

No.: N/98 and 97/2018

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 05.11.2019

Present:

Shri Shambhu Dayal Meena	..	Chairman
Shri H.M. Manjunatha	..	Member
Shri M.D. Ravi	..	Member

OP No.41/2018

BETWEEN:

Mac Charles (India) Limited,
No. 28, Sankey Road,
Bengaluru-560 052.

Mr. Chaturbhuj Bassarmal Paradhanani,
No. 28, Sankey Road,
Bengaluru-560 052.

Vikas Telecom Private Limited,
Embassy Ikon, Infantry Road,
Bengaluru-560 001.

.. **PETITIONERS**

[Petitioners represented by Navayana
Law Offices, Advocates]

AND:

The Managing Director,
Bangalore Electricity Supply Company Limited,
K. R. Circle,
Bengaluru-560 001.

OP No.41 and 42/2018

The Managing Director,
Hubli Electricity Supply Company Limited,
P.B. Raod, Navangar ,
Hubballi-580 025.

The Managing Director,
Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan, K.G. Road,
Bengaluru-560 009.

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RESPONDENTS

*[Respondents represented by
JustLaw, Advocates, Bengaluru]*

OP No.42/2018

BETWEEN:

Mac Charles (India) Limited,
No. 28, Sankey Road,
Bengaluru-560 052.

Mr. Chaturbhuj Bassarmal Paradhanani,
No. 28, Sankey Road,
Bengaluru-560 052.

Vikas Telecom Private Limited,
Embassy Ikon, Infantry Road,
Bengaluru-560 001.

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PETITIONERS

*[Petitioners represented by
Navayana Law Offices, Advocates]*

AND:

The Managing Director,
Bangalore Electricity Supply Company Limited,
K. R. Circle,
Bengaluru-560 001.

The Managing Director
Gulbarga Electricity Supply Company Limited,
Station Road ,
Kalaburagi-585 101.

The Managing Director,
Karnataka Power Transmission Corporation Limited,
Cauveri Bhavan, K.G. Road,
Bengaluru-560 009.

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RESPONDENTS

*[Respondents represented by
JustLaw, Advocates, Bengaluru]*

ORDERS

1. The Petitioners have filed the present petitions under Sections 86 (1) (f)

of the Electricity Act, 2003 with the following prayers:

- a) Call for the records;
- b) Quash the Official Memoranda dated 08th December, 2017 issued by the Respondent – BESCOM (Annexure – P1 in both cases);
- c) Quash the Official Memoranda dated 19th January, 2018 issued by the Respondent – BESCOM (Annexure – P2 in both cases);
- d) Quash the Electricity Bills dated 01st March, 2018 issued by the Respondent – BESCOM (Annexure – P3 in both cases);
- e) Direct BESCOM to refund amounts collected in the name of cross subsidy from Vikas Telecom Private Limited, by treating as group captive user.
- f) Pass such other and incidental orders including an order as to costs as may be appropriate under the facts and circumstances of the case.

2. The facts mentioned in the petitions are:

- a. The Petitioner-1 in OP No. 41/2018, is the owner and operator of a 4.2 MW Wind Power Project located at Gadag District situated within the Distribution Area of the 2nd Respondent – HESCOM. The

Petitioner-1 in OP No. 42/2018 is the owner and operator of a 2.1 MW Wind Power Project located at Ballari District situated within the Distribution Area of the 2nd Respondent – GESCOM. The 2nd petitioner is one of the consumers of 1st petitioner.

b. The Petitioner-1 has executed two Wheeling and Banking Agreements (WBA) dated 31.1.2015 (in OP No. 41/2010) and 19.4.2010 (in OP No. 42/2010) (Annexure – P4 in both cases) with the Respondents for Wheeling and Banking of the power generated from the Wind Power Projects to captive users and third parties.

3. It is the case of the Petitioners that Petitioner-1 is a captive generating plant as per the Electricity Act, 2003 and Electricity Rules 2005. Further, it is the contention of the Petitioners that the Petitioner Nos. 1, 2 and 3 have consumed more than 50% of the energy produced as captive consumption in the Financial Year 2016-17 and that the requirements stipulated in Rule 3 of the Electricity Rules, 2005 have been complied with. It is contention of the Petitioners that the Petitioner-3 (Vikas Telecom Private Limited) should be considered as captive consumer of the Petitioner-1 Company. Hence, the petitioner has alleged that the official memoranda dated 08.12.2017 issued by the Respondent demanding charges for the energy at the tariff of Rs.8.35/unit in both

cases, on the premise that the Petitioners have not met the captive status in FY 2016-17 is wrong.

4. Upon issuance of Notice, the Respondents appeared through their Counsel. Respondent-1 has filed its response in the Memo dated 18.6.2019 submitting that Petitioner-3 does not own any shares in the Petitioner-1 Company and that the Petitioner-1 had not requested to consider the Petitioner-3 as group captive consumer for the Financial Year 2016-17; that the Respondent vide letters dated 13.02.2017 and 27.12.2017 had issued consent to wheel energy to Petitioner-3, Vikas Telecom Private Limited, as a non-captive consumer and therefore, the Petitioner-3 cannot be considered as captive consumer of the Petitioner-1; that the Petitioner-1 and Petitioner-2 have failed to consume 51% of the energy generated and have jointly consumed only 36.74% of the energy generated and having failed to meet the requirement set out in Rule 3 of the Electricity Rules, 2005, cannot be considered to be captive users for FY 2016-17; that in view of the failure to comply with the requirements of Rule 3 of the Electricity Rules, 2005, the Petitioners are liable to pay cross subsidy surcharge as per 4th proviso to Section 42(2) of the Electricity Act, 2003 and Electricity tax in terms of the Karnataka Electricity (Taxation on Consumption or Sale) (Amendment) Act, 2018; that considering these aspects, the Respondent issued revised Official Memoranda dated 13.06.2019, (Annexure – R1) in both cases withdrawing the earlier OM dated

08.12.2017; that the Respondent vide OM dated 13.06.2019 (Annexure-R2) has communicated to the Petitioner-1 that it is liable to pay Rs.64,38,000/- towards cross subsidy surcharge and Rs.11,41,660/- towards electricity tax in OP No.41/2018 and Rs.70,35,180/- towards cross subsidy surcharge and Rs.12,47,369/- towards electricity tax in OP No.42/2018; that in view of the withdrawal of the impugned OM dated 08.12.2017, the petitions are rendered infructuous and liable to be dismissed. Hence, the Respondent-1 has prayed to dismiss the petitions.

5. The Petitioner-1 filed IA in both cases on 9.7.2019 under section 151 of CPC read with section 94 of Electricity Act, 2003, stating that in view of *the revised Official Memoranda issued by BESCO withdrawing its earlier Official Memoranda of 8th December, 2017, the challenge to the Original Memorandum of 8th December, 2019 will not survive for consideration. However, in the revised Official Memoranda dated 13th June, 2019 the 1st Respondent has admitted the amount paid as per the interim order and directed the concerned Sub Division to raise the HT Bill for collecting the additional amount. BESCO has no right to adjust the amount already paid in terms of the interim order. Due to the acts and omission on the part of BESCO, the Petitioner was compelled to pay the Court fee of Rs.1,21,075/- in OP No. 41/2018 and Rs.1,32,206/- in OP No. 42/2018 at 0.5% of the total demand raised by BESCO. The Petitioner-1 has prayed to direct BESCO to refund the amount*

deposited pursuant to the interim orders dated 02nd May, 2018 in both cases along with the court fee paid and thereafter permit the Petitioner to withdraw the present petitions with liberty to challenge the revised demands of the 1st Respondent in accordance with law.

6. The Respondent No. 1 has filed Objections to IAs filed by the Petitioners, the gist of which is as follows:

- a. The question of the refund of Court fee has to be decided by the Commission.
- b. In so far as the refund of the amount deposited as per the interim order dated 2.5.2018, there is no provision enabling order for refund. The deposit as per the interim order was made towards cross-subsidy surcharge. The letter dated 17.05.2018 also indicates that the Petitioner has paid the sum towards cross-subsidy surcharge. The demand raised by the Respondent in the Revised OM is for payment of Cross Subsidy Surcharge and Electricity Tax. The sum deposited is set off against the sum due to be paid by the Petitioner towards Cross Subsidy Surcharge and Electricity Tax. Hence, the payment has been adjusted towards the liability raised on the Petitioner in the Official Memorandum dated 13.06.2019.
- c. The Petitioners are liable to pay an additional sum of Rs.11,41,600/- in OP No. 41/2018 and Rs.12,47,369/- in OP No. 42/2018, as

mentioned in the OM dated 13.6.2019 (Annexure R-2). The demand is in accordance with law and there is always a presumption about the correctness of the regulation and the action taken there under, until set aside by a competent court of law.

d. As the impugned Official Memoranda dated 08.12.2017 have been withdrawn by the Respondent, the petitions are infructuous and deserve to be dismissed.

e. The averment in para 7 of the IAs that the remittance of Court fee and remittance as per the interim order was due to the acts and omissions on part of BESCO, is denied as untenable.

f. Hence, the respondent-1 has prayed for dismissal of the petitions and the IAs in both cases.

7. We note that it is admitted by both parties that the impugned OM dated 8.12.2017 have been withdrawn by Respondent-1 in both cases. Therefore, the petitions do not survive for consideration on this aspect.

8. The point which remains for consideration is with regard to claim of the Petitioner to refund the amounts deposited in both cases as per the interim orders dated 2.5.2018. The Respondent-1 has contended that the deposit as per the interim orders was made towards cross-subsidy surcharge and the letters dated 17.05.2018, indicate that the Petitioner

has paid the sum towards cross-subsidy surcharge. It is the contention of the Respondent-1 that the demands raised by in the Revised OM dated 13.06.2019 are towards payment of Cross Subsidy Surcharge and Electricity Tax and the sum deposited is set off against the sum due to be paid by the Petitioner towards the same head and the question of refund does not arise.

9. We note from the Orders dated 26.04.2018 and 02.05.2018 in both cases, that the Petitioners had filed Memo dated 30.04.2018 in both cases, stating that the applicable cross subsidy surcharge would be Rs.64,38,000/- in OP No.41/2018 and Rs.70,35,180/- in OP No.42/2018. The Interim Orders dated 02.05.2018 in both cases mention the submission of the Counsel for the Petitioners that the Petitioner-1's customers have paid the said amounts. The Petitioner-1 has also addressed letters dated 9.8.2018 to the Commission, stating that pursuant to the interim orders, the amounts of Rs.64,38,000/- in OP No.41/2018 and Rs.70,35,180/- in OP No.42/2018 were deposited with Respondent-1 on 17.05.2018 towards cross subsidy surcharge. In the revised OM dated 13.06.2019, the demand made by Respondent-1 is towards the Cross subsidy surcharge and Electricity tax payable by the Petitioner, as the Petitioner cannot be treated as a captive power plant for FY- 2016-17, due to non-fulfilment of the criteria mentioned in Rule 3 of Electricity Rules, 2005. When the Petitioner had admitted the liability to pay the Cross subsidy

surcharge in these proceedings, the question of refund of the amounts deposited towards the same, does not arise. The Respondent-1 has adjusted the same towards the demand raised in the revised OM dated 13.6.2019. Hence, the prayer of the Petitioner-1 is rejected.

10. The next point for consideration is whether the prayer of the Petitioner-1 for a direction to BESCO to refund the court fee paid, is tenable. It is alleged by the Petitioner that the petitions had to be filed by paying the applicable fee, due to the acts and omissions on the part of the Respondent-1 and the wrongful demand raised by the Respondent-1 in the OM dated 8.12.2017. Therefore, it is the submission of the Petitioner that the fee has to be reimbursed by Respondent-1. The Respondent-1 has denied the allegation and has submitted that the Commission has to decide the refund of court fee. We note that the prayer of the Petitioner is not for refund of court fee by the Commission but for a direction to the Respondent-1 to refund of deposit amount along with the court fee, as the cause for the litigations was the wrongful acts of the Respondent-1. In other words, the Petitioner has sought imposition of 'costs' on the Respondent-1. In the present cases the petitions are already admitted and thereafter the developments have taken place for withdrawal of the earlier O.M's issued by Respondent No.1 (BESCO). Under these circumstances, Clause 3 (iv) of the KERC (Fee) Regulations, 2016 does not provide for refund of court fee.

11. We see from the records, particularly, letter dated 28.02.2017 addressed by the Petitioner-1 to Respondent-1 in both cases (Annexure P-6) and the Shareholding Certificate dated 28.02.2017 attached to the said letter, that the Petitioner-3 is not a shareholder of Petitioner-1 company. Embassy Property Developments Private Limited, is a shareholder of Petitioner-1. It is the contention of the Petitioner-1 that consumption of Petitioner-3 has to be included for fulfilment of the requirements of Rule 3 in respect of Petitioner-1, as Embassy Property Developments Private Limited, had acquired the shares of Petitioner-1 company and Embassy Office Ventures Pvt Ltd was a shareholder of Petitioner-3. This cannot be accepted. At best, the consumption of Embassy Property Developments Pvt Ltd., which had acquired 73.41% of shares of Petitioner-1 could have been considered for consumption as group captive company and prima facie, Petitioner-3 could not have been a part of the group captive company, as it did not hold any shares in Petitioner-1 company. For the Petitioners to claim group captive status, the share holding and the consumption pattern as per Rule 3 have to be met with amongst themselves. The Petitioner-3 did not hold any shares in Petitioner-1 company. Hence, its consumption cannot be considered for computing captive consumption of Petitioner-1 Company under Rule 3. From the records, we notice that Embassy Property Developments Pvt Ltd., had not consumed any

power generated by Petitioner-1 in FY 2016-17. Hence, the Petitioner-1 has failed to comply with the requirements of Rule 3 in FY 2016-17. Therefore, the levy of Cross subsidy surcharge and Electricity Tax is proper.

12. The Petitioner-1, has claimed that consumption of Petitioner-3 had to be included in the computation of group captive consumption for FY 16-17. As held in the preceding paragraph, the energy supplied to Petitioner-3 has to be treated as supply to a non- captive consumer, as it did not hold any shares in Petitioner-1 company. The Petitioner-1 ought to have voluntarily offered to pay Cross subsidy surcharge and Electricity Tax, for FY 2016-17, and showed its bona fides. Instead, in all the correspondences produced with the petition, it asserted that Petitioner -3 is a part of Embassy group and the consumption of Petitioner-3 had to be included while computing the captive consumption of Petitioner-1. The Respondent-1 on its own, found the mistake in the OM dated 8.12.2017 and revised the same, during the pendency of the present proceedings.

Hence, we feel that the question of imposition of costs does not arise in these cases. Consequently, the prayer of the petitioner for a direction to the Respondent-1 to refund the fee paid is rejected.

13. For the foregoing reasons, we pass the following:

ORDER

- a. The petitions are dismissed, with liberty to the petitioners to challenge the revised OM dated 13.06.2019 in both cases.
- b. The original Order shall be kept in OP No.41/2018 and a copy, thereof, in OP No.42/2018.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER