

KERALA STATE ELECTRICITY REGULATORY COMMISSION

THIRUVANANTHAPURAM

PRESENT: Shri. K.J.Mathew, Chairman
Shri. P. Parameswaran, Member
Shri. Mathew George, Member

November 10, 2011

Petition RP No.10/2011

In the matter of
Review Petition on the Order on Truing up of Accounts of KSEB for 2007-08

Kerala State Electricity Board

- **Petitioner**

Background

1. The Order on truing up of accounts of KSEB for the year 2007-08 was issued by the Commission on 10-6-2011. On being aggrieved by certain decisions in the Order, the petitioner Kerala State Electricity Board (hereinafter called KSEB or the Board) filed a review petition on 26-7-2011. The petitioner has raised several issues for reconsideration such as disallowance of Rebate allowed for the Traders, disallowance on the cost of power purchase, disallowance of interest on security deposit, disallowance of depreciation, disallowance of Section 3(1) Duty, provision for netting off of dues from the Government, disallowance of return on equity for the year 2007-08, treatment of 20 paise rebate allowed to the consumers and expenses capitalized. The petition was admitted and numbered as RPNo.10/2011. The petition was uploaded in the website of the Commission and a press release was issued to inform the public. Hearing on the petition was held on 4-10-2011.

Hearing on the petition

2. In the hearing held on 4-10-2011, KSEB presented the petition. The petitioner stated that in the impugned order, the Commission did not allow the rebate

allowed to the traders for prompt payment of electricity charges to the tune of Rs.18.83 crore on the presumption that the amount has not been paid. In order to support the claim the Board has presented details of invoices raised by KSEB and the amount paid by the traders, which is net of the discount allowed. Second issue is the reduction in power purchase cost on account of non-achievement of T&D losses. In this regard, the Board has stated that in 2007-08, KSEB achieved loss reduction of 1.45%. The actual loss levels vary with power flow on a month to month basis and also based on the sales to HT-EHT and LT categories. The Commission should consider the reduction in energy consumption by different categories and its impact on T&D loss while approving the T&D loss and imposing penalties. Further, the average power purchase cost considered for imposing penalty for under achievement is also to be reconsidered. According to KSEB, while estimating the power purchase cost, sales to the extent of 649.12 MU meant for export and the revenue received cannot be accounted for arriving at the average power purchase cost. Further, the Commission did not consider the internal generation cost. According to KSEB, while arriving at the penalty, total cost of generation and power purchase less the revenue received from export of power or the net energy used in the system should be considered. In such a situation the average power purchase cost will be only Rs.0.86/kWh instead of Rs.2.39 per unit approved by the Commission. KSEB stated that this error should be corrected. In support of the argument, KSEB produced the Order of the APTEL in Appeal No.100/2007 dated 14-12-2007 and Appeal No.9 of 2008 dated 9-5-2008.

3. Another argument was on the disallowance of interest on security deposit (Rs.9.53 crore) for the year 2007-08. KSEB's argument in that since the accounts are prepared based on accrual principle, whatever booked as interest on security deposit should be allowed. Disallowance of depreciation is another issue raised in the petition. The Commission allowed the depreciation based on CERC principles. Further, the Commission did not follow norms specified in the CERC regulations other than depreciation. There is no uniform approach followed by State Commissions in India. Hence, KSEB requested to review the decision on disallowance of depreciation charges.
4. The Commission has disallowed Rs.77.54 Crore as section 3(1) duty, which is a firm liability of the Board. The Board requested to reconsider this decision. The Board has also requested to reconsider the provision made for netting-off of dues with the Government and the amount of Rs.400 crore written off. The disallowance of return on equity to the tune of Rs.167.42 crore for 2007-08 is another issue raised by the Board. The Board has repeated the arguments made

on this issue such as consideration of the Government Order dated 13-12-2010 and the provisions of Electricity (Supply) Act, 1948, National Tariff Policy etc.

5. Another point on which review was sought is the consideration of additional revenue of Rs.100.29 crore for the year 2007-08 on account of 20 paise rebate allowed by the Board. In this regard, the Board stated that the Commission did not issue any direction to stop the reduction in tariff till the Government release the subsidy. The Commission has invited only attention to the Section 65 in the Order dated 5-1-2006. According to KSEB, the Commission should have given specific direction to KSEB not to extend the rebate till the actual payment of subsidy is received from GoK. Once the Order was issued by the Commission, KSEB had no jurisdiction to unilaterally withdraw the rebate allowed to consumers. Hence, KSEB continued the rebate till the Commission revised the tariff vide order 26-11-2007. Another issue pointed out by the Board is that though the Commission has made considerable disallowance of expenses, the same did not reflect in the expenses and interest capitalized. Hence KSEB requested to reduce the expenses and interest capitalised for the year 2007-08 duly considering the truing up order.
6. The Board stated that in the ARR&ERC Order for 2007-08, the Commission had considered the utilisation of the surplus of Rs.329.72 crore arrived at for the year 2007-08 against the revenue deficit arrived at after in the truing up of accounts for the period 2003-04 and 2004-05. Hence, the surplus of Rs.1338.93 Crore arrived at by the Commission for the year 2007-08 after the truing up process, has to be reduced by Rs.329.72 Crore. Thus the net available surplus for the year 2007-08 will only be Rs.1009.21 crore.
7. KSEB in their petition has further argued that the surplus arrived at by the Board is not in fact available with the Board. All the non-cash items of the Board net of the disallowed amount is Rs.1202.69 crore, and including the electricity duty was made use of for capital expenditure, repayment of capital expenditure and short term deposits for meeting the future capital liabilities. The Board also mentioned the details of short term investment made and its utilisation as repayment of loans and for pension fund. Hence the surplus as arrived at by the Commission is not available for meeting the future revenue gap. Hence, the Board challenged the decision on adjusting the revenue surplus in the year 2007-08 in the revenue gap of the subsequent years.
8. The HT-EHT Association submitted a request for allowing time till 14-10-2011 for filing objections on the petition. The Commission allowed the request and permitted time till 14-10-2011 for filing the objections with a copy to the petitioner.

The Association since submitted their written objections on 14-10-2011. In the written objections, the Association has argued that the petition has to be rejected since there are no grounds made in the petition consistent with the review jurisdiction. Regarding the rebate for prompt payment the Commission has already mentioned in the order that if the payment is made actually it is eligible for passing on to the tariff. According to the Association, a review petition is for correcting the error apparent, and the claim should be raised in subsequent ARR&ERC or truing up petition.

9. In the case of cost of purchase of power also the Board could not find any apparent error and the argument that decrease in energy consumption of the HT& EHT category cannot be a reason for increase in T&D losses. There was an overall reduction of consumption of 2.2% compared to the approved level. Hence, there would have been a reduction in T&D loss level. Further load shedding was imposed during peak hours, which should have contributed to reduction in losses. So there is no merit in the argument of the Board. Regarding the average power purchase cost, the KSERC (Terms and Conditions for Determination of Tariff for Distribution and Retail Sale of Electricity under MYT framework) Regulations 2006 provide that merit order has to be followed while approving the cost of power purchase. Accordingly, the Commission has deducted the costly thermal purchase which is about Rs.9.8 per unit. The Commission has considered purchase from all sources and the stand taken by the Commission is correct. The judgment of ATE in Appeal No.100/2007 and 9/2008 is not relevant in the present case. According to the Association, there can be many methods for taking the average rate for disallowance of excess T&D loss. The generation of power and sale outside shall not be considered while arriving at the average rate.
10. The interest on security deposit should be as per actuals and disallowance of depreciation has been accepted by ATE in Appeal No. 5 of 2009. The issue of section 3(1) duty is a settled matter as per appeal No. 94/2008. The request for allowing write off of Rs.400 crore shall not be allowed since the Appellate Tribunal has upheld the decision of the Commission. In the case of return on equity there is no apparent error, and the matter is before the Commission pending final disposal. In the case of additional revenue of Rs.100 crore on account of 20 paise rebate, APTEL order in Appeal No.177/2009 has dismissed the request of KSEB since it is devoid of merits. The matter of expenses and interest capitalized has been dealt in the truing up order. Regarding the utilisation of surplus by KSEB, it is not a matter to be addressed in the review petition and hence does not merit consideration. Based on the above arguments, the Association pointed out that KSEB could not show any 'error apparent' in the

review petition and the Board only raised new arguments other than those raised in the truing up petition which are not allowable. Hence, the Association argued that the petition should be rejected summarily.

Analysis and decision of the Commission

11. The Commission has considered the arguments of the Board and the written submissions of the Association. Power of review available with the Commission is as per the provisions of Section 94(1)(f) and clause 67(1) of KSERC (Conduct of Business) Regulations, 2003. The said clause in the Regulation is as follows:

67. Powers of Review, Revision etc.,-(1) The Commission may either on its own motion or on an application made by any interested or affected party, within 90 days of the making or issuing of any decision , direction, order, notice, or other document or the taking of any action in pursuance of these regulations, review revoke, revise, modify, amend, alter, or otherwise change such decision, direction, order, notice, or other document issued or action taken by the Commission or nay of its officers.

12. As per section 94(1)(f), review of decisions, directions and orders are as per the Code of Civil Procedure 1908. The application and the scope of the review of an Order is circumscribed under Order 47, Rule 1, of Code of Civil Procedure. The review power, under the aforesaid provision is reproduced 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; or

(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 of 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 of the Court which passed the decree or made the order”.

13. The review petition has to be dealt with as per the powers conferred upon the Commission for review. The deliberation on the merits on the issues discussed in the original order are not contemplated in a review proceedings. It is also not for deliberating new contentions on the issues which are taken up in the original proceedings. The review jurisdiction is limited power to be exercised when new facts which could not be reasonably produced at the time of the order or considering any apparent error on the face of record. The Commission is also bound by the decisions of Hon. Appellate Tribunal for Electricity in Appeal No.94 of 2008 (KSEB Vs KSERC & Ors), Appeal No. 5 of 2009 (KSEB Vs KSERC) and Appeal No.177 of 2009 (KSEB Vs KSERC) on some of the same issues raised in the review petition. Based on this, the present petition has been analysed,.

14. The first issue raised in the review petition is on the rebate disallowed for prompt payment by traders. The Commission in the impugned order has discussed the matter in clear terms. Para 41 of the said order states as follows:

“..... The Commission however, is inclined to allow the 2% rebate given by the Board to the traders if it is a commercial condition of sale rather than based on the CERC regulations. However, the Commission notes that the Board has not made any payment under this head and hence the amount is not allowed. As and when the payment is effected promptly the same shall be eligible for allowing in the tariff.”

15. The Commission in the said order has mentioned that if the amount is actually paid, the same can be allowed. As part of the review petition, the Board has provided the details of invoices on this account to support the claim that rebate was actually paid as the traders have remitted amount less the rebate allowed. Based on the materials provided, the Board is eligible for the rebate as noted in the original order.

16. Next issue taken up in the petition is on the disallowance of power purchase cost to the tune of Rs.20.79 crore. In this regard, Board has argued that T&D loss reduction approved could not be achieved due to changes in the consumption pattern and the average power purchase cost considered by the Commission does not include the internal generation cost. The Commission has taken the cost of energy scheduled for sale outside for considering the average power purchase cost. In this regard, the Board could not provide any grounds for necessitating a review. The matter is already settled in terms of the decisions of Hon. APTEL in Appeal No.94 of 2008 and Appeal No.177 of 2009. In the Order on Appeal No.94, Hon. APTEL has ordered as follows:

22) *The power purchase cost is a reality. So are the actual sales. The appellant has actually not earned any revenue by sale of the units which it should have been able to sell with T&D target at 26.5%. In our view it is more reasonable to disallow the cost incurred for purchasing the additional units of energy on account of failure to meet the target for T&D loss reduction than to penalize the distribution licensee by adding assumed revenue from the sale of the additional units of power purchased.*

23.....*The Commission should disallow **the additional cost for purchase of additional power** rather than adding on the revenue side the amount which could be earned by achieving the T&D loss target.*

17. In Appeal No.177 of 2009, though the Board has raised the issue of considering the average cost of power including internal generation, it was not considered by the APTEL. Further, there was considerable export of power in 2005-06. A consistent methodology has been adopted by the Commission for estimating the average power purchase cost. The situation in 2005-06 was similar when there was considerable export of power. Hence, the matter of disallowance of excess T&D loss is a concluded issue and arguments made by the Board in this regard are not sustainable. It is also pertinent to note that all the arguments made by the Board in this regard are new and were not raised at the time of considering the original petition. Entirely new arguments cannot be raised in a review petition. Without going into the merits of the arguments of the Board, the Commission is of the view that Board did not mention these in the original petition and the present arguments are an afterthought, and hence they cannot be considered under review proceedings. In this connection, we would like to add that the Commission is in the process of developing regulations under section 61. The arguments on consideration of excess T&D loss and assigning the value can be raised while finalizing the norms/regulations.

18. In the case of disallowance of interest on security deposit, the matter is already settled as per the Order in Appeal 177 of 2009. The relevant portion of the order is given below:

“The only item disallowed in the truing up is interest on security deposits. Even according to the Appellant through its reply dated 31.10.2008 to the State Commission the actual disbursement of interest

as security deposit for the year 2005-06 was only Rs. 3.26 crores as against the approved amount of Rs. 35.40 crores. Therefore, the State Commission has rightly allowed the amount actually disbursed. As such these findings on this claim is perfectly justified.

19. As shown above, the Board is eligible for the amount actually incurred in this regard and there is no scope for review on this issue. Regarding the argument on depreciation the Board could not produce any convincing arguments for a review. The issue of depreciation as per CERC guidelines has been raised many occasions. It is pertinent to note that the Board has been following the CERC norms for depreciation in all the ARR&ERC proceedings from 2010-11. In any case, the matter is settled in terms of the Order in Appeal No.5 of 2009. In the said order Hon. APTEL has ruled as follows:

21. The depreciation is an important element in the tariff fixation. Under section 61 of the Electricity Act, 2003, the Appropriate Commission shall specify the terms and conditions for the determination of tariff and in doing so, shall be guided by the principles and methodology specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees and the Tariff Policy. Therefore, the State Commission is well within its right to follow the Central Commission guidelines.

20. Next issue is on the section 3(1) duty. This matter is also settled in terms of the judgments of Appellate Tribunal in Appeal No.94 of 2008 and Appeal No.177 of 2009. The relevant portions of the Order on Appeal No. 94 is reproduced below:

28.....The Commission can make no concession in respect of duty payable under section 3 which is imposed statutorily on the appellant. Nor can the Commission allow the duty payable as pass through in tariff. In this regard we are constrained to agree with the view of the Commission.

29) Mr. Ramachandran submits that in a cost plus method of tariff fixation, we cannot burden the distribution licensee with any expenditure lawfully incurred. According to him electricity duty payable under section 3 of the KED Act should be part of the general expenses as has been done in the past. Mr. Sibal submits that if it is so done, the burden of the duty will eventually fall on the consumer and would not be permissible as per the proviso quoted above. We entirely agree with Mr. Sibal's contentions. The provision of the legislation cannot be frustrated by such manipulation. Even if in some year/years the duty in question has been included in the A&G expenses, the same cannot be adopted as a

practice. There can be no estoppel against statute. Hence, the Commission's view in this regard needs to be upheld.

The relevant portion of Order on Appeal No.177 of 2009 is given below:

The Appellant claimed the A&G Expenses of Rs. 113.84 crores, in the truing up petition, as against the approved ARR figure of Rs. 90.70 crores. Out of Rs. 113.84 crores Rs. 63.26 crores was on account of the electricity duty to be paid to the Government under Section 3(1) of Kerala Electricity Duty Act which cannot be passed on to the consumers as held by this Tribunal in Appeal No. 94 of 2008.

21. The disallowance of the provision for writing off of Rs.400 crore as part of the netting off process is also dealt by the Hon. APTEL in Appeal No.5 of 2009. This was mentioned in the impugned order. Hence no review is required on this account also. Regarding return on equity, the matter is deferred in the impugned order since it is under the examination of the Commission as a separate issue. Hence, this issue is still open and return allowed by the Commission in the impugned order is only on a provisional basis.
22. Regarding the treatment of Rs.100.29 crore, the arguments of the Board is not sustainable since the rebate allowed can be treated only as subsidy and the Commission has directed the Board to realize the same from the Government. The Board has committed a serious maladjustment in the accounts by withdrawing it from the revenue, though the rebate was allowed under section 65 of the Act. Withdrawal of the revenue from the books of accounts amounts to reduction in the approved tariff. It is to be mentioned that in the truing up of accounts for 2005-06, the Commission has taken a similar view in this matter and the Order has become final. So no review is possible under the head.
23. The argument of the Board that Interest and expenses capitalized have to be correspondingly reduced is also not acceptable. There is no disallowance under capital expenditure or interest and financing charges/expenses which are transferred to capital account.
24. As regards the Board's contention that the revenue deficit of Rs.360.06 crore was already adjusted and the surplus/deficit arrived at in the truing up process for the year 2007-08, the Commission has mentioned in the Order as follows:

77. The Commission after considering in detail, the petition filed by the Board, the objections from stakeholders and other materials placed before it hereby arrives at a revenue surplus of Rs. 1338.93 Crore as against a revenue gap of Rs.91.28 Crore presented by the Board based on the audited accounts. The revenue surplus so arrived at would be adjusted against accounts of subsequent years. With the above, the petition is disposed of.

25. Though the Commission has arrived at a surplus of Rs.1338.93 crore, the method of adjustment has not been specified in the said order mainly on the reason that some of the issues are still open and the exact revenue gap/surplus is not yet final.

Orders of the Commission

26. In the light of the above analysis of all the points raised by the Board as well as the objector, the HT-EHT Association, the Commission is of the view that there are no sufficient grounds placed by the petitioner for a review of the Order dated 10-6-2011 on the truing up of accounts of the Kerala State Electricity Board for 2007-08, under Section 94(1) (f) Electricity Act 2003. Accordingly, the petition stands dismissed.

**Sd/-
P.Parameswaran
Member**

**Sd/-
Mathew George
Member**

**Sd/-
K.J.Mathew
Chairman**

Approved for Issue

Secretary