

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

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

December 20, 2008

IN THE MATTER OF

Petition in respect of Tariff applicable to Metered Temporary Connections for
Sabarimala Mandalam and Makaravilakku Festival

Petition DP No.70	Dy.No. 002595 Dated 05-08-08	M/s Sabarimala-Pamba Contractors and Merchants Association Vs Kerala State Electricity Board	Petitioner Respondent
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ORDER

Background

- (1) The petitioner Sabarimala Pamba Contractors and Merchants Association , a registered association of contractors and merchants engaged in various business activities in Pamba and Sabarimala, challenging Board Order B.O.(FM) No 1530/02 (Plg Com 4325/01) dated 12-11-2002, tariff applicable to metered temporary connection for Sabarmala Mandalam and Makara Vilakku Festival . The said notification was challenged before the High Court of Kerala in WP (C) No 2175/2007. The Hon High Court in its Judgement dated 16-11-2007 directed the petitioner to file the petition before the Commission.
- (2) The above writ petition was filed when the Board started charging energy and duty for the consumers at the rate of Rs 15.60 per unit from the members of the petitioner Association

(3) Prayers

Hon Commission may be pleased to consider the contentions and grounds raised in the above petition and reduce the energy charges now being collected by the respondent from the members of the petitioner.

(4) Public Hearing.

Sabarimala Pamba Contractors and Merchants Association stated as follows in the petition filed before the Commission and also in the public hearing held on 23-10-2008 at the Commission's office.

- 4.1 The petition was filed since, the Board was charging energy and duty at the rate of Rs 15.60 per unit from the members of the petitioner Association who are vendors who take shop rooms in auction for specified period from Devaswom Board.
- 4.2 For quite some time the Board has been Charging exorbitant rates for the energy consumed in the said shop rooms which has no connection with any tariff prevailing in the State of Kerala. Merely because shop rooms are in Sabarimala and Pamba the Board is not entitled to charge energy rates at an unconscionable rate. The difference in energy rates can be verified if this Hon Commission verifies the energy rates charged for Devaswom Board and to other Commercial establishments. To cite an example the energy charges for supply given to Devaswom Board at Sabarimala and Pamba is Rs 4.50 per unit, whereas, the members of the petitioner Association are charged at the rate of Rs 15.60/ unit. It is also submitted that members of the petitioner Association are never given any permanent connection and the connection given is only temporary and the respondent Board is charging exorbitant amount as OYEC charges from members of the petitioner Association.
- 4.3 In the Writ petition filed before Hon High Court the petitioner has challenged the right of KSEB in relying upon their Notification, after the coming into force of the Electricity Act, 2003. Under the said Act only the Hon Commission has the authority to fix the tariff and by continuing a tariff by virtue of a notification issued by the respondent which has become obsolete is clearly against provisions of law.
- 4.4 In the Hon High Court the respondent (the Kerala State Electricity Board) has filed a counter affidavit along with annexures and the same is produced as annexure C. The argument of the respondent is that the Commission had approved the continuance of the existing tariffs and other charges as per annual report of the Commission for 2003 -04 and the Commission had approved the tariff issued by the Board. It is reiterated that the tariff issued by the Board is absolutely irrational , unreasonable and without any basis. The only intention behind the tariff of respondent Board is to squeeze and extract as much money from the petitioner association without any rhyme or reason.

- 4.5 It is high time that the Hon. Commission should take notice of the aforementioned aspects and should interfere in the matter and take steps for fixing reasonable rates for the electrical energy consumed by the various traders who are members of the petitioner Association comparable with the energy charges levied from the Devaswom Board. The petitioner is specifically enumerating the ground on which they are seeking relief and the grounds mentioned are furnished hereunder.
- 4.6 The respondent Board has no power to rely upon or fix tariff after the coming into force of the Electricity Act, 2003 and therefore charging members of Petitioner Association on the basis of the rates furnished in Annexure B for electricity consumed by them is illegal and void. The respondent Board shall be called upon to refund energy charges collected in excess of any amount that may be fixed by this Hon. Commission.
- 4.7 Under the Electricity Act, 2003 the Commission alone has jurisdiction to fix energy charges based on the cost involved in providing electric connections. The electricity lines for the above connections were drawn several years back and every time a trader/vendor of the petitioner Association takes possession of a Room, a connection is provided from the nearest post. As far as the Devoswom Board is concerned they are also using the same electric line and the Devoswom Board is charged only at Rs 4.50 per unit of energy consumed and in such a situation there is no rationale in fixing energy charges for the traders at more than 3 times the said rate. This is clearly unconscionable and highly extortionate.
- 4.8 The Regulatory Commission may kindly interfere in the matter of exercising the power under Electricity Act, 2003 and may issue appropriate and reasonable orders to save members of the petitioner association who are petty vendors and traders from being charged at the present unconscionable energy rates.
- 4.9 Respondent should not be allowed to rely on Annexure B Notification or Annual report of the Commission forming part of Annexure C to justify an unreasonable stand when issue relating to legality of the tariff arises for consideration.
- 4.10 The respondent Board may be called upon to reduce the tariff to a reasonable rate from that mentioned in Annex B since unconscionable energy rates has driven traders /vendors of the Petitioner Association to severe loss.

5. KSEB's response

During the hearing held on 23-10-2008 and also in the counter affidavit filed, KSEB pointed out that:

- 5.1 Sabarimala is a renowned place of pilgrimage where several million of pilgrims visit during the pilgrim season, November, December and January. This Shrine is situated in the midst of thick forest which forms part of Periyar Tiger Reserve. In order to reach the Shrine every pilgrim has to climb a distance of more than 4 KM from Triveni – Pamba. The roads leading to this place run through forest for several kilo meters. These forests are populated with wildlife, especially elephants. Therefore Board has to spend huge amount of money and deploy large number of officers and man power to construct and maintain power supply.
- 5.2 Prior to the introduction of the Electricity Act, 2003 the duties and functions of the Board were governed by provisions of the Electricity (Supply) Act, 1948, the Indian Electricity Act, 1910 and rules made thereunder. Section 59 of the Electricity (Supply) Act, 1948 stipulates that the Board shall function in such a way that it should ensure 3% rate of return on its net fixed asset. The Electricity Act, 2003 came into force with effect from 10-06-2003. As per Sec 49 and 59 of the Electricity (Supply) Act, 1948 and as per tariff policy issued by the Government of India the tariff has to be fixed in such a way that the cost of supply is realized apart from 14% return on equity. Section 46 of the Electricity Act, 2003 also empower the licensee to realize the cost of construction of line etc required for the supply of electricity to a consumer. Therefore it may please be seen that both the Electricity (Supply) Act, 1948 as well as the Electricity Act, 2003 provide for fixation of a tariff in such a way that the cost of supply is ensured over and above a permissible return on the investment. In the case of supply of electricity to the shops and contractors in Sabarimala, the Board has followed the same principle and it was perfectly legal and within the powers of the Board to fix a tariff commensurate with the investment.
- 5.3 It is well known to everybody that Sabarimala as well as Pamba - Thriveni are situated within forest. Even Devaswom Board has been permitted to construct buildings in the land leased out to them after obtaining clearance from Ministry of environment and Forests. During the Mandalapooja, Makaravilakku Festival seasons the works of Sabaimala Devaswom are tendered and awarded. Similarly the places for temporarily establishing shops are also leased out based on tender or auction. Therefore it is a matter of only common knowledge that no body can claim themselves to be contractors and shop keepers of Sabarimala because nobody can be sure that same person will get works or lease during the next season. In view of the above facts it is yet to be explained by the petitioners how they can claim to be contractors and shopkeepers who would be doing their business at Sabarimala and Pamba in the coming years.
- 5.4 In view of the fact that majority of shop keepers and contractors at Sabarmala and Pamba during the festival season are not at all permanent and they cannot be given any permanent connection. Neither do they have nor can they have any permanent address in the localities where they conduct their business at Sabarimala and Pamba Therefore connection which can be given to them can only be temporary in nature. Further the connected load of each connection given to a shop keeper or a contractor would depend upon the magnitude of the work or business which he does

during a particular season. Further none of them possess any land or building in Sabarimala or Pamba.

- 5.5 The total connection given at Sabarimala and Pamba fall into two categories namely permanent and temporary connections. Permanent connections can be given only to permanent buildings of Devaswom which may require electricity throughout the year. If a permanent connection is taken, minimum charge has to be remitted whether or not energy is consumed by the consumer. It is well known that the consumption for Devaswom establishments would mainly be during festival season and during the other nine months Devaswom Board will have to pay minimum charges. In fact Devaswom Board has requested the Board to convert many of their permanent connections to temporary connections so that they can save the minimum charges.
- 5.6 The materials that are required for construction of lines and that for giving connection can only be transported by head load from Pamba - Thriveni. The outturn of labour will be very poor in such hilly areas where persons work in adverse climate conditions. Since the area is densely populated by elephants, every year the line material will have to be changed to ensure uninterrupted power supply. The Board has even established a 66 kV sub station at Thriveni and another one at Kochu Pamba to ensure uninterrupted supply of quality power though they are mainly used only during festival seasons. It may please be appreciated that the Board spends a very huge amount for construction of lines and for providing such other facilities to ensure uninterrupted power supply. In view of the above facts it may please be found that the Board is perfectly justified in realizing reasonable charges commensurate with the expenditure they incur. Such charges need not necessarily be equal to the charges for normal supply in plane areas. It was under these circumstances the Board issued B.O.(FM) No 1530/02(Plg.Com4325/01)dt 12-11-2002 in exercise of its powers under Sec 49 and 59 of the Electricity (Supply) Act, 1948. Subsequently when Kerala State Electricity Regulatory Commission came into force the tariffs which were in vogue at that time were approved for implementation in subsequent years as well. A true copy of the approval order issued by KSERC is produced herewith (Exhibit R1A)
- 5.7 The KSE Board, a statutory body was constituted under Sec 5 of the Electricity (Supply) Act, 1948 As per Sec 18 of the said Act duties and functions of the Board have been prescribed as follows.
- (i) To arrange in coordination with the Generating Company or Generating Companies, if any, operating within the State, for the supply of electricity that may be required within the State and for transmission and distribution of the same in the most efficient and economic manner with particular reference to those areas which are not for the time being supplies or adequately supplied with electricity.
 - (ii) To supply electricity as soon as practicable to a licensee or other person requiring supply if the Board is competent under this Act so to do:

- (iii) To exercise such control in relation to generation, distribution and utilization of electricity within the State as is provided for by or under this Act:
- (iv) To collect data on demand for and use of electricity and to formulate perspective plans in coordination with the Generation Company or Generating Companies, if any, operating in the State for generation, transmission and supply of energy within the State.
- (v) To prepare and carry out schemes for transmission, distribution and generally for promoting the use of electricity within the state : and
- (vi) To operate generating stations under its control in coordination with the generating company or generating companies if any, operating in the State and with the Government or any other Board or agency having control over a power system.

5.8 Enactments which were governing generation, transmission and distribution of electricity were the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. As per provisions of these enactments, the Government and the Board had absolute powers to regulate tariff. The Electricity Act, 2003 which repealed the above Acts came into force in the State of Kerala only on 10-12-2003. Prior to 10-12-2003 the domain was governed by the Electricity (Supply) Act, 1948 and the Indian Electricity Act, 1910. Section 49 of the Electricity (Supply) Act, 1948 specifically empowers the State Electricity Boards to classify consumers and determine tariff in accordance with the geographic area, type of consumption etc. It was in exercise of these powers, the Board was supplying electricity to its consumers, regulating the tariff.

5.9 It is pertinent to note at this point that as per Sec 59 of the Electricity (Supply) Act, 1948, the SEBs has to work in a commercially viable manner and make a rate of return of 3% over its net fixed assets. But this condition was seldom achieved by SEBs. In order to rationalize tariff of electricity to meet the cost of supply and to ensure rate of return, the Electricity Regulatory Commission Act, 1998 was introduced. One of the major provisions in the new Act is that SEBs which were losing heavily on account of irrational tariff structure empower regulatory commission to direct the State Government to compensate concessions given by SEBs as per directions of State Government. Kerala State Electricity Regulatory Commission was constituted in the State under Sec 17 of the Electricity Regulatory Commission Act, 1998 on 14-11-2002 vide G.O.(MS) 34/2002/PD and Commission assumed office on 29-11-2002.

5.10 Since formation of SERC was not mandatory as per Sec 17 of the Regulatory Commission Act, 1998, none of the Sections of the Act repeals the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. The power of KSE Board to determine tariff of Electricity conferred upon it under Sec 49 and 59 of Electricity (Supply) Act, 1948 survives till the formation of SERC. The Hon High Court after a detailed discussion of Sec 17 of the Electricity Regulatory Commission Act, 1998 in OP No 663/2003 (B) made it clear that "since the Commission does not exist during the period of tariff revision, Board as well as Government were not barred from exercising their statutory power under law".

- 5.11 The impugned tariff order was issued on 12-11-2002, which was before the formation of KSERC and well before enactment of the Electricity Act, 2003. Therefore the Electricity Act, 1910 and the Electricity (Supply) Act, 1948 was applicable at that time. As per provisions of the above Acts KSE Board was absolutely empowered to issue tariff order.
- 5.12 Sub Section (3) of Section 49 of the Electricity (Supply) Act, 1948 empowers the Board to fix special tariff for consumers, depending on the geographic position of the area, nature of supply and purpose for which supply is required and relevant factors warrant the same. (Andhra Pradesh State Electricity Board Vs Gouthami Solvent Oils AIR 1991 SC 141-152).
- 5.13 The Electricity Act, 2003 came into force with effect from 10th June, 2003 . As per Sec 49, 59 of the Electricity (Supply) Act, 1948 and as per tariff policy issued by the Government of India the tariff has to be fixed in such a way that cost of supply is realized apart from 14% rate of return on equity. Sec 46 of the Electricity Act, 2003 has also empowered the Licensee to realize the cost of construction of line etc required for supply of electricity to a consumer. Therefore it is respectfully submitted that both the Electricity (Supply) Act, 1948 as well as the Electricity Act, 2003 provide for fixation of tariff in such a way that the cost of supply ensured over and above a permissible return on investment. In the case of supply of electricity to shops and contractors in Sabarimala, Board has followed the same principles and it was perfectly legal and within the powers of the Board to fix a tariff commensurate with the investment.
- 5.14 The Board further submitted break up of expenditure incurred by KSEB during the year 2007-08 . Expenses incurred by KSEB towards Transmission and Distribution in Sabarimala came around Rs 32 Lakhs and Rs 216 Lakhs respectively.

6. Findings of the Commission

- 6.1 The Board has issued B.O.(FM) No 1530/02(Plg.Com4325/01)dt 12-11-2002 in exercise of its powers under Sec 49 and 59 of the Electricity (Supply) Act, 1948. Subsequently when Kerala State Electricity Regulatory Commission came into force the tariffs which were in vogue at that time were approved for implementation in subsequent years as well. A true copy of the approval order issued by KSERC is produced herewith (Exhibit R1A) Kerala State Electricity Regulatory Commission was constituted in the State under Sec 17 of the Electricity Regulatory Commission Act, 1998 on 14-11-2002 vide G.O.(MS) 34/2002/PD and Commission assumed office on 29-11-2002. Since formation of SERC was not mandatory as per Sec 17 of the Regulatory Commission Act, 1998 none of the Sections of the Act repeals the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 the power of KSE Board to determine tariff of Electricity conferred upon it under Sec 49 and 59 of the Electricity (Supply) Act , 1948 survives till the formation of SERC. The Hon High Court after a detailed discussion of Sec 17 of the Electricity Regulatory

Commission Act, 1998 in OP No 663/2003 (B) made it clear that “ since the Commission does not exist during the period of tariff revision, Board as well as Government were not barred from exercising their statutory power under law”.

- 6.2 Commission directed the Board to submit a detailed tariff petition by 30th April, 2006 rationalising the existing historical tariff, with complete supporting data and analysis in accordance with the relevant sections / provisions of the Electricity Act 2003, National Electricity Policy, Tariff Policy and Regulations issued by the Commission, so that proceedings on Tariff rationalization can be initiated soon. And till the issue of such tariff order , the Commission approved continuation of the existing Tariff and other charges by KSEB.
- 6.3 KSEB vide letter No KSEB/TRAC/TF-05/P dated 11-12-2006 requested the Commission to allow KSEB to submit proposals for tariff revision and rationalization after consultation with the Government. The Commission in its letter (No KSERC TP-23/ARR & ERC 07-08/2006/902 dated 12-12-2006 and No KSERC/TP-23/ARR&ERC 07-08/2006/192 dated 23-03-2007) instructed KSEB to submit proposals for bridging the revenue gap. In the absence of any reply from KSEB the Commission in its meeting on 20-04-2007 decided to publish a draft tariff schedule to be made effective from 1-6-2007. In response to the Commission's draft schedule of Tariff, KSEB filed their proposals. Since KSEB's proposal contained major changes in Tariff categorization the Commission decided to treat the proposal of KSEB as tariff revision proposal. But this proposal did not contain any special tariff for Sabarimala and Pamba area.
- 6.4 The Commission considered the tariff petition and the objections filed by the stake holders and approved a detailed schedule of terms and conditions of tariff for Retail and Bulk Supply to be effective from 1-12-2007 and it contained no special tariff for Sabarimala and Pamba area. Hence this tariff order is uniformly applicable to all areas coming within the area of the distribution licensee - KSEB.
- 6.5 The petitioners are not permanent occupiers of the shops since every year the shops are allotted to the highest bidder and hence the occupiers change every year. Since the load is of a temporary nature only temporary connection can be extended to them. In the tariff order there is a tariff for Temporary Connection and the same tariff shall be applicable for all consumers for temporary connection.
- 6.6 More cost is incurred by the Board in providing connection in these areas as stated by the board as the materials that are required for construction of lines and that for giving connection can only be transported by head load from Pamba- Thriveni. The outturn of labour will also be very poor in such hilly areas when persons work in adverse climate conditions. In such case the Board can prepare a separate estimate for cost of providing connection in the hilly tract and get the approval of the Commission which shall be applicable for all consumers in the Sabarimala and other similar area if any.

6.7 Since the expenses towards transmission and distribution in the Sabarimala area has already been included in the ARR for the year and since tariff is based on ARR approved by the Commission these costs are already covered in the tariff approved by the Commission. Hence no additional charges can be collected from Sabarimala area as the tariff approved by the Commission is applicable to all consumers in the State.

8. Order of the Commission

Based on the above findings of the Commission it is ordered that:

- (1) The tariff order of the Commission published vide Kerala Gazette extra ordinary Notification No. 2148 dated 27th November 2007 supercedes notification issued vide B.O(FM) No. 1530/2002 (Plg.Com.4325/2001) Thiruvananthapuram, Dated 12-11-2002.
- (2) The tariff applicable for Metered Temporary Connection for Sabarimala Mandalam and Makaravilakku Festival for the petitioners shall be 'LT – III Temporary Connection' as per the above Gazette Notification dated 27th November 2007.
- (3) The Board may file petition before the Commission for realizing the cost of giving temporary service connection to the consumers in the above locality, if required.

The petition is disposed off accordingly.

Sd/-
M.P. Aiyappan
Member

Sd/-
C. Abdulla
Member

Sd/-
C. Balakrishnan
Chairman

By Order of the Commission

Sd/-
Secretary (in charge)