

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

PRESENT: Shri. C. Balakrishnan, Chairman
Shri. C. Abdulla, Member
Shri. M.P.Aiyappan, Member

July 2, 2008

IN THE MATTER OF

Review Petition in respect of the Order on TP 23 of 2006
on ARR of KSEB

Kerala State Electricity Board

---- Petitioner

ORDER

Background

1. KSEB filed a review petition before the Commission against the Order passed by the Commission dated 26-11-2007 in the matter of ARR & ERC for the year 2007-08. The Commission placed the petition on its website and posted for a preliminary hearing on 10-4-2008 and issued a public notice. In the preliminary hearing held on 10-4-2008, the Commission noted that the review petition filed by KSEB was much delayed as the order on the ARR petition was issued on 26-11-2007. The Commission directed KSEB to explain the reason for the delay in filing the review petition. KSEB argued that as per clause 67 of KSERC (Conduct of Business) Regulations, 2003, the Commission either on its own or an application made by any interested or affected party, within 90 days, can review, revoke, revise, modify, amend, alter or otherwise change direction, order, notice or document issued or action taken by the Commission or its officers. KSEB submitted that, they have received the

Order of the Commission dated 26-11-2007 on the ARR petition for 2007-08 only on 12-2-2008, and hence there was no delay occurred in filing the review petition. Meantime, the President, Kerala High Tension and Extra High Tension Industrial Electricity Consumers' Association vide fax dated 9-4-2008 requested the Commission to reject the petition on the ground of delay and also requested to grant him sufficient time for studying and participating in the public hearing. The Commission deferred the hearing to 16-5-2008.

2. During the hearing held on 16-5-2008, the Commission condoned the delay of filing review petition and allowed KSEB to submit the matter in detail. The Kerala High Tension and Extra High Tension Industrial Electricity Consumers Association requested 10 days time for filing their objections and requested for supply of materials filed by KSEB. M/s.Binani Zinc filed their preliminary objections and requested time for filing detailed objections. The Commission allowed their request and gave 10 days time for filing their objections and also directed KSEB to provide the material to the objector within 3 days. KSEB submitted the copy of material before the Commission which was forwarded to the Association. The Association and M/s Binani Zinc filed their objections on 3-6-2008.

Public hearing on the matter

3. In the public hearing held on 16-5-2008, the Petitioner KSEB was represented by a team headed by the Member (Finance), who presented the case of KSEB. It was argued that the order on ARR & ERC was issued on 26/11/2007 and the said order was incorrect, hypothetical and even impracticable to implement it in a real world. According to the Board the Commission has cut down the expenses to the tune of Rs.470.80 crore and increased the Revenue by Rs.289.04 crore, thus leaving a difference of Rs.759.84 Crore. The sales approved by the Commission was also higher than expected by the Board. The reduction

of loss approved by the Commission to the tune of 2% would involve disproportionately large investments. Board was able to reduce the losses by 9.29% during 2001-02 to 2006-07. According to the Board a detailed techno-economic study including cost-benefit analysis with investment requirement is to be done to arrive at an optimum level of loss reduction every year and hence the loss reduction targets fixed by the Commission should be revised.

4. Regarding hydel generation and power purchase, Board contented that, accommodating reduction in energy from CGS against the surplus hydel energy available during monsoon is wrong. KSEB also stated that as against the estimates given in ARR, the reduction in availability of Central share, and the consequent increase in power purchase cost was communicated to the Commission. The additional burden was estimated by considering the reduction in fixed cost, variable cost and transmission charges of CGS Stations and by assuming that deficit energy would be met from Naphtha based stations of RGCCPP and BSES-Kochi. KSEB also argued that accommodation of reduction in energy from CGS against the surplus hydel energy available during the monsoon is not correct and due to the limitation in storage, excess water cannot be carried forward to the summer months. Further, as against what is mentioned in the ARR petition, the Kuttiadi addl extension (100 MW), Neriamangalam extension (25 MW), Kuttiaidi tail race (3.75 MW), and Kudamkulam (160 MW) projects would be completed only in 2008-09. However, Commission considered these projects as available, to meet the peak demand. In the case of depreciation, KSEB followed Annual Account Rules whereas the Commission allowed depreciation as per CERC norms, which is lower. KSEB also stated that the norms allowed by the Commission are in violation of the policy directives issued by the Government. Appellate Tribunal for Electricity in its order dated 24-5-2006 and 29-9-2006 allowed the depreciation rates specified by Ministry of Power as per annual account rules as against the orders of Delhi

Electricity Regulatory Commission. In the case of prior period credits, KSEB alleged that Commission came out with erroneous contention that allowing expense under this head would amount to charging consumers on account of expenses which is not incurred. The miscellaneous losses write off is due to the netting off of dues from the Government. Similar contentions were raised in the case of provision for bad debts and submitted that other expenses claimed by the Board should be allowed in full. KSEB also contented that the section 3(1) duty payable to the Government and revenue deficit on account of 20 paise rebate extended to the consumers should be allowed in the ARR. On the grounds mentioned in the petition, KSEB prayed as follows:

- I. Review T&D loss reduction targets considering the investment cost allowed in Transmission and Distribution sectors.
- II. Reconsider the reduction of Rs 105.91 crores made towards reduction in fixed costs from Power Purchase cost for the year 2007-08 on account of reduction of allocation from CGS
- III. Admit the additional financial burden to the Board on account of the increase in generation and power purchase from liquid fuel stations to meet the short fall in generation from CGS due to the reduction of allocation.
- IV. Admit the depreciation as per the provisions in the Electric Supply, Annual Accounts Rules-1985, in view of the recent judgments of Hon'ble Appellate Tribunal for Electricity and Hon'ble Supreme court against the tariff orders issued by Delhi Electricity Regulatory Commission (DERC) and KERC.
- V. Admit the other expenses as claimed in the ARR
- VI. Treat the section 3(1) duty as revenue expense and allow to account the same as part of the A&G expense, as was done since 1963.
- VII. Revise the revenue from tariff up to 30th November 2007 taking into account the rebate of 20 paise allowed to domestic and commercial consumers with effect from 01-01-2006 vide order of the Commission dated 05-01-2006 OR
- VIII. If the Commission was reluctant to account the rebate as revenue shortfall and insists to account the same as revenue, then it was requested that KSEB may be permitted to raise the amount due to

20 paise rebate allowed as arrears from domestic and commercial categories. If the Commission prefers to have any specific method to recover the same, it may also be specified.

Objections of Consumers

5. During the hearing dated 16-5-2008, Shri. Nawas of M/s Binani Zinc argued that the contentions made by the KSEB was unfair and the increase in hydel generation would reduce the purchase from costly thermal stations. He strongly objected the inclusion of netting off dues in the ARR and argued that the revisions argued by the Board should not be allowed. He also sought time for filing detailed objections along with Kerala High Tension and Extra High Tension Industrial Electricity Consumers Association.

6. Shri. A.R Satheesh representing Kerala High Tension and Extra High Tension Industrial Electricity Consumers' Association objected the argument of KSEB on the loss reduction and hydel generation. According to him, based on the records of KSEB itself, the claims on loss reduction cannot be believed. According to the power system statistics published by the Board T&D loss in 1999-00 itself was only about 18%, but according to the Board the present loss level was more than 18%. In such a situation, Board cannot claim that loss reduction have taken place.

7. The Kerala High Tension and Extra High Tension Industrial Electricity Consumers' Association, has filed detailed objections to the said petition. The Association submitted that the KSERC (Conduct of Business) Regulations, 2003 provides time limit on review and by citing an earlier order of the Commission, argued that scope of review under Code of Civil Procedure is limited. They requested that Commission should not encourage the lawless practices of the Board. The Association further argued that KSEB has not provided revised estimates in the review

petition through the financial year was over and provisional accounts were available. The reason for the delay in issuing the impugned Order as contented by the Board was not correct and delay was due to delay of KSEB in filing Tariff Petition and the lacuna in the filing not being consistent with the regulations of the Commission.

8. Regarding energy sales, the Association with support of data argued that KSEB always underestimate the sales and hence only actual figures would be considered for revision if any of the impugned tariff order. KSEB did not follow the mandatory provisions in the regulations and directions issued by the Commission. KSEB has linked loss reduction with investments, but KSEB was lagging behind the investment targets too and has not implemented the agenda of replacement of faulty meters, had it been implemented as planned it would have reduced the losses. The Association quoting the Order of the Appellate Tribunal for Electricity in Appeal No 100 of 2007 dated 4-12-2007 stated that the Commission has authority in setting loss targets and the Utilities have to adhere to the targets set. So the loss target set by the Commission was achievable.

9. On hydel generation, the objector contented that as against the estimate of 6934 MU by KSEB, the Commission estimated 8336.63 MU in the impugned order. The actual according to KSEB data was 8326.63 MU only a difference of 9.37 MU. The higher availability of 1393 MU would definitely result in reduction in power purchase. The Association also objected to KSEB's contention that due to storage limitations higher generation in summer months was not possible, by quoting the generation details during monsoon months and summer months in 2007-08. Reduction in fixed cost was true on account of reduction in central allocation and non-commissioning of Koodamkulam plant. They also requested that revenue from sale of surplus power to out side states should also be considered while fixing power purchase costs.

10. Regarding depreciation, the Association referred tariff orders of states like Andhra Pradesh, Chattisgarh, Punjab, Himachal Pradesh, Bihar and Delhi Discoms and stated that depreciation rates notified by CERC alone would be allowed. The prior period charges as mentioned in the petition for the last 10 years showed that only in two years (2000-01 & 2001-02) it was high. The Miscellaneous expenses projected by KSEB was about 12% of the approved ARR and the KSEB demand of approving the same by the Commission without review is fallacious. The Association also strongly objected to the provision of Rs.402 Crore towards write off. On the above grounds the Association argued that review petition of the Board was illogical and to be rejected.

Findings of the Commission

11. The Commission considered the petition filed by KSEB and the arguments of Member (finance) along with the objections filed against the petition. KSEB in its petition has argued that “numerous items as per the above order are incorrect and mere hypothetical and even impracticable to implement in a real world”. However, KSEB did not specifically bring the items that come under the purview of a review petition under section 94(1)(f) of Electricity Act 2003 in this petition. Before going into the *locus standi* of this review petition, the Commission feels that it is pertinent to deal with some of the issues. The contentions of KSEB are mainly relating to the area dealing with various items approved by the Commission such as loss reduction targets, hydel generation, expense items such as power purchase cost, depreciation, A&G expenses and other expenses, revenue from sale of power etc,. The Commission in the impugned order has clearly spelt out reasons for arriving at the above items. Regarding the hydel generation, the Commission has arrived at the decision based on the actual storage available as on 30-9-2007 and the anticipated inflow during the rest of

the year upto May 2008. Based on the available estimates, the Commission estimated that upto March 2008, generation from hydel projects to the tune of 3824.84 MU is available which on an average is about 21 MU per day. KSEB had the capacity to generate daily an average of more than the average assumed by the Commission. The actual generation for the year 2007-08 submitted by KSEB during the proceedings also shows that the estimates of the Commission is reasonable. Hence the contention of KSEB that due to limitation in storage capacity carry forward of excess water to summer months is not reasonable at least in this case. Further, the Commission has allowed the fixed costs of IPPs as projected by KSEB to meet the peak load.

12. Regarding the reduction in fixed cost, the estimates arrived at by the Commission is based on the records made available to the Commission and the same is reproduced in the impugned order, which is self evident. The Commission is not in agreement with the manner in which KSEB has arrived at the additional financial burden due to reduction of CGS allocation by converting the two part tariff stations into single part tariff. In the impugned order the Commission allowed Rs.621.29 Crore towards fixed cost of Central Generating Stations (including Koodamkulam and Kaiga Stage II) as against the Rs.727.20 Crore projected by KSEB. The revised fixed cost estimates for 2007-08 filed along with ARR & ERC of the Board for 2008-09 in Data Form-F2 for central generating stations (excluding Koodamkulam and Kaiga stage II) works out to Rs.515.31 Crore only. The estimates given by KSEB are found out to be far from actual in many occasions. Hence, the Commission has to arrive at independent estimates based on its own judgment with available information on record. The considered view of the Commission is that the judgment arrived at by the Commission is based on materials available before the Commission and considering the facts and circumstances at the time of decision and no additional information is brought before the Commission to amend its earlier stand. At any rate,

the power purchase cost of CGS stations are pass through once they fall in the merit order stack of approved purchase. So the difference if any could be considered in the truing-up process for the year 2007-08.

13. It is also worthwhile to point out that KSEB did not file any petition to amend the Original petition No. TP 23. The Commission with the intention of arriving at the best estimates has considered all the available informations including the letter dated 11-6-2007 of KSEB. Further KSEB failed to inform the delay in completion of projects such as the Kuttiadi addl extension, Neriamangalam extension, Kuttiaidi tail race, and Kudamkulam during the disposal of the impugned petition. It is important to note that the petitioner failed to bring necessary information before the Commission during the process of disposal of petition No T.P.23 in a proper manner to considered in the Petition. Hence, the Commission directs that, now on if the petitioner likes to amend or to make additional submissions to the Original petition shall file the same with affidavit to be considered as part of the petition.

14. Regarding depreciation, other debits, section 3(1) Duty etc., the Commission in its various orders have made its position very clear, which need not be repeated again.

Scope and Ambit of Review petition

15. Now, it is necessary to examine the scope of the review petition filed by KSEB in relation to Order 47 Rule (1) of Code of Civil Procedure, 1908. The Commission in its Order dated 11-03-08 on the review petition TP No.20/06 and TP No. 22/06 on truing up for 2003-04 and 2004-05 respectively filed by KSEB has taken a view that the review petition has to be qualified within the purview of the powers conferred on the Commission under Section 94(1)(f) of the Electricity Act 2003. The relevant portions of the Order are extracted below:

“.....The application and the scope of the review of an Order are circumscribed under Order 47, Rule 1, of Code of Civil Procedure. The scope of review, at the very outset, is much restricted. The Court of review has only a limited jurisdiction under Order 47, Rule 1. The review power, under the aforesaid provision are re-produced as below: -

“Application for review of judgment – (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order”

6. The above mentioned provisions of CPC mandates that a Court of review may allow a review only on specific grounds such as (a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the aggrieved person or such matter or evidence could not be produced by him at the time when the order was made; or (b) Mistake or error apparent on the face of the record; or (c) For any other sufficient reason which is analogous to the above two grounds.

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8. Hence, the review proceedings under Order 47, Rule 1, to be used for the for the rectification of an error, which is self evident, apparent and glaring on the face which would warrant reconsideration of the judgment/order so pronounced. The Review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. The law has made clear distinction between what is an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the latter can be corrected by exercise of review jurisdiction. A Review Petition has a limited purpose that cannot be allowed to be an appeal in disguise”

(Emphasis added)

16. It is to be noted that there are several decisions of the Supreme Court and High Court of Kerala which deals with scope and ambit of review. In the decision of the Supreme Court in Parsion Devi & Others V.Sumitri Devi & Others (1997) RD-SC 768 held that “Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise."

17. Further the decision of the Supreme Court in *The Hon Supreme Court in Smt. Meera Bhanja Vs. Nirmala Kumari Choudhury* (Order dated 16-11-1994) reported in AIR 1995 SC 455, has held that the scope and jurisdiction of mistake apparent as :

“It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC.”

.....

“it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions”

18. In *Haridas V. Usha Rani Banik (Smt) and Others (AIR 2006 SC P.1834)* the Supreme Court has held that “(T) There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized a vitiated by ‘error apparent’. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent errorwhere without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out”.

19. The aforesaid decisions of the Supreme Court when applies to the back ground of this case, the position is clear that there is no error apparent on the face of the record so as to alter the decision of this Commission dated 26-11-2007.

20. The High Court of Kerala in its decision in *C.C.Sivaprasad Vs. K.Sasidharan & Others* reported in AIR 2006 Ker.165:2006 held the view that *Power of review – it is a very restricted power – Court cannot under the cover of that power arrogate to itself the power to decide the case once again on the ground that on the reassessment of evidence the earlier*

finding was incorrect. Similarly the Supreme Court in Board of control for Cricket in India and Another V. Nethaji Club & others reported in 2005 (4) SCC 741 held that Order No.47 Rule.1 of the code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

21. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason that would depend on the facts and circumstances of the case. The words “Sufficient Reason” in Order No.47 Rule.1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine “*actus curiae neminem gravabit*”. Further the High Court of Kerala in Delta Foundation & Construction Vs. Kerala State Construction Corporation Ltd. reported in AIR 2003 Ker. 201 held the view that the grounds for review under O. 47 of the Code of Civil Procedure include mistakes or errors apparent on the face of the record. Error apparent on the face of the record must be an error which must strike on mere looking at the record and would not require long drawn process of reasoning on points on which there may conceivably be two opinions. An error which is not self evident and has to be detected by a process of reasoning can hardly said to be an error apparent on the face of the record justifying the Court to exercise its powers under Order 47 Rule.1 of the Code of Civil Procedure. As held by the Apex Court in Parison Devi and Others Vs. Sumitri Devi and Others (1997 (8) SCC 715) if there is a clear distinction between an erroneous decision and an error apparent on the face of the record the first can be corrected by the higher forum while the latter can only be corrected by

exercise of the review jurisdiction. The similar view was also held by the High Court of Kerala in Saramma V. Mathew in 2001 (1) KLJ 521 that an error which is not self evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order No.47 Rule.1 of CPC. Under Order No.47 Rule.1 of CPC, it is not permissible for an erroneous decision to be reheard and corrected.

22. KSEB filed this petition in the guise of review petition which is in effect an appeal memorandum. Instead of preferring an appeal before the appropriate forum as per law, KSEB has chosen a short cut method of filing review petition in which the points raised there in are squarely related to an appeal petition. Further KSEB is trying to re-agitate the same points which are made in their ARR & ERC petition for the year 2007-08. The Supreme Court in Harinagar Sugar Mills Ltd V. State of Bihar reported in 2006 (1) SCC 509 held that though the review may have been maintainable but the appellants could not be allowed to re-agitate the points which had already been decided by the Court. The review could be granted only if there was a mistake apparent on the face of the record. Hence, above discussion amply supports that the present petition is not maintainable under Section 94(1)(f) of the Act.

23. KSEB prayed that the 20 paise rebate allowed without advance subsidy receivable from the government may be permitted to be collected as arrears from domestic consumers. The Commission has considered the revenue on account of 20 paise rebate in the ARR strictly in line with the provisions of Section 65 of the Act , which was clearly spelt out in the Order. As per section 65, the reduction in tariff is not operative if the advance subsidy is not received. If KSEB has allowed the rebate in violation of the provisions of the Act, it shall be on account of KSEB only.

Order of the Commission

24. In the light of the discussions made in the findings of the Commission it is found that the present petition filed by KSEB under Section 94(1) (f) Electricity Act 2003, is not maintainable and hence dismissed.

Sd/-

Sd/-

Sd/-

M.P. Aiyappan
Member

C. Abdulla
Member

C. Balakrishnan
Chairman

Authenticated copy for issue

Secretary in Charge