therefore the co-generation irrespective of fuel used has to be promoted under Section 86(1)(e).

33 This is required to be reconsidered as the definition for co-generation only defines the process of co-generation. "Generate" has also been defined in the

Act which only defines the process. Both the cogeneration and the generation could be from fossil fuel or from renewable source of energy. Only when the process is qualified by the fuel then it becomes clear whether the co-generation or generation is with fossil fuel or with renewable source of energy.

34. In our opinion, this issue whether the distribution licensee could be fastened with the obligation to purchase a percentage of its consumption from co-generation irrespective of fuel used is a very important issue and needs to be re-examined by the Full Bench. The limited question for reference to the Full Bench is as follows:

"Whether the distribution licensee 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."

Registry is directed get the Administrative Order from the Chairperson to post it before the Full Bench for re-examination of the interpretation given in the Century Rayon Case on this question.

35. Accordingly ordered.

36. Pronounced in the open court on this 23rd day of September, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/NON-REPORTABLE

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