

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 24th October, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

Complaint No. 5 / 2017

BETWEEN:

Bidadi Industries Association (R),
Building No.219, Madanahalli Village,
Byramangala – Harohalli Road,
(Above VRL Office),
Bidadi Industrial Area,
Ramanagar District,
Karnataka – 562 109

..

COMPLAINANT

[Petitioner is represented by Adlaw Partners, Advocates]

AND:

Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001

..

RESPONDENT

[Respondent is represented by Just Law, Advocates]

ORDERS

- 1) The Complainant in the above Complaint has prayed for the following reliefs :

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- (a) To pass an order, quashing the Circular No.BESCOM/BC-26/BC-22/2411/2009-10/Cys-12 dated 29.5.2017, issued by the Bangalore Electricity Supply Company Limited;
 - (b) To pass an order, quashing the bills raised by Bangalore Electricity Supply Company Limited with effect from March, 2017 levying temporary tariff on the members of the Petitioner Association availing open access;
 - (c) To pass appropriate order under Section 142 of Electricity Act, 2003; and,
 - (d) To pass such other order(s) as this Commission may deem fit and proper in the facts and circumstances of the case.
- 2) In substance, the grievance of the Complainant is against the Sample Bill (Working Example), as per Annexure-1 enclosed to the impugned Circular dated 29.5.2017, which suggests that the energy drawn by the existing HT and EHT consumers opting for Open Access without a Drawal Schedule or in excess of the Drawal Schedule furnished under the Open Access transaction in a particular time block is to be charged with the tariff for temporary connection for HT and EHT consumers.
- 3) On appearance of the Respondent – Bangalore Electricity Supply Company Limited (BESCOM) through its learned counsel, at its request, arguments on the question of maintainability of this case was heard. The Commission, by Order dated 8.8.2017, held that this Commission can go into the validity or otherwise of the Working Example, as per Annexure-1 enclosed to the impugned Circular and the present case is maintainable to this extent before this Commission, which does not fall within the purview of 'Consumer Dispute'.

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- 4) The relevant facts required for the determination of the controversy noted above may be stated as follows :
- (a) That the Complainant is an Association registered under the Karnataka Societies Act, 1960 and its members are HT/EHT industrial consumers of the Respondent (BESCOM). That the said HT/EHT industrial consumers have entered into individual Supply Agreement with the Respondent (BESCOM) for the agreed Contract Demand, after observing all the necessary formalities in this regard. The Supply Agreement contains the standard terms and conditions for supply of power. That one such Agreement of M/s. Toyota Kirloskar Motors (P) Ltd., is produced at ANNEURE-B to the Complaint. That the HT/EHT industrial consumers are entitled to obtain supply of power as per the terms and conditions of the said Agreement on payment of the Demand Charges and Energy Charges as determined by this Commission and other charges, if any, and accordingly, the said HT/EHT industrial consumers have been consuming energy on payment of required charges.
- (b) That several members of the Complainant-Association have been availing of the open access to a part of their demand and are availing of the remaining part of their demand with the Respondent (BESCOM). That the Respondent (BESCOM) was issuing monthly energy bills for that portion of the energy supplied by it, as per the applicable tariff determined by this Commission.

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(c) That however, the Respondent (BESCOM) came out with a Circular dated 29.5.2017, whereby it sought to subject such HT/EHT industrial consumers, who are availing of the Open Access, to tariff for temporary connection for that part of the energy supplied to them by it. That levy of such charges was not mentioned in the body of the said Circular, but was indicated in the Sample Bill enclosed as Annexure-1 to the said Circular. That the Circular along with Annexure-1 enclosed to it, is produced by the Complainant at ANNEXURE – D to the Complaint. That the Respondent (BESCOM) has also raised the bills, subjecting the open access consumers to tariff for temporary connection for that part of the energy supplied by it. That the applicable tariff for FY-2018 for the HT2(a)(i) consumers within the area under the Bruhat Bengaluru Mahanagara Palike (BBMP) and the Municipal Corporations is as follows :

Details	Tariff approved by the Commission
Demand Charges	`210/kVA of billing demand / month
Energy Charges:	
- For the first one lakh units	665 paise / unit
- For the balance units	695 paise / unit

That the approved tariff for HT-5 – Temporary Supply is as follows :

	Tariff approved by the Commission
Fixed Charges	`240/HP/month for the entire sanction load / contract demand
Energy Charges:	1000 paise / unit

That the Circular dated 29.5.2017 issued by the Respondent (BESCOM) refers to: (1) the KERC (Terms and Conditions for Open Access) Regulations, 2004

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(hereinafter referred to as the 'O.A. Regulations, 2004'); (2) Notification No.Y/03/4 dated 31.5.2006 effecting amendments to certain provisions of the O.A. Regulations, 2004; and (3) The relevant directives of this Commission's Tariff Order dated 11.4.2017. That neither the directives in this Commission's Tariff Order nor the O.A. Regulations, 2004, nor its amendments, would suggest that an existing consumer of an Electricity Supply Company (ESCOM) opting for open access to meet any part of its demand should be charged with tariff for temporary connection for the part of energy supplied by the ESCOM to it. The sum and substance of the Petitioner's contentions is that, payment of tariff for temporary connection as per Clause 11(viii) of the O.A. Regulations 2004, as amended in the year 2006, would apply only to an open access consumer, who has no existing Contract Demand with the ESCOM, but not to the 'existing consumers'. That the demand raised at the tariff for temporary connection by the Respondent (BESCOM) is not supported by any provisions of law and that the request made by the Complainant and its members not to impose tariff for temporary connection was not at all responded. Therefore, the present Complaint has been filed.

- 5) The Respondent (BESCOM) has not chosen to file its Statement of Objections. However, the learned counsel for the Respondent (BESCOM) has raised the following grounds in support of the imposition of the tariff for temporary connection, as is being done by the Respondent (BESCOM):

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- (a) That the Respondent (BESCOM) is only complying with Clause 11(viii) of the O.A. Regulations, 2004, as amended by this Commission's Notification bearing No.Y/03/4 dated 31.3.2006 (hereinafter referred to as the 'amended O.A.Regulations, 2006').
- (b) That the Circular dated 29.5.2017 issued by the Respondent (BESCOM) is in line with the amended O.A. Regulations, 2006.
- (c) That in the event of failure of contracted supply under Open Access, for arranging the back-up supply from the Grid or in the case of outages of generator supplying to a consumer on open access, for providing standby arrangement from the Grid, the ESCOM is entitled to collect tariff for temporary connection applicable to that consumer category as specified by the Commission under Clause 11(viii) of the O.A. Regulations 2004, as amended in 2006. That there is no dispute that the Open Access consumers were drawing power through the State Grid when there was no injection of power into the State Grid under the Open Access transactions.
- (d) That there is no violation of this Commission's Tariff Orders or of any other provision of law.
- (e) That all the Open Access consumers are a separate category of consumers, by themselves. That such Open Access consumers cannot be treated on par with the other consumers of ESCOMs. Once a consumer, even having an

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existing contract for supply, opts for open access, there is no obligation to compulsorily supply power to such consumer at the normal tariff applicable. The gist of the contentions of the Respondent (BESCOM) is that, tariff for temporary connection stated in Clause 11(viii) would apply to all the O.A. consumers, irrespective of whether they have contracted demand or not, with the ESCOM for the energy drawn over and above the Open Access quantum.

- 6) We have heard the learned counsel for the parties in the case, particularly on the validity or otherwise of the Working Example as per Annexure-1 attached to the impugned Circular dated 29.5.2017. The disputed portion in the said Working Example relates only to the imposition of tariff for the HT5 – Temporary Supply in respect of the 'existing consumers', for that portion of the power supplied from the State Grid when there is no injection of power or drawal of power is in excess of the scheduled power under the Open Access transactions.
- 7) From the rival contentions of the parties, the following issues would arise for our consideration :
 - (1) Whether Clause 11(viii) of the O.A. Regulations, 2004, as amended in 2006, would apply only to the 'Exclusive Consumers' as contended by the Petitioner or whether it would apply both to the 'Exclusive Consumers' and the 'Existing Consumers', as contended by the Respondent (BESCOM)?
 - (2) What Order?

- 8) After considering the submissions made by the learned counsel for the parties, our findings on the above issues are as follows :
- 9) **ISSUE No.(1):** *Whether Clause 11(viii) of the O.A. Regulations, 2004, as amended in 2006, would apply only to the 'Exclusive Consumers' as contended by the Petitioner or whether it would apply both to the 'Exclusive Consumers' and the 'Existing Consumers', as contended by the Respondent (BESCOM)?*
- (a) The O.A. Regulations, 2004 do not make a distinction between the 'Existing Consumers' or the 'Exclusive Consumers' for payment of charges or tariff under Clause 11(viii) or any other Clause or for any other purpose in respect of the Open Access transactions under the said Regulations. Therefore, the plain and literal meaning of Clause 11(viii) would suggest that, the said Clause would apply to the 'Existing Consumers' as well as the 'Exclusive Consumers' availing the Open Access. The Respondent (BESCOM) supports such an interpretation. On the other hand, the Petitioner contends that, the said provision under Clause 11(viii) would apply only to 'Exclusive Consumers' availing Open Access. Therefore, this Commission is required to adjudicate on the proper and correct interpretation of Clause 11(viii) of the said Regulations. It may be noted that, such an exercise could be undertaken only if the plain and literal meaning of Clause 11(viii) would lead to an absurd result. Keeping this in mind, we shall deal with the contention of the Petitioner.

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- (b) The Commission notes that, Section 43 of the Electricity Act, 2003 casts upon the Distribution Licensee a duty to supply electricity to a consumer upon request and on fulfilling certain terms and conditions as provided in the provisions of the said Act and the relevant Regulations framed thereunder. Therefore, for obtaining supply of electricity from a Distribution Licensee, a consumer has to make a request for supply of electricity. Without there being a request and the fulfilment of the other requirements, a consumer cannot demand supply of electricity, as a matter of right, from the Distribution Licensee. Admittedly, in the present case, the Open Access consumers concerned had applied to the Respondent (BESCOM) for supply of electricity and the supply of electricity has been arranged to them, after executing of the supply Agreements and fulfilling the other terms and conditions. In respect of such 'existing consumers', the Respondent (BESCOM) has an universal obligation to supply energy to the extent of the Contract Demand.
- (c) The Commission further notes that, Clause 8.5.6 of the National Tariff Policy dated 6.1.2006, issued by the Government of India, reads thus:

"In case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff for temporary connection to that consumer category as specified by the Appropriate Commission."

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- (d) Subsequent to issuance of the National Tariff Policy dated 6.1.2006 Clause 11(viii) of the O.A. Regulations, 2004 has been amended, to bring the said provision in line with the Tariff Policy dated 6.1.2006. The said Clause 11(viii), before amendment and after amendment, reads thus :

Clause No.	Regulation as existing	Regulation as modified
11(viii)	<i>“Charges for arranging back up supply from the grid shall be payable by the open access customer in the event of failure of contracted supply to cover the risk. The amount of back up charges shall be mutually agreed between the parties.”</i>	<i>“Charges for arranging back up supply from the grid shall be payable by the open access customer in the event of failure of contracted supply. In case of outages of generators supplying to a consumer on open access, standby arrangements should be provided by the licensee on payment of tariff for temporary connection to that consumer category as specified by the Commission.”</i>

- (e) The National Tariff Policy dated 6.1.2006, as well as Clause 11(viii) of the amended O.A. Regulations, 2006, would cast a duty on the Distribution Licensee to provide a standby arrangement to an Open Access consumer, in case of outages of the generators supplying to a consumer on open access on payment of tariff for temporary connection to that consumer category. The Open Access consumer, availing of such a provision of 'standby arrangement', has to pay a tariff for temporary connection to that consumer category, for providing supply of power from the Grid. Usually, such an

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arrangement being temporary in nature, supply of power in such a situation is charged at the tariff for temporary connection, which is usually on the higher side than the normal tariff.

- (f) There is no provision restricting an existing consumer of a Distribution Licensee from availing of a part of his demand on open access, without forfeiting his contracted demand with the Distribution Licensee. This stand is made clear by the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.1 of 2006, decided on 11.7.2006, in the case of *Indian Aluminium Company Limited –Vs- West Bengal Electricity Regulatory Commission and others*, which is relied upon by the learned counsel for the Complainant. Therefore, the contention of the Respondent (BESCOM) that, an 'existing consumer' opting for the Open Access has no right to claim supply of power under the Contract Demand, is not acceptable.
- (g) The last proviso to sub-Section (2) of Section 42 of the Electricity Act, 2003 provides for Open Access, subject to such Regulations as may be framed by the Commission to all the consumers who require a supply of electricity, where the maximum power to be made available at any time exceeds one megawatt. Such entitlement for Open Access can be availed even by an 'Exclusive Consumer' who has no Contract Demand with the ESCOM. The 'Existing Consumer' availing of the Open Access is not prohibited from relinquishing the Contract Demand with the ESCOM, wholly or in part. Hence, an 'Existing Consumer' availing of the Open Access can become an

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'Exclusive Consumer' by relinquishing the Contract Demand with the ESCOM, wholly or in part. There is no obligation to compulsorily supply power to such 'Exclusive Consumers' in excess of the Contract Demand with the ESCOM. For this reason, the National Tariff Policy casts a duty upon the ESCOM to make a standby arrangement in the event of outages of the generators supplying to an 'Exclusive Consumer' or in the case of failure of contracted supply under the Open Access. As already noted, the ESCOM has a duty to supply power to an 'Existing Consumer' having a Contract Demand under the universal supply obligation, though such consumer opts for the Open Access.

- (h) For the above reasons, we are of considered view that, in case of the existing consumers, they can avail of a part of their demand on open access, while continuing to be a consumer of the Distribution Licensee. This would further lead to the conclusion that, the supply of power over and above the Open Access quantum by the Distribution Licensee to the existing consumers, who avail of Open Access, would amount to supply of energy to its consumers on normal tariff under Contract Demand. In the case of the 'Existing Consumers', the demand charge payable represents the charge for the standby arrangement and the energy charge payable represents the charge for consumption of energy. Therefore, any supply of power to an 'Existing Consumer' over and above the Open Access quantum is to be charged at the normal tariff. This conclusion is irresistible from the different provisions of the Electricity Act, 2003.

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- (j) The obligation to supply energy under the provisions of the 'standby arrangement' and charging the tariff for the temporary connection would arise only in the case of the 'Exclusive Consumers' availing of the Open Access. In other words, a consumer having no Contract Demand with the Distribution Licensee is required to pay the tariff for the temporary connection for the energy supplied under the 'standby arrangement', as directed in the National Tariff Policy.
- (k) The 'failure of contracted supply' stated in Clause 11 (viii), cited above, would arise whenever there is deviation in the Open Access Injection Schedule or the Drawal Schedule, either by the generator or by the 'Exclusive Open Access Consumer'. The back-up supply in such instances can also be charged with tariff for temporary connection applicable to such consumer category.
- (l) An 'Existing Consumer' availing of the Open Access in excess of the Contract Demand with the ESCOM can also be treated as an 'Exclusive Consumer' for the power supplied in excess of the Contract Demand with the ESCOM during the standby arrangement or the back up supply. In that event, an 'Existing Consumer' is also liable for payment of the tariff applicable for temporary connection for such excess quantity of power supplied.
- (m) The above discussion would make it clear as to how the energy drawn by an 'Existing Consumer' or an 'Exclusive Consumer' under the Open Access, is to

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be accounted for and charged. The sample bill as per Annexure-1 enclosed to the impugned Circular dated 29.5.2017 has admittedly not followed the 'Accounting and charging the power drawn under the Open Access transaction', as explained above.

- (n) From the above analysis, the contention of the Complainant on Issue No.(1) is to be accepted and the rival contention of the Respondent (BESCOM) on Issue No.(1) is to be rejected, as noted above. The literal interpretation of Clause 11(viii) would lead to an absurd result, as it leads to curtailment of the right of the 'Existing Consumer' to get supply of power upto his Contract Demand with the ESCOM.
- (p) The learned counsel for the Respondent (BESCOM) has relied upon the Judgment of the Hon'ble High court of Madras in Writ Petition No.12603 of 2009 and other connected cases, decided on 8.12.2009, in support of his contention. It is pointed out that, a similar contention raised in the above-cited Writ Petitions, to the effect that, 'the payment of outage charges or grid availability charges does not arise, in case an Open Access customer who is already a consumer of the TNEB', is not accepted by the Hon'ble High Court of Madras.
- (q) The perusal of the above-said Judgment of the Hon'ble High Court of Madras would show that, the exact question, whether an 'Existing Consumer' availing

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Open Access would be liable for the tariff for temporary connection in the event of providing the supply of power under the standby arrangement by the Distribution Licensee, has not been considered and no finding on it has been given. Therefore, that decision cannot be treated as a 'precedent' to hold that an 'Existing Consumer' availing Open Access is liable for the tariff for temporary connection in the event of supplying energy by providing the standby arrangement or back up supply by the Distribution Licensee.

- (r) The learned counsel for the Respondent (BESCOM) has also relied upon the Judgment of the Central Electricity Regulatory Commission (CERC) in Petition No.10/MO/2014, decided on 29.4.2015, in the case of *Shamanur Sugars Ltd. – Vs- the State Load Despatch Centre Karnataka*. This decision has no relevance in respect of the controversy involved in the present case. In the said Judgment, it is held that the charges payable under Clause 11(viii) of the O.A. Regulation, 2004 do not apply to a Generating Company exporting power by availing of the Inter-State Open Access. Therefore, this Judgment does not support the contention of the Respondent (BESCOM) in the present case.
- (s) For the above reasons, we answer the first part of Issue No.(1) in favour of the Complainant and the second part of the said Issue against the Respondent (BESCOM). Consequently, it is to be held that, the Working Example as per Annexure-1 to the Circular dated 29.5.2017 is not in consonance with the

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proper interpretation of Clause 11(viii) of the O.A. Regulations, 2004, as amended in 2006 and accordingly, the said Working Example is not valid in law.

10) **ISSUE No.(2)** : *What Order?*

For the foregoing reasons, we pass the following:

ORDER

- (1) The Working Example, enclosed as ANNEXURE-1 to the Circular bearing No.BESCOM/BC-26/BC-22/2411/2009-10/Cys-12 dated 29.5.2017 issued by the Respondent (BESCOM), is not valid in law;
- (2) The applicability of Clause 11(viii) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004, as amended by the Notification No.Y/03/4 dated 31.5.2006, shall be as follows :
 - (a) An 'Existing Consumer' of the Respondent (BESCOM) availing Open Access and drawing power from the Grid, during the period when there is no injection of power due to outages of generator or in excess of the Open Access Drawal Schedule, shall be charged for the said quantum of power:
 - (i) at the regular tariff applicable to that category of consumer upto the Contract Demand with the Respondent (BESCOM), but not at the tariff for temporary connection;

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- (ii) at the tariff for temporary connection applicable to that category of consumer, exceeding the Contract Demand with the Respondent (BESCOM); and,
- (b) An 'Exclusive Consumer' of the Respondent (BESCOM) availing Open Access and drawing power from the Grid, during the period when there is no injection of power due to outages of generator or in excess of the Open Access Drawal Schedule, shall be charged at the tariff for temporary connection applicable to that category of consumer for the said quantum of power.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER