

No.N/9&10/09

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 9th September 2009

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|----------------------------|----------|
| 1. Sri K.P. Pandey | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member |

Case No. OP 06/2009

Between

M/s. Bhoruka Power Corporation Limited
No.48, Lavelle Road
BANGALORE – 560 001
(Represented by Sri Shridhar Prabhu, Advocate)

.... Petitioner

Vs.

1. The Managing Director
Gulbarga Electricity Supply Company Limited
Main Road
GULBARGA – 585 102
2. The Managing Director
BESCOM, K.R. Circle
BANGALORE – 500 001
(Represented by its Advocate Sri Sriranga)

... Respondents

Case No. OP 07/2009

Between

M/s. Bhoruka Gases Limited
Whitefield Road, Mahadevapura
BANGALORE – 560 048
(Represented by Sri Shridhar Prabhu, Advocate)

.... Petitioner

Vs.

1. The Managing Director
Gulbarga Electricity Supply Company Limited
Main Road
GULBARGA – 585 102
2. The Managing Director
BESCOM, K.R. Circle
BANGALORE – 500 001
(Represented by its Advocate Sri Sriranga)

... Respondents

1. The petitioner in OP 06/2009 M/s Bhoruka Power Corporation Limited (BPCL) (hereinafter referred to as P1) is a generating Company within the meaning of Electricity Act, 2003 owning and operating hydel power generating station of total capacity of 90.652 MW. Out of this, 6.6 MW power generating station is in Shahapur, Gulbarga District which is geographically located within the area of the 1st respondent distribution licensee (GESCOM). It has been prayed by P1 to declare wheeling of power by M/s BPCL to M/s Bhoruka Gases Limited is for captive use and therefore quash the demand for payment of surcharge made by 1st respondent. On the same issue, M/s Bhoruka Gases Limited (BGL) (hereinafter referred to as P2) a company and a sister concern of P1, being a registered consumer of BESCO, also has filed a petition in OP 07/2009 with the same prayers. As the issues in both the petitions are common, the Commission decides to take both the petitions together for consideration and decision.

2. The case of the petitioners is that P2 has taken 26 % of the paid up share capital of 6.6 MW power plant belonging to P1 and therefore is entitled to the status of the captive user and not liable to pay the surcharge as demanded by the respondents. The petitioner in support of this case has also produced the copy of the certificate issued by its statutory auditors dated 18.12.2008 wherein it is certified that P2 has a shareholding to the extent of 26.29 % in P1's company.

3. In reply the respondents have contented that the petitioner does not satisfy the requirement of Rule 3 of Electricity Rules, 2005 to claim exemption from payment of surcharge.

4. The core question is whether the petitioners satisfy the conditions of Rule 3 of Electricity Rules, 2005 to claim the status of a captive plant and captive user. Therefore it is useful to refer to Rule 3 of Electricity Rules, 2005 which reads as under :

"3. Requirement of Captive Generating Plant.- (1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless.-

(a) in case of a power plant –

(i) not less than twenty-six per cent of the ownership is held by the captive user(s); and

(ii) not less than fifty-one per cent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty-six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty-one per cent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent.

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating

station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause(a) above including –

Explanation.- (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate Identified for captive use and not with reference to generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty-six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustrations – In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty-six per cent and proportionate to Unit A to 50 MW and not less than fifty-one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of each captive users to ensure that the consumption by the Captive Users at the percentage mentioned in sub-clauses (a) and (b) of sub-rule (1) of above is maintained and in the minimum percentage

of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation.- (1) For the purpose of this rule.-

(a) 'Annual basis' shall be determined based on a financial year;

(b) 'Captive user' shall mean the end user of the electricity generated in a Captive Generating Plant and the term 'Captive Use' shall be construed accordingly;

(c) 'Ownership' in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

(d) 'Special purpose vehicle' shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity".

5. The material produced by the petitioners (which is not disputed by the respondents) clearly establishes that P2 satisfies Condition No.(i) of the Rule 3(1)(a). Condition No.(ii) of Rule 3(1)(a) for the year 2008-09 does not get satisfied since 51 % of aggregate energy generated in 2008-09 has not been consumed for captive use during the period of captive user status of P2 between 18.12.2008 and 31.3.2009. Condition No. 3(1)(a)(ii) extracted above clearly states that the consumption of electricity from the captive plant, for captive use, shall be not less than 51 % of the aggregate power generated, worked out on an annual basis.

6. In our considered view the claim for captive status can be considered only for the year 2009-10 and not for 2008-09.

7. In view of the above finding, it is ordered as follows :

(1) Consumption of power from 6.6 MW of Shahapur Hydro Plant by BGL (P2) for the year 2008-09 cannot be considered as captive consumption and consequently P1/P2 are liable to pay surcharge and hence are not entitled to get refund of surcharge already paid to the Respondents.

(2) Consumption of power from April 2009 to March 2010 shall be considered as for captive consumption subject to adhering to the Condition No.3(1)(a)(i)&(ii) by P2 for the entire year. In that case the petitioner shall not liable to pay surcharge for the year 2009-10. However, the petitioner(s) shall become liable to pay surcharge in case captive consumption falls short of 51 % of the power generated by 6.6 MW plant during 2009-10, in which, P2 owns 26 % of paid up share capital. Petitioners shall furnish an undertaking to this effect to the respondents and respondents shall be entitled to recover the money due at the end of the year 2009-10, in accordance with law.

8. Both the petitions thereby stand disposed off in the above terms.

Sd/-
(K.P. PANDEY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K.SRINIVASA RAO)
MEMBER