

Before the Electricity Ombudsman
9/2, 6th Floor, Mahalakshmi Chambers, M.G.Road,
Bangalore

Present: B.R.Jayaramaraje Urs, IAS (Retd.)
Electricity Ombudsman

Case No.OMB/B/G-83/2010/861

Dated 30.05.2012

M/s.Safina Towers Private Limited,
 #3, Ali Asker Road,
 Bangalore-560052

(Represented by Sri Shridhar Prabhu,
Advocate - Authorised Representative)

.. **Appellant**

Vs

1. The Asst. Executive Engineer(EI)

E-2 Sub-Division, BESCO,
 "C" Station, Queen's Road,
 BANGALORE-560005

(Represented by Shri V.Y.Kumar,
Advocate-Authorised Representative)

2. The Chairperson,

Consumer Grievance Redressal Forum,
 B.E.S.C.O.M. Corporate Office,
 K.R.Circle,

BANGALORE-560001

.. **Respondents**

1. This is an appeal under the provisions of KERC (Consumer Grievance Redressal Forum and Ombudsman) Regulations, 2004 against the orders passed by the Consumer Grievance Redressal Forum, Bangalore (hereinafter referred to as the 2nd Respondent) vide No CGRF/32/2009/860-866 dated 31.5.2010 in respect of the Appellant's grievance relating to non-refunding of the excess tariff collected by Asst.Executive Engineer, E-2 Sub-Division, BESCO (hereinafter referred to as the 1st Respondent) along with interest. Aggrieved by the decision of the 2nd Respondent, the Appellant has submitted his case as under:

2. The Appellant is an Electricity Consumer of BESCO under H.T.-2(a) tariff category. Electrical installation bearing R.R. No. EHT – 109 stands in the name of the Appellant. The Appellant is a Private Limited Company and is an infrastructure service provider as defined in the Union of India – Ministry of Commerce Notification No.33 (RE) 92-97 dated 22.03.1994 under the Software Technology Park of India (STPI) Scheme. The Appellant has signed an agreement with the Union of India on 14.07.2005. As per the agreement, the Appellant has to lease out the entire premises to the export-oriented software companies. Thus, all occupants of the Appellant's STP are 100% export-oriented companies. The software industry is located at No.3, Ali Asker Road, Bangalore.

3. The Appellant has registered with the Department of Information Technology & Bio Technology, Government of Karnataka. Registration Certificate was issued on 16.09.2005. As per the Millennium I.T Policy of Government of Karnataka, software companies are treated as industries and industrial tariff is levied on such industries. Information Technology and Bio Technology (I.T & B.T for short) industries are brought under H.T-2(a) Schedule in the Tariff Order, 2005. In spite of this, the Appellant was classified under HT-2(b) commercial category. Hence, he represented to the 1st Respondent on 26.03.2008 to set right this anomaly. The 1st Respondent considered his representation and accorded approval for change of tariff from HT-2(b) (commercial) to HT-2(a) (industrial) from 17.02.2006 vide Official Memorandum No EEE/AED/AEE (O)/AE(T)/1310-16 dated 31.05.2008. This O.M. was issued by the Executive Engineer (Ele), CO&M, Additional East Division, BESCO on the basis of a letter issued by the Chief General Manager(E), BMAZ. In spite of this O.M, the 1st Respondent did not refund the excess tariff collected from 17.02.2006, but chose to refund excess tariff collected with effect from 31.05.2008, i.e. from the date of issue of O.M. Aggrieved by the decision of the 1st Respondent, the Appellant filed a complaint before the 2nd Respondent. The 2nd Respondent, after hearing both parties, passed orders upholding the decision of the 1st Respondent. Being aggrieved by the orders of the 2nd Respondent, the Appellant has filed this appeal.

4. The 1st Respondent's comments were called vide letter No.OMB/B/G-83/2010/8380 dated 08.06.2010 and the 1st Respondent has furnished his comments vide letter No. AEE/E2//AAO/SA1/2210 dated 23.01.2012.

5. In his comments, the 1st Respondent submitted that the electrical installation bearing R.R No 2 EHT 109 was serviced on 19.01.2006 under HT-2(b) Tariff in the name of M/s. Safina Tower P. Ltd, No 3, Ali Asker Road, Bangalore with a sanctioned load of 2000 K.V.A for commercial complex for software company. Subsequently, the Appellant represented to Managing Director, BESCO for change of tariff from HT-2(b)(commercial) to HT-2 (a)(industrial) on 26.03.2008 by paying Rs.250/- vide Receipt No.4369 dated 26.03.2008. Letter had been addressed to the Executive Engineer, Additional East Division by the Chief Engineer(E1),BMAZ vide No CGM/BMAZ,DGM(T)/GM-2/F-243/5425-28 dated 27.09.2008 to effect the change of tariff as per Circular No CYS/140 dated 10.11.2006 from H.T-2(b) to HT-2(a).

6. The 1st Respondent added that the Executive Engineer(E1) Additional East Division placed an Official Memorandum to accord approval for change of Tariff from H.T-2(b)(commercial) to H.T-2-(a)(industrial) with effect from 17.02.2006 vide their O.M No EEE/AED/AEE(O)/AE(T) 1310-16 dated 31.05.2008 on the basis of letter No. CEE BMAZ Vide Serial No(3). The Circular stated that the benefit of industrial tariff could be extended to software & hardware industries from the date of production of such certificate issued by the IT& BT Department. On the basis of instructions of Corporate Office vide letter No BESCO/GM(T)BC-19/F-029/08-09/5672-76 dated 11.09.2008, an amount of Rs 13.72 Lakhs had been refunded in the month of January 2009. This refund had been considered from 31.05.2008. Hence, the Counsel for the 1st Respondent prayed this Authority to confirm the orders of the 2nd Respondent and to disallow the appeal.

7. The matter was taken up for hearing on 10.02.2012 and, on behalf of the Appellant, Advocate, Sri Shridhar Prabhu appeared and put forth his arguments and, on behalf of the 1st Respondent, Shri V.Y Kumar, Advocate appeared and put forth his arguments. The arguments got concluded on 04.05.2012.

8. The Advocate for the Appellant argued that, as per BESCO's O.M dated 31.05.2008, the Appellant was required to pay industrial tariff under HT-2(a) category retrospectively from 17.02.2006. In spite of this, BESCO had declined to implement its own decision and, instead, had taken a stand that concession could not be extended retrospectively from 17.02.2006 and, at the most, the benefit could be extended prospectively from the date of issue of the said O.M.

9. Further, the Advocate for the Appellant submitted that the Chairman, CGRF had been earlier working as Director (Technical) BESCO and, based on his directions, the said O.M dated 31.05.08 had been issued. But, as Chairman of the CGRF, he had declined to issue any directions to 1st Respondent to implement his earlier directions. Hence, the Counsel for the Appellant prayed this Authority to direct the 1st Respondent to refund the differential amount paid for the period from 17.02.2006 to 31.05.2008.

10. Arguing on the Circular issued by Government of Karnataka, the Counsel for the Appellant pointed out that the Circular dated 10.01.2002 by the Government had not been brought to the notice of the public nor gazetted as shown in the Circular. The Electricity Act had come into effect from June, 2003 and Karnataka Electricity Regulatory Commission had been set up under this Act. Tariff Orders had been issued by K.E.R.C on 10.01.2002. The Appellant applied as per Government Order dated 10.01.2002 and I.T Department issued Registration Certificate in 2005. As per the Government order, the Appellant was entitled to be considered under H.T.2(a) category from the date of issue of Registration Certificate. As per the existing Circular dated 10.01.2002, the Appellant had followed all the procedure and obtained Registration Certificate from the I.T & B.T.Department in 2005 and was eligible to be considered under H.T-2(a) category. Distribution Company's Circular cannot overrule Government Circular and the Executive Engineer and G.M.(T), BESCO had rightly applied the Government Circular dated 10.01.2002 and had held that the H.T.-2(a) tariff was applicable from the date of issue of Registration Certificate by the I.T Department. As per the Articles of Association of BESCO, the

Licensee was bound by the Government directions and, therefore, the officers of the BESCO could not be held that they had acted illegally. This had been pointed out by one of the 2nd Respondent's Members in the impugned order in the form of a dissent note. K.E.R.C is a Tariff Issuing Authority and Tariff Order issued by KERC had not put any conditions in its Tariff Order that benefit would have to be extended from the date of production of Registration Certificate issued by the I.T & B.T. Department and there was no requirement to produce any Certificate, much less by the Appellant. Only this Appellant was discriminated against and insisted on production of I.T Registration Certificate. K.E.R.C issued Tariff Order taking into account various factors including the proposals of BESCO. BESCO had not offered any such suggestions in its proposals that I.T. Companies should produce Registration Certificate issued by the I.T & B.T. Department for availment of benefits under H.T.-2(a) and, hence, BESCO could not put any conditions contrary to the Tariff Order and Conditions of Supply of Electricity of Distribution Licensees in the State of Karnataka.

11. The Advocate for the Appellant arguing on the Government Circular submitted that Circular had not said that the Consumers should approach BESCO with I.T Certificate for availing benefits and the Circular was only for internal consumption of BESCO and public was not informed about this Circular. If BESCO had made known this Circular to the public by publishing it in the Karnataka Gazette, the consumer would have come to know of this Circular. Since the Circular was not in the public domain, the Consumer was not bound to follow this Circular.

12. Commenting on the BESCO's assertion that it was still following 2002 Govt Circular, the Advocate for the Appellant submitted that such assertions would support his arguments that BESCO was still following 10.01.2002 Circular and any Circular issued by BESCO contrary to Government Circular would be invalid and to be treated as null and void under Article 108 of the Articles of Association of BESCO.

13. The Advocate for the Appellant, referring to the impugned order, argued that one of the 2nd Respondent's Members had relied upon the Government Circular dated 10.01.2002 and upheld the case of the Appellant and, hence, prayed this Authority to set aside the impugned order and to allow the appeal.

14. The Advocate for the 1st Respondent submitted that BESCO had recognised the Appellant as a software industry eligible for H.T.-2(a) Tariff. The Appellant Company's installation had been serviced on 17.02.2006 under H.T.-2(b) tariff category and, on the day of servicing the installation, the Appellant had not produced Registration Certificate issued by the I.T & B.T. Department entitling him any concession. As per the Regulations, the persons seeking benefit had to produce relevant Registration Certificate issued by the I.T & B.T Department, Government of Karnataka. The Appellant, for the first time, filed an application for change of tariff category from H.T.-2(b) to H.T.-2(a) in the year 2008. The Executive Engineer, Additional East Division on production of Registration Certificate by the Appellant, issued an O.M for change of tariff from H.T.-2(b) to H.T.-2(a) from the date of servicing the installation i.e 17.02.2006. Subsequently, BESCO in its Board meeting dated 23.08.08 reversed its earlier decision dated 31.05.08 and issued fresh guidelines stating that the benefit of industrial tariff would be extended from the date of production of Registration Certificate issued by the I.T & B.T Department, Government of Karnataka.

15. The Advocate for the 1st Respondent further submitted that the Appellant vide letter dated 14.01.2008 had requested BESCO to change the tariff from H.T.-2 (b) to H.T.-2(a). Accordingly, BESCO had extended the benefit from 26.03.2008. If any person sought tariff category change, he had to make an application. In the present case, the Appellant made an application for change of tariff category on 26.03.2008 and BESCO accorded approval for change of tariff category from 17.02.2006 retrospectively. Subsequently, BESCO Board on 23.08.08 had reversed its earlier decision dated 31.05.08 and issued revised guidelines stating that the benefit of industrial tariff would be extended from the date of production of Registration Certificate issued by the I.T & B.T Department, Government of

Karnataka. BESCO noted that the Executive Engineer had issued O.M dated 31.05.08 in contravention of its Circular dated 10.11.2006. This circular stipulated that concession should be extended from the date of production of I.T & B.T Certificate. In the present case, the Executive Engineer BESCO, without any request from the Appellant, had made the Circular applicable with retrospective date by exceeding his authority and without jurisdiction. The Appellant had been refunded Rs.13.72 lakhs excess tariff collected from the date of production of Registration Certificate.

16. The Advocate for the 1st Respondent further submitted that though the Appellant's installation had been serviced on 17.02.2006, he had not availed the benefit of Industrial Tariff by producing the Registration Certificate issued by the I.T & B.T. Department, Government of Karnataka. In the instant case, the Appellant had filed application seeking industrial tariff on 14.01.2008 and, immediately, BESCO processed the proposal and issued orders on 31.05.2008. The O.M issued by the Executive Engineer dated 31.05.2008 extending benefits retrospectively was void ab initio as it had been contrary to Board Circular dated 10.11.2006. Board Circular enjoyed higher status vis-a-vis O.M issued by the Executive Engineer and the Executive Engineer had no powers to issue any O.M in contravention of the Circular issued by the Board.

17. The Advocate for the 1st Respondent affirmed that BESCO, which is a Registered Company under the Companies Act, 1956 had got powers to determine the date for extension of benefit. BESCO issued a Circular on 10.11.2006 and the Appellant made an application seeking H.T.-2(a) category benefit on 14.01.2008. By rule of law, any Circular would have a prospective effect until and unless it was made specifically retrospective.

18. The Advocate for the 1st Respondent averred that the Executive Engineer initially relied upon G.M(T)'s instructions and, subsequently, the G.M(T) vide letter 11.09.2008 issued clarification to follow Board's Circular dated 10.11.2006. As per Government Circular dated 10.01.2002, it was mandated on the Consumer to

produce the Registration Certificate issued by the I.T & B.T. Directorate for availment of H.T.-2(a) tariff and BESCO had not violated any of the Tariff Orders issued by the K.E.R.C. and, hence, prayed for dismissal of appeal.

19. Arguing on the dissent note issued by one of the Members of the CGRF in the instant case, the Advocate for the 1st Respondent submitted that when only two Members participated in the proceedings of the Forum, the views of the Chairman would prevail and, hence, prayed this Authority to confirm the orders of the 2nd Respondent and to dismiss the appeal.

20. Both parties were informed vide letter No.OMB/B/G-83/2010/154 dated 25.01.2012 regarding availability of Sub-Regulation 1 of Regulation 20 of KERC (Consumer Grievance Redressal Forum and Ombudsman) Regulations, 2004 which provides for settlement by agreement through conciliation and mediation. However, both parties have not availed this opportunity. Hence, I am proceeding to pass an order in this matter.

21. Having regard to the contending position of the parties, the issues emerge for our consideration are:

a) What is the import of G.M(T)'S letter addressed to the Executive Engineer BESCO dated 29.04.2008?

b) Whether the Executive Engineer has interpreted the letter correctly?

c) Whether the Government Order allows extension of industrial tariff from the date of issue of Certificate by the competent authorities or from the date of production of certificate to the Distribution Licensee?

22. To answer the first question, we will have to peruse the letter issued by the G.M (T) to the Executive Engineer dated 29.04.2008. Letter states that the Appellant has applied for industrial tariff to be effective from the date of service of the installation and it advises the Executive Engineer to instruct the Appellant to bring a certificate from the I.T & B.T Department that the industrial tariff will have to be

applied from the date of service of the installation and it instructs the Executive Engineer to take action to extend the industrial tariff from the date indicated in that letter i.e. from the I.T. & B.T.Department.

23. O.M dated 31.05.2008 issued by the Executive Engineer states ***"Approval is hereby accorded for change of Tariff from H.T.-2(b)(commercial) to H.T.-2(a) (industrial) tariff from 17.02.2006 in respect of R.R. No 2EHT-109 of M/s. Safina Towers Pvt. Ltd, at No.3, Ali Asker Road, Bangalore as per the General Manager (Technical), BESCO Corporate Office letters ref. (2a & 2b) i.e 29.04.2008 and 21.05.2008.***

24. From the (a) contents of the G.M (T)'s letter dated 29.4.2008 and from (b) extract of the O.M dated 31.05.2008 issued by the Executive Engineer, it becomes clear that the Executive Engineer has issued O.M dated 31.05.2008 based on the letters issued by the G.M(T) dated 29.04.2008 and 21.05.2008. But G.M(T)'S letter dated 29.04.2008 does not say that the industrial tariff should be extended from the date of service of the installation, but says that the Consumer be advised to bring a Certificate from the I.T & B.T Department indicating extension of industrial tariff from the date of service of the installation and further instructs the Executive Engineer to take action to extend the industrial tariff from the date indicated in that letter. Another letter of G.M (T) dated 21.05.2008 instructs the Executive Engineer to follow the Company's Rules while taking decision in the instant case.

25. The General Manager(T) quite surprisingly advises the Executive Engineer to instruct the Appellant to bring a Certificate from the I.T. and B.T. Department that industrial tariff could be extended from the date of service of installation in the case of the Appellant. The I.T. and B.T. Department cannot be expected to give any advice with regard to the date from which industrial tariff should be extended to the Consumers. The I.T. and B.T. Department's job is to satisfy itself whether the Consumer is engaged in software technology development and to issue Registration Certificate stating that the Consumer has registered with the Department. It is up to the Distribution Licensee to decide from which date the industrial tariff should be

extended, either from the date of production of I.T. Registration Certificate or from the date of service of installation. BESCO Board taking into account the financial implication has resolved on 10.11.2006 to extend the industrial tariff to the Consumers from the date of production of I.T. Registration Certificate.

26. Two letter dated 29.04.2008 and 21.05.2008 issued by the GM(T), BESCO is not based on any Board decision. These letters are only a response to the clarification sought by the Executive Engineer in his letter dated 19.04.2008. Further, the GM(T)'s letter does not straight away say that industrial tariff should be extended from the date of service of installation. It only advises the Executive Engineer to instruct the Appellant to bring a letter from the I.T. and B.T. Department advising the Distribution Company to apply industrial tariff from the date of service of installation. Further, it appears that there was a discussion on this issue in the chamber of Director(T), BESCO Corporate Office which was attended by Chief General Manager(E) Coml. O&M, BMAZ and the Assistant Executive Engineer(E), E-2 Sub Division, on 30.05.2008 and this is evident from the OM dated 31.05.2008. It seems that the Executive Engineer has issued OM dated 31.05.2008 based on the discussion that took place on 30.05.2008 and advice given by the Director(T) in the meeting. It is noted in the OM that he had been directed to effect change of tariff from H.T.-2(b) to H.T.-2(a).

27. The Executive Engineer based his OM dated 31.05.2008 on the letter dated 29.04.2008 and 21.05.2008 issued by GM(T). In those letters, there is no specific directions to the Executive Engineer to extend the industrial tariff to the Consumer from the date of service of installation and, as such, the Executive Engineer ought not to have issued such an O.M. Further, the Executive Engineer cites the discussion he had with the Director (T) dated 30.5.2008 and the Executive Engineer cannot issue O.M. based only on discussion without clear cut written directions or orders from the Senior Executive.

28. The Executive Engineer appears to have issued the O.M dated 31.05.2008 without insisting on the Appellant to bring a certificate from the I.T & B.T.

Department indicating that industrial tariff could be extended from the date of service of the installation as suggested by the G.M(T). The Executive Engineer might have taken the date of service of installation for extension of industrial tariff because the Appellant had not availed power on the date of issue of Registration Certificate. Even the G.M(T) could not have issued such a letter advising the Executive Engineer to instruct the Appellant to bring a certificate from the I.T & B.T.Department that the industrial tariff could be extended from the date of service of installation when the BESCO Board had issued a Circular vide No CYS 140 dated 10.11.2006 to extend the industrial tariff only from the date of production of I.T Registration Certificate. G.M (T)'s letter dated 29.04.2008 appears to have not based on BESCO'S Circular nor it has got the approval of the Managing Director.

29. Without going into the validity of the letter issued by the G.M (T) dated 29.04.2008, we will have to see whether the Executive Engineer has followed the instructions conveyed in that letter. The G.M (T) has wrongly advised the Executive Engineer to advise the Appellant to bring a Certificate from the I.T & B.T Department indicating that industrial tariff would be effective from the date of service of the installation. From the information made available to this Authority, even these instructions appear to have not been followed by the Executive Engineer. The Executive Engineer appears to have not insisted on any letter from the I.T & B.T.Department, but has acted on the I.T Registration Certificate issued earlier dated 16.09.2005 and since the installation had not been serviced on that date, he appears to have taken the date of issue of Occupancy Certificate by the Bangalore City Corporation i.e 17.02.2006 for extension of industrial tariff to the Appellant. Hence, it is established beyond doubt that the Executive Engineer has acted contrary to the letter dated 29.04.2008. Even the G.M (T) appears to have acted on his own and appears to have not taken the Board's approval nor M.D'S clearance before issuing such a letter (dated 29.4.2008). From the records made available to this Authority, it appears that the Executive Engineer has not issued any letter to the Appellant to bring a letter from the I.T. & B.T. Department. He appears to have issued the O.M based on the discussion he had with the Director(T) dated 30.05.2008. There is no proceeding drawn on the discussion and the Executive

Engineer in the O.M cites the discussion dated 30.5.2008 and states that in the meeting held on 30.5.2008 it had been directed to effect change of tariff from H.T.-2(b) to H.T.-2(a) from 17.02.2006 in accordance with the Corporate Office directions vide letter No BESCO/GMT/B.C-19/F-1029/2008-09/1087-89 dated 29.04.2008 and BESCO/GMT/BC-19/F-1029/2008-09/1915-17 dated 21.05.2008.

30. When proposals came to the G.M(T) from the Asst. Executive Engineer for refund of excess tariff collected from 17.02.2006, he conveyed in his letter dated 11.09.2008 that the Board had considered the issue of extending industrial tariff to the consumers in its meeting dated 23.08.2008 and resolved to adhere to its earlier Circular instruction issued vide reference No CYS 140 dated 10.11.2006 extending the tariff from the date of production of Registration Certificate by the consumer. It is seen that the Appellant has applied for change of tariff on 26.03.2008 and the 1st Respondent has considered the request in the light of the clarifications issued by the G.M (T), BESCO and extended industrial tariff from 26.03.2008 which is found to be in order.

31. The Appellant's Advocate has cited Government Circular dated 10.01.2002 and argued that the Appellant is covered under that Circular and, as per this Circular, the Appellant need not produce the Registration Certificate to the Distribution Company. But the Government Circular is very clear which states ***"The I.T. & B.T. Companies are treated as "Industrial Consumers" and not "Commercial Consumers" for the purpose of levying electricity tariff envisaged in the respective policies. The company seeking such concessions shall make an application to KBITS. After due verification of actual requirements of the Power for IT/ Biotech activities, the Director IT & Biotechnology, will issue a certificate to the company based on which the KPTCL authorities shall levy the industrial Tariff"***. Even 2002 Government Order insists production of Registration Certificate to KPTCL and extension of industrial tariff by the KPTCL thereafter.

32. In the light of the discussions made above, there are no good grounds to interfere in the Orders passed by the 2nd Respondent and, hence, the following orders.

ORDER

33. For the foregoing reasons, **the appeal is dismissed.**

(B.R.Jayaramaraje Urs)
Electricity Ombudsman

1. M/s.Safina Towers Private Limited, #3, Ali Asker Road, Bangalore-560052 (represented by its Legal Counsel, Sri Shridhar Prabhu, Advocate, Bangalore).
2. Consumer Grievance Redressal Forum, BESCO Corporate Office, K.R.Circle, Bangalore.
- 3.The Asst.Executive Engineer (Ele), E-2 Sub Division, BESCO, "C" Station, Queen's Road, Bangalore - 560005
4. Managing Directors of ESCOMs.
5. PS to Hon. Chairman, KERC
6. PS to Hon.Member (H), KERC
7. PS to Hon.Member (S), KERC
8. PS to Secretary, KERC
9. OCA