

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No: 246/MP/2012

Coram:

Shri VS Verma, Member

Shri M Deena Dayalan, Member

Date of Hearing: 09.07.2013

Date of Order : 18.09.2013

In the matter of

Petition under Regulation 14 read with Regulation 5 (4) of the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 in relation to non-grant of registration to Timarpur-Okhla Waste Management Company Private Limited, a company engaged in generation of electricity from renewable sources for issuance of and dealing in renewable energy certificates by the National Load Despatch Centre under Clause 5 (3) of the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulation, 2010.

And in the matter of

M/s Timarpur-Okhla Waste Management Company Private Limited **Petitioner**

Vs

1. National Load Despatch Centre (NLDC)
2. BSES (Rajdhani) Power Limited

Respondents

Parties Present:

Shri Vishal Gupta, Advocate, TOWMCL
Shri Kumar Mihir, TOWMCL
Shri Rahul Tyagi, TOWMCL
Shri Dharmendra Gupta, TOWMCL
Miss Minaxi Garg, NLDC
Shri Satya Prakash, NLDC
Ms Jyoti Prasad, NLDC
Shri Aditya Pyasi, BRPL
Shri Amit Kapur, Advocate, BRPL



ORDER

The petitioner, M/s Timarpur-Okhla Waste Management Company Private Limited, has filed this petition being aggrieved by the action of the National Load Despatch Centre (NLDC), Respondent No 1 for refusing to register the petitioner as an eligible entity under the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (the REC Regulations) for issuance of the Renewable Energy Certificates (RECs). The petitioner has made the following prayers, namely:

“(i) Declare that the Petitioner is entitled to be granted registration under Reg. 5(3) of the REC Regulations for issuance of and dealing in RECs with respect to the 8 MW capacity to be supplied to BRPL and the EPA and for the 8 MW capacity to be sold to third parties through open access aggregating to 16 MW retrospectively with effect from the date of the Petitioner’s application, that is, 4.07.2012;

(ii) Direct the Respondent - National Load Despatch Centre to grant registration, under Reg. 5 (3) of the REC Regulations for issuance of and dealing in RECs with respect to the 8 MW capacity to be supplied to BRPL under EPA and for the 8 MW capacity to be sold to third parties through open access aggregating to 16 MW retrospectively with effect from the date of Petitioner’s application, that is, 04.07.2012.

(iii) Pass such other order and further order(s)/direction (s) as this Hon’ble Commission may deem fit and appropriate in the facts and circumstances of the case.”

BACKGROUND:

2. The petitioner is a special purpose vehicle jointly set up by Infrastructure Leasing & Financial Services Limited through its subsidiary Unique Waste Processing Company and Andhra Pradesh Technology Development Centre for developing the integrated



waste processing project (the Project) for processing and disposal of municipal solid waste and use the products for generation of electricity. The petitioner invited bids for selection of a project developer for developing a 16 MW power plant for augmentation of its waste disposal capabilities through the competitive bidding process. It was envisaged that the petitioner would be taken over by the successful bidder. A part of the electricity generated was agreed to be sold to BSES Rajdhani Power Ltd (BRPL), Respondent No 2, under a long-term Power Purchase Agreement and therefore, BRPL was the 'procurer' for undertaking the competitive bidding process.

3. The petitioner filed a petition, being Petition Non 37/2007 before Delhi Electricity Regulatory Commission (DERC).under Section 63 of the Electricity Act, 2003. DERC by its order dated 17.8.2007 approved the deviations in standard bid documents, with certain observations. Subsequently by its order dated 8.11.2007, DERC directed the petitioner to amend the bid documents so as to incorporate certain additional terms as per the said order dated 8.11.2007.

4. Pursuant to the competitive bidding process undertaken, Jindal Urban Infrastructure Limited emerged as the successful bidder and the letter of intent dated 29.1.2008 was issued in its favour at the quoted tariff. As originally envisaged, the petitioner was acquired by Jindal Urban Infrastructure Limited. DERC in its order dated 20.1.2011 adopted the levelised tariff of `2.49/kWh for the year 2009-10 and `2.833/kWh from the year 2010-11 and onwards. The petitioner executed Energy Purchase Agreement dated 20.1.2010 with BRPL valid for a period of 25 years, which was subsequently modified in compliance with certain directions of DERC as contained



in the order dated 20.1.2011. The modified Energy Purchase Agreement is being referred to as 'the EPA' for the purpose of this order. Under the EPA, BRPL agreed to purchase 50% of ex bus energy on monthly basis, after the Project's auxiliary consumption upto 22%. DERC by its order dated 18.1.2012 directed that BRPL would be sold minimum 50% energy with cap of 60 MU in a year and the petitioner would be entitled to use the surplus energy for captive purposes or sell to a third party after availing open access.

5. The Project was commissioned on 27.1.2012.

6. By virtue of clause (1) of Regulation 3 of the REC Regulations, the Commission has nominated NLDC as the Central Agency to perform functions under clause (2), which include registration of eligible entities and issuance of RECs under these regulations. In accordance with clause (1) of Regulation 5, generating company engaged in generation of electricity from renewable energy sources (RE generator) was eligible to apply for registration to the Central Agency for issuance of RECs on fulfilling the following conditions, namely:

- (a) It has obtained accreditation from the State Agency,
- (b) It does not have PPA for the capacity related to such generation to sell electricity at a preferential tariff,
- (c) It sells electricity generated either (i) to the distribution licensee of its area 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.

- (d) The Captive Power Producer based on renewable energy sources is eligible for issuance of RECs in case it 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.

7. Regulation 7 of the REC Regulations deals with actual issuance of RECs. Under clause (1) of Regulation 7, the eligible entity was to apply to the Central Agency for issuance of RECs within three months after corresponding generation from eligible renewable energy project. Clause (2) authorizes the Central Agency to issue RECs to the eligible entity after it has satisfied that all the conditions for issuance of RECs have been complied with by the eligible entity.

8. The petitioner made separate applications before the State Agency for accreditation; one for 8 MW to be supplied to BRPL and other for 8 MW which the petitioner proposed to sell through open access. The petitioner was granted accreditation on 5.7.2012 by the State Agency for total capacity of 16 MW under two certificates. On receipt of accreditation certificates, the petitioner, on 6.7.2012, applied to NLDC for registration as 'eligible entity' under clause (1) of Regulation 5 of the REC Regulations for 8 MW to be supplied to BRPL as per the EPA approved by the DERC and remaining 8 MW proposed to be sold to a third party through open access.



9. After filing of the applications by the petitioner, certain communications were exchanged between NLDC and the State Agency who involved the petitioner also while answering NLDC's communications. Despite the clarifications furnished by the State Agency and/or the petitioner regarding the petitioner's eligibility for accreditation/registration, registration has not been granted. Hence, the petitioner has filed the present petition. We do not consider it necessary to refer to the issues raised in these communications and the replies sent since the same issues have been raised by NLDC in its reply to the present petition and these are being discussed in the later part of this order.

10. The petitioner has contended that it meets the criteria for registration specified under clause (1) of Regulation 5 of the REC Regulations since it has obtained accreditation with the State Agency. The petitioner has further submitted that it is not supplying power generated (8 MW) to BRPL at the preferential tariff since the tariff for supply has been discovered through the competitive bidding process approved by DERC and the tariff does not exceed the pooled cost of power purchase by BRPL. The petitioner has stated that it has proposed to supply a part of generation (8 MW) by availing open access to third party at mutually agreed price, as approved by DERC, or through the power exchange at market discovered price. The petitioner has stated that under the EPA, BRPL is not entitled to claim RPO benefits for the power supplied by the petitioner and according to the terms and conditions of bidding, the petitioner was to retain the benefits accruing to the Project. The petitioner has further relied upon the observations of DERC in the order dated 29.8.2012 in Petition No 31/2012 urging that in that case it was held that when the developer of waste-to-power plant sells power to a



distribution utility under an approved PPA, the developer would be free to sell RECs in the market.

NLDC Reply

11. NLDC in its reply has raised three substantive issues. Firstly, it has been stated that BRPL by its letter dated 25.10.2012 addressed to NLDC has claimed that it would offset its Renewable Purchase Obligation specified by DERC against the energy purchased from the petitioner under the EPA. At the same time, NLDC has pointed out that the petitioner seeks registration as an eligible entity for issuance of RECs in respect of the same generation. Therefore, NLDC has submitted that there exists a dispute which needs to be resolved by the appropriate forum before the petitioner is considered for registration. NLDC has stated that in accordance with the Statement of Reasons given by the Commission in support of the REC Regulations, as amended, the petitioner is ineligible to participate in REC mechanism since BRPL, the buyer, intends to offset its Renewable Purchase Obligation against the energy purchased. Secondly, it has been stated that the tariff for sale of energy generated by the Project has been determined by the Appropriate Commission, in this case DERC, through the competitive bidding process. Therefore, the tariff becomes a preferential tariff determined by the Appropriate Commission and the petitioner cannot be considered for registration as an eligible entity. Thirdly, NLDC has stated that the Project comprises only one unit with total installed capacity of 16 MW. However, it has been pointed out, two projects with capacity 8 MW each have been accredited. According to NLDC, the petitioner should have applied for accreditation for the Project as a whole and cannot split the Project into two for the purpose of accreditation since multiple applications for accreditation for one



project are not allowed. In support of its contention, NLDC has relied upon the following provision in the model Guidelines for accreditation:

"In case, the applicant has multiple RE generation projects then, separate Applications will have to be submitted by the Applicant for each generation project. Accreditation of each project shall be carried out separately..... "

..

BRPL Reply

12. BRPL has submitted that it is considering the power procured from the petitioner as part of RPO obligation mandated by DERC. It has been further stated that the tariff for sale of electricity, ` 2.49/kWh for year 2009-10 and ` 2.833/kWh for the subsequent years exceeds the pooled cost of power purchase of BRPL for the year 2007-08, which was approximately ` 2.46/kWh. BRPL has pointed out that the DERC order dated 29.8.2012 was passed in the case of M/s Delhi MSW Solutions Ltd Vs Tata Power Delhi Distribution Ltd. The petitioner name in the order was referred to only to cite it as an example for other distribution licensees, to enter into PPA on such terms and conditions from those already entered into by the distribution utilities purchasing power through a competitive bid from composite MSW and power generation project. Therefore, BRPL has urged that the observation of DERC cannot be extended to the present case. Under the above noted facts and submissions, BRPL has submitted that the petitioner is not entitled for registration with respect to 8 MW capacity tied up for supply to BRPL.

Analysis and Decision

13. We have heard learned counsel for the petitioner and BRPL and the representative of NLDC. We have bestowed our serious consideration to the issues raised. The following issues arise for our consideration and decision, namely -

- (a) Whether the petitioner can be classified as RE generator?
- (b) Whether the petitioner is disqualified for registration as 'eligible entity' because it made two applications for accreditation?
- (c) Whether the tariff being paid by BRPL is preferential tariff within the context of Regulation 5 of REC Regulations?
- (d) Whether the tariff at which power is being supplied to BRPL exceeds the pooled cost of power purchase of BRPL and whether this has any relevance for a project selling electricity at a tariff determined under Section 62 or Section 63 of the Act?
- (e) Whether the petitioner becomes ineligible for the reason that BRPL considers the power purchased against its RPO obligation?

Re Issue (a)

14. The Commission at the hearing on 31.1.2013 directed the petitioner to explain whether it could be classified as 'RE generator'. The Commission also permitted the petitioner to file any material available in its possession with regard to the status of the petitioner company as RE generator. The Commission also directed to issue notice to



Ministry of New and Renewable Energy to file a reply explaining the position as regard the status of the petitioner or any of the waste management plant engaged in producing electricity , that is, whether such plants can be classified as RE generator.

15. In the affidavit dated 18.2.2013, the petitioner has submitted that DERC in order dated 17.8.2007 in Petition No 37/2007 (No F.3(164)/Tariff/DERC/1990) filed by the petitioner recognized that the Project was based on renewable source. The petitioner has further submitted that DERC in its order dated 29.8.2012 in Petition No 31/2012 has recognized municipal solid waste (MSW) as a renewable energy source. The petitioner has extracted the observations of DERC in both the orders, which support the petitioner's submissions. The petitioner has also relied upon definition of 'Renewable Energy Source' given in Regulation 2 of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2010 and Regulation 7 thereof, extracted hereunder:

"v) 'Renewable Energy Sources' means renewable sources such as small hydro, wind, solar including its integration with combined cycle, biomass, bio fuel cogeneration, urban or municipal waste and other such sources as approved by the MNRE"

"7. Project Specific tariff

a) Project specific tariff, on case to case basis, shall be determined by the Commission for the following types of projects:

i. Municipal Solid Waste Projects;"

16. Ministry of New and Renewable Energy in its letter dated 20.2.2013 has clarified that Municipal Solid Waste are primarily from biomass route and therefore are

considered as renewable energy. The Ministry has further informed that it is also considering the request for providing Central Financial Assistance for the Project.

17. On consideration of the material on record, we are satisfied that the Project is based on Renewable Energy Source and the petitioner is a RE generator. The issue is, therefore, decided accordingly.

Re Issue (b)

18. NLDC in its reply has pointed out that since the petitioner has split its 16 MW project into two projects, each of 8 MW, for obtaining accreditation from the State Agency it cannot be considered for registration. NLDC has alleged that accreditation has been obtained by violating the model guidelines for accreditation, according to which the applicant having multiple RE generation projects has to file separate applications for each generation project for accreditation. From this, NLDC has deduced that when accreditation is to be obtained by RE generator for one project, single application for accreditation has to be made. We do not agree with the views of NRLDC in this regard.

19. We have already extracted the relevant part of the model guidelines. There is no warrant to hold that invariably for accreditation of one project only one application should be made. The petitioner filed two separate applications as it had adopted or proposed to adopt two separate routes for sale of power. It seems that the procedure adopted was cleaner way of obtaining accreditation since it facilitated proper



examination by the State Agency. The model guidelines are meant for guiding the State Agency. In the present case, the State Agency has satisfied itself regarding eligibility of the petitioner for accreditation and has granted accreditation for the Project by issuing two accreditation certificates. At this stage, the certificates issued by the State Agency need not be disturbed. In case the petitioner is directed to obtain fresh accreditation with the State Agency, the result will be that the petitioner will come back to NLDC again after getting fresh accreditation. It will delay the processes without serving any useful purpose. It may also be pointed out that the guidelines need not be enforced with such rigidity as to defeat the substantive rights of a person granted under law or instruments having force of law, such as the REC Regulations. The guidelines primarily cover the procedural aspects without creating any rights or obligations. The rights and obligations are regulated under the REC Regulations. Accordingly, we do not find any infirmity in petitioner applying for and getting two separate accreditation certificates and uphold their validity.

Re Issue (c)

20. The next issue is whether the tariff for sale of power to BRPL can be said to be 'preferential tariff' within the meaning of the term used in Regulation 5 of the REC Regulations. The expression 'preferential tariff' is defined in sub-clause k) of clause (1) of Regulation 2 of the REC Regulations as under:

“k) ‘preferential tariff’ means the tariff fixed by the Appropriate Commission for sale of energy, from a generating station using renewable energy sources, to a distribution licensee.”

21. Under the Electricity Act there are two modes for determination of tariff, one under Section 62 and other under Section 63. Tariff determination under Section 62 involves detailed scrutiny of costs of generation, by the Regulatory Commission, while tariff determination under Section 63 does not "need" detailed cost scrutiny, as competition is expected to ensure cost efficiency in bids quoted by the bidders. However, under both these routes, the cost of generation is deemed to be fully recovered. Under Section 62, the Regulator ensures full cost recovery, whereas under Section 63 any investor while participating in the bid quotes tariff after considering all costs as well risks involved during the project life. The scheme of REC envisages that once the full cost of generation of a generator is recovered through tariff, such generator does not become eligible for REC. The expression "Preferential Tariff" used in Regulation 5 of the REC Regulations must be interpreted in this backdrop, to mean the tariff determined by the Appropriate Commission in such a way that the cost of generation is fully recovered. Under both these routes, the generator offers the green attribute separately. The Commission has already clarified this issue through second amendment of the REC Regulations.

Re Issue (d):

22. BRPL has argued that the tariff at which power is being supplied to BRPL exceeds its pooled cost of power purchase and for this reason the petitioner is disqualified for grant of REC. BRPL has stated that the tariff for sale of electricity, `2.49/kWh for year 2009-10 and `2.833/kWh for subsequent years exceeds the pooled



cost of power purchase of BRPL for the year 2007-08, which was approximately ₹ 2.46/kWh. BRPL has compared the tariff of ₹ 2.49/kWh for year 2009-10 and ₹ 2.833/kWh for next 24 years with the pooled cost of power purchase for the year 2007-08. It would have been appropriate for BRPL to give year-to-year data for comparison. However, the Commission does not consider it necessary to get into further detail in this regard, as this issue no longer remains relevant in view of this analysis and decision 'on this issue' raised in the preceding para as well as in the succeeding para.

Re Issue (e)

23. The last issue is whether the petitioner is not qualified for registration for the reason that BRPL considers the power purchased to meet its RP Obligation. NLDC has pointed out that the petitioner has sought registration as an eligible entity for issuance of RECs for the same generation which BRPL considers to meet its RP Obligation. Therefore, in the opinion of NLDC, there is a dispute between the petitioner and BRPL on the question of drawing benefits under the REC scheme and unless the dispute is resolved at the appropriate forum, the petitioner cannot be considered for registration against the power being supplied to BRPL. BRPL has stated that it is considering the power supplied from the Project towards RP Obligation. The petitioner has claimed its right to avail benefit of REC mechanism on the ground that under the bid documents all residual rights accrued in its favour as the project developer. The petitioner has further claimed that as per the EPA, BRPL is not entitled to claim RP Obligation benefits. The petitioner has also relied upon the order of DERC in Petition No 31/2012 wherein it was

observed that the developer was free to sell RECs in the market on account of green attribute of generation from MSW projects.

24. DERC vide its Tariff Order F.1 (365) Estt./DERC/2013-14/1717 dated 31.7.2013 regarding "True-up for FY 2011-12, Aggregate Revenue Requirement and Distribution Tariff (Wheeling & Retail Supply) for FY 2013-14" has considered TOWMCL as a renewable source (Non-Solar) of power for fulfillment of Renewable Procurement Obligation (RPO) of BRPL at a price of ` .2.60/ Unit for FY 2013-14. It appears that the DERC has considered the power procured by the BRPL from TOWMCL for fulfillment of its RPO.

25. On consideration of the rival contentions, we however, feel that the petitioner may, if so advised, take steps for resolution of the dispute in accordance with the dispute resolution mechanism provided under Article 22 of the EPA and decide the future course of action in accordance with law. Alternatively, the petitioner is at liberty to approach DERC for a clarification as to whether 8 MW of energy covered under the EPA with BRPL qualifies to be considered as meeting the RPO of the distribution licensee.

Conclusion

26. Having regard to the above discussion, we direct NLDC to register the petitioner against 8 MW of power which the petitioner proposes to sell through open access at negotiated price or through the power exchange at market determined price, within 15



days of this order. In case the petitioner seeks resolution of the dispute with BRPL under Article 22 of the EPA or seeks a clarification from DERC within 30 days of this order, the accreditation granted by the State Agency in its favour shall not lapse during pendency of the dispute.

27. With the above directions, the petition stands disposed of.

Sd/-
(M Deena Dayalan)
Member

sd/-
(V S Verma)
Member

