

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

PRESENT

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

Petition No. RP – 2 of 2011

5th April 2011

IN THE MATTER OF

Review in respect of Order No. KSERC/Legal Regln/2009 dated 23/11/2010 – Securing compliance of the licence conditions

ORDER

1.0 Background

1. The review petition is against the order of the Commission dated 23-11-2010 issued for securing compliance of conditions of licence applicable to Kerala State Electricity Board in terms of the Kerala State Electricity Regulatory Commission (Conditions of Licence for Existing Distribution Licensee) Regulations, 2006. The petitioner (hereinafter referred to as the “Board”) is not paying licensee fee as stipulated in the Regulations, though several notices were issued to the petitioner. The Commission, after observing the procedural formalities contemplated under section 130 of the Electricity Act, 2003 issued orders under section 129 of the Act for securing compliance of the licence condition. Though the notice stipulated under section 130 was served to the Board also, they did not file any suggestions or objections to the notice. The review petition is filed in this context. The main arguments of the Board in the review petition are based

on the directions issued by the Government under section 108 of the Electricity Act 2003.

2. According to the Board, Clause V of the direction issued by the Government as per section 108 of the Electricity Act is still in force. Though the Board has no objection to pay the licence fee and requested the Government to amend the said clause, Government has not yet amended it. The said directions have neither been stayed nor altered in operation by any court. In the judgment of the Hon. High Court of Kerala in the Writ Petition No. 13130 of 2007 filed by the Kerala HT&EHT Consumers Association, it has been observed by the court with respect to Clause V of the direction that it is up to the Regulatory Commission to take up the issue with the Government. Therefore, Clause V of the Government policy directive continues to be in force. Without amending the said clause, payment of licence fee may invite audit objection and public criticism. As per Section 108, the direction issued by the Government involving public interest shall be final. Further, the Commission has not demanded licence fee from the Board till 21.12.2009. The Commission has enhanced the fee for filing ARR&ERC and tariff petitions recently. The State Government has also been extending financial support to the State Commission in discharging its functions.

2.0 Hearing on the matter

1. The hearing on the matter was held on 09/03/2011. In order to examine the admissibility of the petition, the Commission sought clarifications from the Board on the following issues:

- a. Grounds on which the review petition is filed.
- b. Whether the review petition is maintainable when the opportunity given during the original proceeding was not used.
- c. Whether a review is maintainable on a specific order issued under section 129 of the Act?

The representative of the Board could not provide a clear reply to the queries of the Commission, but stated that the review petition was filed under the general provision. The Board could not mention which 'general provision' enables the Commission to admit the petition against an order issued under Section 129. Regarding non-response of the Board during the original proceedings, the Board replied that they were of the impression that since they had already replied to the earlier directive of the Commission for the payment of licence fee, no reply was necessary for the proceedings under Section 130 and accordingly did not respond to the notice. The Board could not give a satisfactory response on the question whether a review is maintainable for an order under section 129.

From the response of the Board, the Commission notes that their reply is not at all satisfactory. On the important question of admissibility of the petition, the Board could not provide any valid justification for admitting the petition. The reply was casual and not supported by any provisions of law. Though prima facie the petition deserves rejection, the Commission allowed the Board to advance their arguments as if the review petition is admitted.

On further proceedings, the Board stated that it is agreeable to payment of licence fee. The major hurdle is said to be the policy direction of the Government issued to the Commission under Section 108 of the Electricity Act, which prohibits the Commission from collection of licence fee from KSEB. Though the Regulation has been effective from 2006, Commission has demanded the fee only in 2009, with retrospective effect. He has also submitted that the Board has addressed the Government for notifying the Government Orders issued under Section 108 of the Act regarding the licence fee.

2. During the course of the argument, the Commission raised the following questions to the Board.

i. The policy direction of the Government is to the Commission only and not to the Board. The policy directions under section 108 of the Act 2003 are for guidance of the Commission.

On the above, the Board replied that when there is a dispute as to whether the direction issued by the Government comes under a policy or not, it is for the Government to take a decision as per sub section (2) of section 108 of the Act.

ii. Whether Board is aware of any other licensees in India who are not paying the licence fee?

The answer was that all licensees are paying licence fee as far as they are aware.

iii. Is the Board aware of the judgment of the Hon. High Court of Kerala in Writ Petition No. 13130 and 14849 of 2007 wherein it has been held that any direction issued by the Government under Section 108 of the Act which are against the provisions of the Act is ultravires?

The answer was that there is no specific decision by the court regarding the direction of the Government contained in clause V of the Government Order relating to the licence fee. The legal opinion received by the Board from the Legal Wing of the Board was in this direction. Board is also of the view that the direction of the Government is in accordance with the provisions of the Act. Till the Government amends the G.O. licence fee need not be paid by the Board. There may be audit objection if fee is paid otherwise.

iv. Whether the Board is of the view that whatever be the provisions in the Act, Regulations etc. Board will obey only the Government Order?

The answer was that there is policy directive of the Government under Section 108 of the Act. He also pointed out that Government gives grant to the Commission under Section 102 of the Act.

v. Clause V of the G.O. mentions the impact on tariff when the licence fee is paid by the Board. What will be the impact on tariff when licence fee is paid?

The answer was it would be 0.05 paise per unit or less than one paise or at the rate of Rs.1.00 per consumer per annum.

vi. If the direction of the Commission to pay licence fee was legally defective for any reason, why the Board has not challenged the direction in any court of law?

The answer was in the negative and it was given to understand that the Board did not like to approach a court of law against Commission's direction to pay the licence fee.

3.0 ANALYSIS AND DECISION OF THE COMMISSION

From the above specific questions raised by the Commission and the answers of the representative of the Board, it was seen that answers to none of the questions raised by the Commission were convincing. Violation of the conditions of a licence is a very serious issue which may even lead to the cancellation of the licence. Filing of the review petition itself is without any legal background. The KSEB could not present any valid reason for admitting the revision petition. This means that Board approaches this issue in a casual manner. Even the submission that Commission had demanded the licence fee for the first time on 21/12/2009 is not true to facts. Commission had as per letter No.1/1/KERC/XI/289 dated 6/4/2006 had directed all the licensees in the State to comply with the special condition in the Regulations regarding payment of licence fee and in response to that all licensees other than the Board complied by paying the licence fee. There was also a reply from the Board as letter No. KSEB/TRAC/Licensing Regulations/787/05/G/351 dated 5.6.2006. In any case, there is no need to have communications or notice for complying with the provisions of the Regulations. When regulations are in force, it has to be complied with unless it is amended or nullified by a competent judicial forum. The Board stated that they are agreeable to pay the licence fee, but are afraid of audit objection and public criticism. Such casual arguments on an important issue of violation of licence conditions are to be deplored heavily and cannot be accepted at all. It is strange to note the argument of the Board that compliance of statutory provisions invites audit objections and public criticism. The impact of paying licence fee on the Tariff of consumers in the State was admitted to be very negligible. The Commission is confident that the consumers of the State are willing to pay one rupee per annum or so for administering an efficient and effective regulatory system.

This has been abundantly made clear from the responses of the public mentioned in the order against which this revision is filed. The Board could not explain how the policy directions issued to the Commission have an overriding effect on the statutory provision and licence conditions. The argument of the Board that when there is a dispute as to whether the direction issued by the Government comes under a policy involving public interest or not, and it is for the Government to take a decision as per sub-section (2) of the Act is not at all relevant here since Commission has not raised this issue at any point of time. On the one side Board states that they are agreeable for payment of the fee, and on the other, hang on to flimsy grounds to evade payment of licence fee. Based on the arguments of the Board in the proceedings, the Commission is convinced that the Board is fully aware of the consequences of purposeful contravention of licence conditions leading to a situation of jeopardizing the regulatory regime in the State which is against public interest and larger interest of the electricity sector. Except for the argument that there is a Government direction under Section 108 of the Act not to levy licence fee issued in the year 2006, there are no other valid arguments on the part of the Board for not complying with the conditions of the licence.

It is established from the whole proceedings that the intention of the Board is to continue the violation of statutory provisions on the ground of directions of the Government and at the same time avoid the penal provision as per the Act. The Commission had already concluded that the direction of the Government under Section 108 of the Act is only a guiding principle and not binding on the Commission in the discharge of its functions. This stand of the Commission is based on the decisions of the APTEL and the Hon. Supreme Court of India on several occasions. Normally a review petition can be filed on the discovery of a new and important matter or evidence, mistake or error apparent on the face of the record or for any other sufficient reasons. But there is no valid ground submitted by the Board for having a review of the Order dated 13/11/2010 and even admission of the petition. In these circumstances, the Commission has no option but to reject the petition devoid of merit.

4.0 Order of the Commission

On examining the review petition and also considering the arguments of the Board, the Commission is of the view that there is no merit in the review petition. The order dated 13/11/2010 stands unaltered. Accordingly the review petition is dismissed.

Sd/-
Mathew George
Member(Fin)

Sd/-
P.Parameswaran
Member(Engg)

Sd/-
K.J.Mathew
Chairman

Approved for issue

Sd/-
Secretary