

THE STATE ELECTRICITY OMBUDSMAN
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APPEAL PETITION No. P/034/2019
(Present: A.S. Dasappan)
Dated: 8th August 2019

Appellant : T.P. Varkey,
Managing Director,
M/s Mothers Agro Foods (P) Ltd.,
Industrial Development Park,
Angamaly South, Ernakulam

Respondent : The Deputy Chief Engineer
Electrical Circle,
Perumbavoor

The Assistant Executive Engineer,
Electrical Sub Division,
KSE Board Ltd, Angamaly,
Ernakulam

ORDER

Background of the case:

The appellant in this appeal petition is a consumer of the Kerala State Electricity Board Ltd bearing No. Consumer No. LCN 6/6008 under Electrical Section, Angamaly. The supply is given under High Tension category with a contract demand of 510 kVA. The appellant had obtained their Industrial electric connection on 22-02-2012. The Licensee has demanded a sum of Rs. 17.44 lakhs as transmission side development charges on per kVA basis from the appellant, vide letter No.ECP/TI/HT/Mothers Agro Food/2017-18/3527 dated 23-02-2018 of Deputy Chief Engineer, Electrical Circle, Perumbavoor. The appellant filed a petition before the CGRF which was disposed vide Order No. 63/2018-19 dated 20-03-2019, ordering that the demand notice issued to the appellant by the respondent is genuine and legally sustainable and the Forum dismissed the case due to lack of merits. Challenging the decision of the CGRF, the appellant approached this Authority by filing this appeal petition.

Arguments of the appellant:

On 23.02.2018, KSEBL have given a letter requesting the appellant to remit transmission development charge Rs. 17.44 Lakhs. On enquiring at KSEBL office they told him that the claim of transmission development charge is pending with Hon.

Supreme Court and hence there will not be any coercive steps like disconnection against the appellant. The respondent also requested to give a letter stating that a Writ Appeal is pending before Hon. Supreme Court. Considering the request, the appellant had given a letter on 09.03.2018 requesting to keep pending the claim.

On 24.09.2018 KSEBL have given a disconnection notice on the same ground which is not acceptable for the following reasons:

1. As per the Electricity Act Sec. 46 [Power to recover expenditure. "The State Commission may, by regulations, authorise a distribution licensee to charges, from a person requiring a supply of electricity in pursuance of section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply". Hon. Commission have not permitted KSEBL, the collection of Substation transmission development charge.
2. The impugned claim is without supplementing any details, data, purchase bills or cost of the equipment's. Without supplementing data's and details licensee cannot claim any amount from consumer.
3. The entire claim is already barred by limitation because it is older than two years. As per the Electricity Act Sec. 56 [2] 'Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity'.

KSEBL never considered the letters and they are repeatedly giving disconnection notice and threatening appellant. During the hearing on 22.11.2018 and 20.12.2018 before CGRF, KSEBL has stated that they had given the disconnection notice based on the B.O.(DF) No.2444/2014(LAIII/2011) Dtd. Thiruvananthapuram 17.09.2014. The appellant is not aware about that Board Order. Without proper High Court/Supreme Court Order, KSEBL cannot claim the Transmission Development charge, while the case is pending from 2011 onwards. The CGRF stated that "the case is pending before Hon'ble High Court of Kerala, KSERC and other Fora for a long period. Only after final disposal of the case, the license can act upon it Hence the Section 56 of the Electricity Act is not relevant in this case". Hence this claim is not valid. The KSEBL cannot claim any amount without proper order and direction from High Court/Supreme Court/KSERC etc..

In this case, KSEBL claim Rs. 17.441akh towards Transmission development charge, the appellant didn't receive the estimate of the same, and work completion report of KSEBL, and the appellant is not aware that the transmission line to the appellant's plant is dedicated to him or not. If it's a dedicated line then only the appellant is liable to pay the full amount of transmission charge.

Relief Sought for:

1. Direction may be given to the KSEBL not to disconnect the supply till hearing and dispose of the complaint.

2. The Ombudsman may cancel the impugned amount Rs. 17.44Lakhs claimed towards transmission development charges.

Arguments of the respondent:

The supply of electricity to the consumer is being used for the purpose of manufacturing of rice and bran. The consumer had taken service connection on 22.02.2012 after executing a bond dtd. 11.01.2012 based on the interim order dt 07.10.2011 of the KSERC in which the commission has directed the Board to give connection to the consumers listed in exhibit 1 of the petition OP 22/2011 by executing an indemnity bond as commitments for making payments of additional charges if allowed in final orders of the Commission on the above petition. Sri Varkey Peter, Mother's Agro foods Pvt. Ltd Angamaly is included as Sl. No. 1 in Exhibit 1. The Commission further ordered KSEB to proceed with the collection of Transmission charges as per the order of the commission dt.23.05.11 on TP87/2011. In the bond or undertaking executed by the applicant, he indemnify to make the payment of additional charges if allowed in final order of KSERC on the petition OP 22/2011 or in the judgement of court in similar issues in respect of M/s De Paul in addition to the charges in respect of his service connection.

Section 46 of The Electricity Act 2003 provides the power to recover expenditures which states that any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply.

On 22-11-2012 Single Bench in WPC 18726, 22781.22098,20515 and 21491 of 2011 held that levy and collection of transmission side development charges are illegal. Against these judgments KSEB filed writ appeal nos. WA 900, 910, 991, 1040 and 1042 of 2013. On 30-6-2014 Division Bench set aside the Single Bench judgment and held that "we are unable to sustain the conclusion of the learned single Judge that the appellants are not entitled to realize the transmission side development charges" and validated the recovery of transmission side development charges from consumers.

In compliance of the above judgment KSEBL issued orders to Deputy Chief Engineers of respective transmission/electrical circles to take immediate necessary steps to realize the transmission'-development charges vide B.O. (DF) No. 2444/2014 (LAI/8347/2011). Dtd. Thiruvananthapuram 17-9-2014. KSEBL further clarified the collection of transmission development charges in instalments vide B.O.D (D&S) No. 53/2015 (LAI/8347/2011). Dtd. Thiruvananthapuram 09-01-2015.

A Petition O P No. 22/2011 was filed by Kerala State Small Industries Association, Ernakulam District before the Hon'ble Kerala State Electricity Regulatory Commission in which the Hon'ble Commission ordered the following on 22-1-2015:

The individual cases for recovery of expenditure from the consumers under section 46 of Electricity Act 2003, may be settled in accordance with the principles pronounced by the Hon'ble High Court in its judgment dtd. 30-6-2014 in WA No. 900/2013 and connected cases.

The individual cases which arose on or before 31-3-2014 for recovery of expenditure from the consumers under section 46 of 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 30-6-2014 in WA No.900/2013 and connected cases.

On the basis of the above Board orders Respondent has issued a notice to the petitioner on 23-2-2018 to remit the amount in 4 instalments in which 50% has to be remitted as 1st instalment. The petitioner has not made any remittance violating the bond, judgments of Hon'ble High Court and Board orders and filed complaint No.63/2018-19 before the CGRF (Central region) and the CGRF (Central region) have dismissed the case due to lack of merits.

Analysis and findings

A hearing of the case was conducted in my chamber at Edappally, Ernakulam, on 11-06-2019. Sri T.P. Varkey, the appellant was present for the appellant's side and Smt. Ambili A.P., Assistant Executive Engineer, Electrical Circle, Perumbavoor and Smt. Shahanas Begum, Nodal Officer, (Litigation), Perumbavoor 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. 17.44 lakhs computed for 510 kVA as development charges on the transmission works.

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.

Hence 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 above orders of the Regulatory Commission.

On a perusal of the above orders it can be seen that in the Petition No. TP-87/2011 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.

The Commission has approved the following methodology for estimating the cost of providing HT/EHT connections and for executing transmission works in favour of other beneficiaries.

Sl. No.	Description	Amount (Provisional)
1	Cost of materials	A
2	Erection & Commissioning	B = 7.5% of A
3	Transportation, Insurance & contingencies	C = 6% of A
4	Civil Works and special works like SCADA etc if any	As per estimation = D
5	Tree cutting compensation if any	As per estimation = E
6	Sub-Total	F = A+B+C+D+E
7	Overhead/Supervision charges	G = 10% of F
8	Total	F+G
9	Taxes & Duties if any extra	

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 above. 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.

In petition No. OP 22/2011 the Commission had issued an interim order on 07-10-2011. In the said interim order the following directions were given.

The Kerala State Electricity Board is directed not to proceed with the pro-rata system devised arbitrarily till a decision is taken on the OP 22/2011 filed by KSSIA

(Ernakulam). KSEB is further directed to give connection to the consumers listed in Exhibit-1 of the petition OP 22/2011 by executing indemnity bond as commitment for making payments of additional charges if allowed in final orders of the Commission on the above petition.

KSEB may proceed with collection of transmission charges as per the order of the Commission dated 23-05-2011 on TP 87/2011.

In view of the above direction issued by the Commission on 07-10-2011, various consumers filed Writ Petitions before the Hon'ble High Court of Kerala challenging the levy of transmission side development charges on per kVA basis by KSEB.

The Single Bench of Hon'ble High Court in its common judgment dated 22-11-2012 in WP (C) No. 18726/2011 and connected cases, held that the levy of transmission side development charges and the demand for non-refundable advance impugned in the Writ Petitions was illegal and on that basis the Single Judge had ordered that the amounts realized from the Writ Petitioners should be refunded to them with simple interest @ 6% per annum.

KSE Board filed Writ Appeal no. 900/2013 and connected cases challenging the common judgment rendered by Single Judge in WP (C) 18726/2011 and connected cases.

The Division Bench of the Hon'ble High Court in its judgment dated 30-06-2014 in the above Writ Appeals allowed the collection of transmission side development charges by setting aside the judgment of Learned Single Judge in WP (C) 18726/2011 and connected cases.

Meanwhile 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) As ordered by the Commission in its order dated 16.11.2009 in OP No.13/2009 and as admitted by KSEB Limited in its submission before the

Commission, it has no right to collect the pro-rata development charge or any other similar charge in any other name.

(3) 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.

(4) 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.

(5) 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”.

Various consumers filed writ petitions before the High Court challenging the levy of transmission side development charges on per kVA basis by KSEB. Writ Appeal No. 900/2013 and other connected appeals were filed by KSEB challenging the common judgment by the single judge. The appellant is not a party in the Writ Appeal No. 900/2013 or other connected cases filed before the Hon. High Court of Kerala 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 is of the opinion that the said judgment of the High Court in a Writ Appeal has 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.

On a perusal of the estimate for enhancing the station capacity by installing a 10 MVA Transformer for an amount of Rs. 290.0962 lakhs prepared by the respondent, it is found that the estimate prepared is not in consonance with Circular No. KSEB/TRAC/S Code/SCC/R2/09/502 dated 13-07-2011 which was issued pursuant to Order dated 23-05-2011 in Petition No. TP 87/2011. The following variation is noted against the methodology for fixing the cost as stipulated by the KSERC in its orders.

Added 3% extra for spares in the estimate of materials (Part-1 Materials) which is not allowable as per KSEB circular dated 13-07-2011. Due to this an excess amount of Rs. 5.6180 lakhs is charged. Erection & Commissioning (Part-2) was calculated as 10% of part-1 in the estimate instead of 7.5%. Insurance, transportation & contingencies was calculated as 13.75% (10% + 3.75%) of Part I instead of 6%. The respondent has stated that the appellant has to remit revised pro rata development charges of transmission side for an amount of Rs.14.795 lakhs at the rate Rs. 2901 for 510 kVA. But this amount is not correct as per the methodology for fixing the cost as stipulated by the KSERC in its orders, as noted above.

In addition to the above discrepancies in the preparation of estimate, the respondent has not seen handed over a copy of the estimate prepared without observing the cost of works based on the then material cost data. Further, the respondent has not prepared an evaluation statement of the works based on actual quantities within 3 months of completion / energisation of the work as stipulated in the Order dated 23-05-2011 in Petition No. TP 87/2011 of Commission.

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. This was not seen followed in this case which amounts to lapses on the part of 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 subject to the conditions mentioned above.

As per Regulation 8 (3a) of Supply Code, 2005 deals with supply where new substation is to be commissioned – **if the licensee finds that supply of electricity to premises applied for requires commissioning of a new substation which is not covered as part of the investment plan approved by the Commission, the licensee shall inspect the premises of the applicant and prepare the cost estimate for the work and intimate the applicant within one month of receipt of application.**

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.

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.

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.

However, the distribution system can be extended, if required, at the cost of the consumer wherever it is absolutely needed. It is authorised by the Section 43 and 46 of the Electricity Act and there is clear provisions in the Regulations created by the Regulatory Commission under Electricity Supply Code 8(2) to (5) to realize the cost for distribution extension to provide the electric supply. So the cost estimates collected by KSEB, to provide the supply except the items which are specifically directed to omit by this Forum as shown below, are found to be in order.

The respondent also denied the application of Supply Code 2014 in the present case of the appellant. Filing of application for power allocation, sanctioning of estimate, remittance of the requisite amount were during the period when the Electricity Supply Code 2005 was in force i.e., prior to the inception of the Electricity Supply Code, 2014. On analysing the facts and circumstances, it is right to say that law applicable to the appellant in this case is the Supply Code, 2005, as the appellant applied for power and remitted required amounts before 01-04-2014 i.e., the Supply Code 2005 was in force.

Decision

From the analysis done and the findings and conclusions arrived at, which are detailed above, I observe the following and take the following decisions.

- 1) There was no revision of estimate in the transmission side.
- 2) The actual works executed in transmission side were not evaluated.
- 3) The applicant has not requested for an exclusive feeder.

As the work was executed not in accordance with the original estimate or revised estimate and an exclusive feeder was not constructed from the substation to the premises of the appellant, the evaluation-cum-cost report shall be prepared.

The final accounts of each work, for which amount has been collected by KSEB to provide the electric supply to the appellant, may be prepared and the actual cost estimate be arrived at, incorporating the revisions as ordered above by this Forum, within three months of this order and the same shall be communicated appellant.

The Order No. OP 63/2018-19 dated 20-03-2019, of CGRF (Central Region), Ernakulam, is set aside.

Having decided as above, it is ordered accordingly. The Appeal Petition filed by the appellant is disposed of with the said decisions taken and issued. No order as to costs.

ELECTRICITY OMBUDSMAN

P/034/2019/ _____ /Dated: _____

Delivered to:

1. T.P. Varkey, Managing Director, M/s Mothers Agro Foods (P) Ltd., Industrial Development Park, Angamaly South, Ernakulam
2. The Deputy Chief Engineer, Electrical Circle, Perumbavoor
3. The Assistant Executive Engineer, Electrical Sub Division, KSE Board Ltd, Angamaly, 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 Substation Compound, KSE Board Limited, HMT Colony P.O., Kalamassery, PIN: 683 503.