

THE STATE ELECTRICITY OMBUDSMAN
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APPEAL PETITION NO. P/071/2016

(Present: V.V. Sathyarajan)

Dated: 14th February 2017

Appellant : M/s KITCO Ltd.,
PB No.4407,
Puthiya Road,
NH By-pass, Vennala,
Ernakulam

Respondent : 1) The Deputy Chief Engineer,
Electrical Circle,
KSE Board Limited,
Ernakulam

2) The Asst. Executive Engineer,
Electrical Sub Division,
KSE Board Limited,
Palarivattom, Ernakulam.

ORDER

Background of the case:

The appellant, M/s KITCO Ltd., is a Kerala State public sector Company engaged in consultancy and allied activities. The appellant has applied for HT supply of power to the extent of 130 kVA under Electrical Section, Vennala. The licensee has demanded a sum of Rs. 2,95,000.00 computed @ Rs. 2270.00/kVA as pro-rata transmission side development charges on per kVA basis from the appellant, as the proportionate cost for enhancing the capacity of Sub Station.

Against this demand, the appellant had filed WP (C) 3951/2013 and the Hon'ble High Court in its interim order dated 11-02-2013 directed KSEB to effect power connection without collecting per kVA development charges and in judgment dated 27-05-2016, it was directed the appellant to approach the CGRF and accordingly the Writ Petition was disposed of. So, the appellant filed a petition before the CGRF which was disposed of vide Order No. 32/2016-17 dated 30-09-2016, with a finding that the demand raised by the respondent is correct

and the appellant is bound to pay the same. Challenging the decision of the CGRF, the appellant approached this Authority by filing this appeal petition.

Arguments of the appellant:

The appellant was challenging the demand for pro-rata per kVA development charges demanded presumably for the development of the common transmission infrastructure. The licensee demanded a sum of Rs. 2,95,000.00 computed at the rate approximately of Rs. 2,270.00 per kVA (for 130 kVA) as proportionate cost for the transmission side. This was in addition to meeting the costs on the distribution side, which the appellant had already paid for.

On receipt of the above, the appellant had contacted the Assistant Engineer, and had informed him that as a prospective consumer, the appellant has no nexus with the Transmission Division, and also had informed him that the appellant is not required to pay any per kVA charges for enhancing the transmission capacity of the Sub-Station. The appellant had also brought to the notice of the Assistant Engineer that the Honourable High Court of Kerala had, in several identical cases stayed similar demands and had directed that application for power connection to be processed and connection given without insisting on the payment of any amount for the development of capacity on the Transmission side. The appellant also pointed out that the Kerala State Electricity Regulatory Commission (KSERC) had issued an order dated 23-05-2011 in Petition T.P. 87/2011 approving rates for transmission works for providing power in excess of 11 kV.

The respondent had also issued a Circular directing the field units to follow the above order and to provide the consumers with an estimate prepared in accordance with the formula given therein. However the Assistant Engineer had expressed his helplessness and had said that in the absence of specific court order in the appellant's case there is nothing that he could do to waive the per kVA demand made by the Transmission Wing. This resulted in the filing of WP(C) No. 3951 of 2013. The power connection was effected as directed in the interim order dated 11-02-2013 without collecting per kVA development charges.

The Writ Petition has since been disposed directing the appellant to approach the CGRF in terms of KSERC order in relation to the matter. The certified copy of the judgment was received by the appellant on 03-06-2016. Therefore the complaint filed was within the period as directed by the Honourable High Court.

The respondent had submitted a statement of facts dated 26-07-2016 and the appellant has submitted a reply dated 16-08-2016. In this reply it was contended that the Kerala State Electricity Regulatory Commission in OP No. 22 of 2011 held that the KSEB Limited can collect expenditure on the transmission side if spent for the purpose of giving connection specifically to a consumer.

In the reply it was also contended that the State Electricity Ombudsman in various appeals like Appeal Petition No. P/144/2015 and P/146/2015 against the order passed by this Forum has held that the cost estimated should only be in accordance with the order dated 23-05-2011 in petition No. TP 87/2011. After the order of the CGRF the appellant has received a demand notice directing to satisfying the per kVA charges.

Further, the appellant stated the following.

1. For that the CGRF has not examined the facts, the legal grounds raised and have not considered the documents produced by the appellant.
2. For that the CGRF has not relied on relevant matters and has relied on irrelevant matter to arrive at the conclusions o the impugned order.
3. For that the CGRF has not applied its mind. The order passed by the CGRF is a non speaking order.
4. For that the CGRF failed to notice that the licensee is prohibited from demand any amount as pro-rata transmission side development charges on per kVA basis from the appellant especially when the licensee has no case that any work had been done on the transmission side to specifically for the purpose of giving power connection to the appellant.
5. For that the appellant is entitled to receive an estimate prepared as stipulated, in case, and only in case, if any work had been carried out in the Substation specifically for the purpose of giving power connection to the appellant.
6. For that the licensee is misusing its monopoly position to harass and threaten the appellant into meeting illegal demand.
7. For that there could not have been any expansion work done at the Sub Station specifically for giving power connection to the appellant as the Sub Station had sufficient capacity at the point in time. The power for the appellant was given from the nearest distribution transformer and without drawing any dedicated feeder. The appellant had already paid for all work done on the distribution side specifically for the purpose of giving connection to the appellant.
8. For that the licensee cannot make any unlawful gain at the expense of the appellant.
9. For that the respondent cannot act in contravention of the license granted by the Regulatory Commission, the provisions of the Electricity Act 2003, the Code or specific orders of the KSERC. In this case the licensee is in gross violation of Kerala State Electricity Regulatory Commission orders.

10. For that the respondent being a body under the State cannot act illegally or unfairly. The licensee cannot make illegal gains by demanding amounts which are not permitted by the Regulation Commission.

11. For that the State Electricity Ombudsman in similar cases had directed the respondent, which the demand for transmission charges shall be in accordance with the order of KSERC in TP 87/2011. No estimate had been provided by the KSEB in such cases.

12. For that the CGRF erred in holding to say that the right of the KSEB to collect transmission charges from an applicant for electric supply is now a settled position. Even the Honourable High Court does not interpret the above Judgement in the manner as exposed by the CGRF. The ratio of the judgment in W.A. No. 900 of 2013 is only that the order of KSERC in T.P. No. 87/2011 is applicable in cases other than those above 11 kV. The above judgement does not sanction levy of any amount other than as approved in KSERC order in T.P. No. 87/2011.

Nature of relief sought for:

1. To declare that the respondent is not entitled to make any demand except as stipulated in TP 87/2011 of KSERC and the circular dated 13-07-2011 of KSEB.
2. To declare that the respondent is not entitled to demand any amounts other than for work, if any, done on the transmission side, charged to distribution profit centre, and carried out specifically for the purpose of giving connection to the appellant.
3. To pass such other appropriate orders or directions that this Forum may deem fit and proper to grant on the facts and in the circumstances of the case and in the interest of justice.
4. To grant costs of these proceedings to the appellant.

Arguments of the respondent:

The respondent argued that the appeal is not maintainable either in law or on facts. The appellant, M/s KITCO Ltd on 20-09-2012 applied for HT supply of power to the extent of 130 kVA under Electrical Section, Vennala. The required load to the appellant is fed from 66 kV Substation, Kakkanad. The cost incurred in effecting this HT supply was a sum of Rs. 2,95,000.00 in addition to the supervision charges. Section 46 of the Electricity Act, 2003 enables the Distribution Licensee to recover reasonable expenditure in providing supply.

It is submitted that in the order dated 23-05-2011 in Petition No. TP-87/2011, the Kerala State Electricity Regulatory Commission observed that licensee is entitled to recover the cost of works on the distribution side as well as transmission side based on the estimated cost of works. It is further submitted that, once the work is completed, then the estimate amount is finalized as per the actual and then intimated to the beneficiary. In the said order the State Commission ordered that on completion of works, the licensee shall prepare an evaluation statement of the work, based on the actual quantities, within 3 months from the completion/energisation of the works and hand over the same to the beneficiary under acknowledgement. The beneficiaries shall be bound to remit the excess cost if any, within one month, failing which the licensee shall be entitled to recover the same, as if it was arrears of current charges under appropriate Regulations.

In order to effect the supply from 66 kV Substation, Kakkanad, two numbers of 10 MVA transformers were replaced with two number of 16 MVA transformers. The cost was Rs. 2,87,00,000.00 thereby charges per kVA works to Rs. 1918 per kVA. It is submitted that there is skewness in power distribution in centres like Ernakulam due to the heavy concentration of Industries, Industrial Parks, IT Parks, Commercial hubs, upcoming Townships etc. Since many number of prospective consumers applied for electric connection with low end connected load, the same is allowed and loads have been met from the existing infrastructure. This necessitates construction of new substations/ upgradation of the existing one or capacity enhancement of transformers etc.

In the most prudent way, the KSEB Limited arrived at the cost incurred towards such capacity based on the cost data approved by the State Commission and thereby levied the cost as per kVA basis. It may be noted that the revised demand for 125 kVA as Rs. 2,39,750.00 is calculated at the rate of Rs. 1918.00 per kVA. It is settled position that expenditure incurred in enhancing the transmission capacity can be realized from the consumers. The demand raised by the Board was challenged in W.P. (C) No.3951/2013 and the Hon'ble High Court by judgment dated 27-05-2016 directed the petitioner to approach Consumer Grievance Redressal Forum. It may be noted that the Division Bench of Hon'ble High Court in WA No. 900/2013 and connected cases upheld that levy and collection of transmission side development charges are legal. Those among the appellants who have not paid the amounts demanded by the Board were allowed two months time to pay the same.

Though M/s KITCO Ltd. filed a complaint before the Consumer Grievance Redressal Forum, the Forum observed that the demand raised by the Kerala State Electricity Board Limited is in order and the petition was dismissed on 30-09-2016. Notice was issued to the consumer to remit the amount within 15 days on 07-10-2016, but they have approached Hon'ble State Electricity Ombudsman. The grounds and relief claimed by the appellant is not correct and hence denied.

In the light of settled position, the demand raised by Board is as per law and the petitioner is bound to remit the same. The Hon'ble State Ombudsman may direct the petitioner to remit the amount immediately. Hence the Petition of the consumer may be dismissed with cost.

Analysis and findings

A hearing of the case was conducted in my chamber at Edappally, Ernakulam, on 09-12-2016. Advocate Sri Ziyad Rahman, was present for the appellant's side and Smt. R. Rajshree, Executive Engineer, Electrical Circle, Ernakulam and Smt. Latha S., Assistant Executive Engineer, Electrical Sub Division, Palarivattom represented the respondent's side. Both sides have presented their arguments on the lines as stated above. On examining the petition of the appellant, the statement of facts filed by the respondent, the arguments in the hearing and considering all the facts and circumstances of the case, this Authority comes to the following findings and conclusions leading to the decisions.

The instant appeal has been filed against the demand issued for a sum of Rs. 2,95,000.00 computed @ of Rs. 2,270.00 per kVA for 130 kVA as development charges on the transmission works and is not in consonance with the order dated 22-01-2015 in OP No. 22/2011 of the Commission. The appellant is aggrieved to the extent that the respondent has no right to collect the pro-rata development charge or any other similar charge in any other name. However, he is entitled to get an estimate prepared as stipulated under Order dated 23-05-2011 in Petition No. T.P 87/2011 and Circular No. KSEB/TRAC/S Code/SCC/R2/09/502 dated 13-07-2011. Further, the respondent could make any demand only in accordance with the orders issued by the Regulatory Commission and more specifically in accordance with Order dated 23-05-2011 in Petition No T.P. 87/2011 and as per the stipulations contained in order dated 22-01-2015 in O.P No. 22/2011.

The point to be decided in this case is as to whether collection of transmission side development charge on per kVA basis is in accordance with the orders of the Regulatory Commission in TP 87/2011?

On a perusal of the above orders it can be seen that in the Petition No. TP-87/2011 was filed by KSEB before the Regulatory Commission in the matter of approval of cost data for transmission works. In the order dated 30-11-2010 issued by the Commission, it is held that the licensee is entitled to recover the cost of works on the distribution side as well as transmission side based on the estimated cost of works. In the order it was also specified that the licensee shall prepare the estimate of costs of the works based on the principles laid down. ***A copy of the estimate thus prepared should be handed over to the beneficiary under acknowledgement. On completion of works, the licensee shall prepare an evaluation statement of the work, based on actual quantities, within 3 months of completion/energisation of the works and hand over the same to the beneficiary.***

The beneficiaries shall be bound to remit the excess cost if any, within one month, failing which the licensee shall be entitled to recover the same, as if it was arrears of current charges under appropriate regulations. Excess remittances if any shall be refunded by the licensees by adjustment in the monthly current charges/ direct refund within a period of 3 months. The Commission has also ordered that any dispute on the matter, including the rates, quantum of works executed etc shall be subject to review by CGRF and Ombudsman. Therefore, any individual dispute of the consumer related to the development charges can be brought before such Forum by the respective consumers.

The Division Bench of Hon'ble High Court laid down the law in its judgment dated 30-06-2014 in Writ Appeal No. 900/2013 and in view of the direction issued by the Hon'ble Commission to treat the pending cases in accordance with law laid down by the Hon'ble High Court till 01-04-2014, the date on which new Supply Code came into existence. The Hon'ble KSERC had issued a final order in petition OP No. 22/2011 dated 22-01-2015. The order reads as follows:

(1) KSEB Limited has the right to recover the reasonable expenditure, specifically incurred by its distribution profit centre for providing electric line and electrical plant required for giving supply of electricity to any consumer irrespective of whether such electric line and electrical plant are in the distribution system or the transmission system owned by the distribution profit centre, subject to the following conditions:-

- (i) the expenditure has been incurred by the distribution profit centre;
- (ii) the expenditure is reasonable;
- (iii) the expenditure has been estimated fairly and transparently in accordance with the cost data approved by the Commission;
- (iv) the expenditure is incurred for providing electric line or electrical plant used for the purpose of giving that supply; and
- (v) the expenditure is not included in the ARR & ERC or in any other investment plan approved by the Commission,

(2) The individual cases for recovery of expenditure from the consumers under Section 46 of the Electricity Act, 2003, as mentioned in the petition may be settled in accordance with the principles pronounced by the Hon'ble High Court in its Judgment dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases.

(3) The individual cases which arose on or before 31-03-2014, for recovery of expenditure from the consumers under Section 46 of the Electricity Act, 2003, which are not mentioned in the petition, may also be settled in accordance with the principles pronounced by the Hon'ble High Court in its Judgment dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases.

(4) The recovery of expenditure under Section 46 of the Electricity Act, 2003 in the cases which arose on or after 01-04-2014 shall be regulated in accordance with the provisions in the Kerala Electricity Supply Code, 2014, since the Judgment of the Hon'ble High Court dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases was issued in view of the provisions in the Supply Code, 2005.

The appellant is not a party in the Writ Appeal No. 900/2013 or other connected cases and SLPs filed before the Hon'ble Supreme Court. The Commission has not admitted an argument that the judgment dated 30-06-2014 of the High Court in Writ Appeal No. 900/2013 and connected cases is only applicable to the petitioners mentioned therein and it has no general application. The Commission cannot take a view that the said judgment of the High Court in a Writ Appeal has no application in other individual cases on the same matter. Generally the principle pronounced by the Hon'ble High Court in its judgment has to be followed by KSEB in similar cases. If the petitioner wants such clarification it is for him to move the Hon'ble High Court and obtain such clarification. In the SLPs filed by the connected parties against the judgment in Writ Appeal No. 900/2013, the Hon'ble Supreme Court have not stayed or annulled the judgment in the Writ Appeal.

It is the bounden responsibility on the part of respondent to prepare the estimate fairly and transparently in accordance with the cost data approved by the Commission and on completion of works the licensee has to prepare and hand over an evaluation statement of the work, based on actual quantities, within 3 months of completion/energisation of the works. On the basis of this the excess/arrears shall be recovered/ adjusted by the respondent. According to statutory provisions and facts it is clear that distribution licensee can recover the expenditure specifically incurred for giving connectivity to a consumer. According to the Commission, the judgment of Hon'ble High Court dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases has to be understood and implemented in view of the Section 46 of Electricity Act, 2003. The licensee may require the applicant to pay the cost estimate worked out under the Sub Clause 3 (a) within a period of one month or such extended period as the licensee may allow at the request of the applicant. Here in this petition the respondent has not produced any documents to prove these facts.

However, the respondent stated that for investments involving huge expenditure only one applicant had to bear the entire cost for the establishment of capital works even though his power requirement may only be a fraction of the total installed capacity. On the other hand, the other applicants whose demand is catered from the investment already made need not bear any cost towards providing supply to his establishment.

In order to administer the processing of applications properly and to avoid inequitable distribution of expenses, KSEB started to levy cost of giving supply as per kVA rate of total expenditure incurred for the development of the infrastructure facilities from all prospective consumers who are the beneficiaries of the electric plant so created. The cost as per the estimate for the construction of the entire capital work is not levied from such applicants and instead, the total cost is divided among all the beneficiaries/applicants considering their power requirement. The methodology was implemented in good faith in order to have an equitable distribution of expenses rather than burdening any one applicant from bearing the entire cost of providing infrastructure, and relieving the others from bearing any cost. Hence the demand of charges on transmission part is legal and not in violation of existing provisions of the rules. The amount demanded is arrived based on the estimate cost of work for the capacity enhancement necessitated for giving supply to the appellant and the prospective consumers.

According to the judgment in Writ Appeal No. 900 of 2013 of Hon'ble High Court and in OP No. 22/2011 of Hon'ble Commission the licensee can recover the transmission charges from the appellant and this Authority is of the view that there is no violation in issuing the demand for transmission charges. The documents produced by the respondent reveals that demand raised towards the transmission side development charges is not in accordance with the directions issued by the Commission in TP 87/2011. Admittedly, the respondent issued demand for the transmission development charge @ of Rs. 2270.00 per kVA on pro-rata basis even without furnishing any relevant documents. In the above circumstances, the respondent is directed to prepare an estimate in accordance with the cost data approved by the Commission on the basis of actual quantities required for the capacity enhancement of substation for giving supply to the appellant.

Decision

In view of the above discussions the respondent is hereby directed to prepare a revised demand on the estimate cost of work for the capacity enhancement necessitated for giving supply to the appellant at any rate within a period of 30 days from the date of receipt of this order and the appellant shall remit the same within one month, failing which the licensee shall be entitled to recover the same.

Excess remittances if any made by the appellant shall be refunded by adjustment in the monthly current charges/direct refund within a period of 3 months. The appeal filed by the appellant is admitted to the extent as ordered above.

Having concluded and decided as above it is ordered accordingly. The CGRF order No. 32/2016-17 dated 30-09-2016 is set aside. No order as to costs.

ELECTRICITY OMBUDSMAN

P/071/2016/_____ /Dated:_____

Delivered to:

1. M/s KITCO Ltd., PB No.4407, Puthiya Road, NH By-pass, Vennala, Ernakulam
2. The Deputy Chief Engineer, Electrical Circle, KSE Board Limited, Ernakulam
3. The Asst. Executive Engineer, Electrical Sub Division, KSE Board Limited, Palarivattom, Ernakulam.

Copy to:

1. The Secretary, Kerala State Electricity Regulatory Commission, KPFC Bhavanam, Vellayambalam, Thiruvananthapuram-10.
2. The Secretary, KSE Board Limited, Vydhyuthibhavanam, Pattom, Thiruvananthapuram-4.
3. The Chairperson, CGRF-CR, 220 kV, KSE Board Limited, Substation Compound, HMT Colony P.O., Kalamassery, PIN: 683 503.