

# KERALA STATE ELECTRICITY REGULATORY COMMISSION THIRUVANANTHAPURAM

Present: Shri K.J.Mathew, Chairman  
Shri.C.Abdulla, Member  
Shri.M.P.Aiyappan, Member

August 17, 2010

In the matter of  
*Suo-motu proceedings for imposition of penalty under Section 142 of the Electricity Act, 2003 on the Kerala State Electricity Board for non filing of Truing up petition*

## ORDER

### Background

1. Filing of truing up petitions before the respective Regulatory Commissions is the responsibility of the licensees. Truing up is essential to realign the consumers' tariff based on the actual expenditure incurred by the licensees. Truing up petitions from the Kerala State Electricity Board (*hereinafter referred to as Board or KSEB*), a deemed licensee under Section 14 of the Electricity Act 2003, (*hereinafter referred to as the 'Act'*) was due for the period 2007-08 and 2008-09. The Commission vide letter dated 10-11-2009 had directed KSEB to submit truing up petitions for the years 2006-07 to 2008-09. KSEB stating the reasons that details for truing up petition were being collected from field units and the preparation of ARR&ERC for 2010-11 was going on, sought time extension till the end of January 2010 for filing the petitions. Against the request of KSEB, the Commission granted time till 31-1-2010. Again vide letter dated 3-2-2010, KSEB stated that the truing up petition for 2007-08 and 2008-09 could not be completed within the time limit for want of details from various functional units of the Board and hence requested time till 28-2-2010. The Commission leniently considered the request of the Board and granted time till 20-2-2010 for filing petition for 2007-08 and 20-3-2010 for filing the petition 2008-09. However, KSEB did not submit the petitions within the stipulated time. Hence, after about 54

days and 24 days respectively of the time limit granted, the Commission in its letter dated 16-4-2010 sought explanation for the delay in filing the petition. In the explanation given vide letter dated 7-5-2010, the Board stated that the appraisal from field units were required for preparing the petition and the same team of officers were working on various other petitions such as ARR&ERC, fuel surcharge etc., and the preparation of truing up was getting delayed. With a request for condonation of delay, the Board stated that top priority was being assigned for filing the petitions and committed that the petitions for 2007-08 and 2008-09 would be filed by 22-5-2010.

2. In the meantime, the Commission issued the Order on the Truing up for the year 2006-07 on 14-5-2010 based on the petition submitted on 22-1-2010. Citing the order, the Board in its letter dated 21-5-2010 requested time for filing truing up petition for 2007-08 and 2008-09 till the State Governments views are obtained on issues such as Board's claim on return on equity, provision for netting off of dues with the Government, subsidy receivable from Government due to the 20 paise per unit subsidy, retaining of electricity duty collected by KSEB etc. Thus, till 22-5-2010, time extension was sought by the Board for preparing truing up petition, while the request now is for an indefinite extension of time for obtaining the so called clarifications from Government. On observing that the Board was deliberately adopting delaying tactics, the Commission rejected the said request since non-filing of truing up will affect the tariff calculations of the licensee for the subsequent years. The Commission further observed that the Board is disobeying the direction issued by the Commission apart from defaulting in the statutory obligation of filing truing up petition, accordingly, decided to proceed against the Board under Section 142 of the Act. The decision was conveyed to the Board as per letter dated 01.06.2010. Even after one month of this communication, the Board did not respond or do any thing to file the truing up petitions. In these circumstances, Commission gave notice to the Special Officer/Secretary of the Board to appear in person if they wish to give reasons, if

any, for not taking action under section 142 and for not imposing the penalty under Section 142 of the Act.

### **Hearing on the matter**

3. Neither the Special Officer nor the Secretary did turn up in person for the hearing held on 12.07.2010 but Shri B.Sakthidharan Nair, Advocate appeared to represent the Secretary before the Commission. He submitted a statement of the Secretary before the Commission and also argued the case. The main contentions put forward by the Secretary of the Board through his advocate are as follows:

- a) Notice of the Commission is illegal since procedures contemplated in Section 129 and 130 of the Act are not complied with.
- b) As per notification No.GO(MS)37/2008/PD dated 25-9-2008, all functions, properties, interests, rights, obligations and liabilities of KSEB is vested with the State Government. The accounts of the Board is prepared based on Electricity Supply (Annual Accounts) Rules, 1985. Commission has not allowed certain expenses that appear in the book and ARR Statement of the Board filed before the Commission. These figures are arrived at consequent to the directions of the Government. So, clarification from the Government on these matters is necessary for filing the truing up petition.
- c) The Commission has not notified the regulation on terms and conditions of Tariff for a deemed licensee like KSEB operating as a single entity performing generation, transmission and distribution.
- d) Para IX of the policy direction issued by the Government as per GO(MS)34/06/PD dated 16.12.2006 should be followed by the Commission. The account of the Board is being audited by the C&AG based on Section 185(2)(d) of the Electricity Act, 2003 and Para IX of the above said Government Order is valid and binding. In support of this contention, he submitted a Supreme Court decision in Punjab State Electricity Board Vs IEL and others.

- e) He urged for time till the clarification from the Government is obtained for the filing truing up petition especially, in the light of the account submitted by KSEB.

## **Analysis of the Commission**

4. The failure of the Board in not submitting the truing up petitions is against the orders of Apex institutions such as the Hon'ble Supreme Court and APTEL. In Appeal No. 100 of 2007 (KPCL Vs KERC & Others), Hon. APTEL has remarked as follows:

*“Invariably, the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. Therefore, truing up is necessary. Truing up can be taken up in two stages: Once when the provisional financial results for the year are compiled and subsequently after the audited accounts are available. The impact of truing up exercises must be reflected in the tariff calculations for the following year. As an example; truing up for the year 2006-07 has to be completed during 2007-08 and the impact thereof has to be taken into account for tariff calculations for the year 2007-08 or/and 2008-09 depending upon the time when truing up is taken up. If any surplus revenue has been realized during the year 2006-07, it must be adjusted as available amount in the Annual Revenue Requirement for the year 2007-08 or/and 2008-09. It is not desirable to delay the truing up exercise for several years and then spring a surprise for the licensee and the consumers by giving effect to the truing up for the past several years.”*

Further, Hon. Supreme Court in UPPCL and Others Vs NTPC Limited in (2009) 6 SCC 235 has ruled that additional costs shall not be passed on to the new tariff since some persons who are consumers during the tariff year in question may not continue to be consumers and some new consumers might have been added to the system and there is no reason why they should bear the brunt. Hence, it is

clear that timely filing of truing up of accounts is compulsory in a regulatory regime.

5. Based on the above, the Board should have submitted the truing up petition for 2007-08 by 2008-09 and for 2008-09 by 2009-10. The Commission in its letter dated 01.06.2010 informed the Board of the necessity of filing truing up petition as has been considered by the Hon'ble Supreme Court in the decision reported in (2009) SCC 235 and the decision of APTEL in UPPCL and others Vs NTPC. The Commission also intimated the decision to take action under Section 142 of the Act. Even after considerable time, the Board neither stepped up the efforts to get the clarification from Government nor approached the Commission with a definite time frame for filing the truing up petition. In this background, the contentions of the Board are examined below:

- a) Section 129 of the Act refers to the power of the Commission to secure compliance, in the event of any contravention of any of the conditions of licence or conditions for grant of licence by a licensee or the contravention of any provision of the Act by a generating company. Section 130 of the Act prescribes the procedure to be followed for securing compliance under Section 129. These provisions are not invoked in the present proceedings. But action is taken under Section 142 of the Act against the Board for non-compliance of the direction of the Commission. Section 142 confers the necessary jurisdiction, hence the argument of the Board that the notice issued is illegal is not valid.

- b) As per the contention of the Board, vide G.O.(MS)37/2008/PD dated 25-9-2008 all functions, properties, interests, rights and obligations of KSEB are vested with the State Government. As per clause 5(1) of the transfer scheme, all rights and liabilities of the Board shall be administered by the Government in the name as 'Kerala State Electricity Board' by appointing a Managing Committee and a Special Officer for continued operations. The liabilities include all debts, duties, obligations, and other outgoings including statutory liabilities. As per Clause 4(2), rights, responsibilities, liabilities and obligations in respect of personnel and personnel related aspects are

excluded. As per Clause 5(3), the liabilities are with the transitional entity, which is bound to provide the details sought by the Commission. No provision in the Act provides that the obligations of the licensee are dispensed with if the transfer scheme is effected. Such scheme of things is not envisaged in the Act as it creates a vacuum in the functioning of the licensees. The provision under clause 4(2) itself weakens the claim of the Board that it is a Government department. These arguments do not suffice to provide an escape from the obligation of filing the truing up petition.

- c) The argument that there is no regulation notified for determination of tariff for a deemed licensee like KSEB is also not acceptable, since most of the licensees in Kerala are deemed licensees and regulations notified are applicable to all licensees unless any one is specifically excluded. The Commission has issued KSERC (Tariff) Regulations, 2003 for enabling the filing of ARR & ERC of the Board. The Board has been following this for filing ARR&ERC petition so far. Truing up petitions filed upto 2006-07 were based on this. If the ARR&ERC for a particular year is approved and is implemented, there is no justification for not filing truing up petitions in the name of new regulations to be made. Truing up petitions contain basically actual expenditure against approved expenditure and deviations, the reasons for the deviations and the final position regarding expenditure and revenue showing the deficit or surplus, which will have to be considered for subsequent years. The justifications for the deviations will have to be critically examined by the Commission. The Board has now filed a petition for issuing regulation specifying the terms and conditions for determination of tariff for the Board which will be considered on merits. In any case, the issue in question refers to a period prior which ARR&ERC orders are available and the argument of the Board does not justify the non-filing of the truing up petitions 2007-08 and 2008-09. Moreover, it has been held by the Hon'ble Supreme Court in Kerala State Electricity Board Vs S.N.Grinda Prabhu and Bros. and Others reported in (1986) 4 SCC 198, that making of regulation is not a precondition to the tariff fixation or price fixation or security charge fixation. There are also other decisions on the same line such as AIR (58),

1971, 2 SCC 16 and AIR 1983 SCC 1296. These decisions are relied on by the Hon'ble Supreme Court in the decision reported in (2010) 4 SCC 603. Thus the argument that regulations are not notified for truing up petition cannot be accepted. In any case, new regulations will have only prospective effect and the Board cannot seek to hide behind the request for some new regulations to be made.

- d) As regards the preparation of Accounts as per ESAAR 1985 and the directions issued under Section 108 of the Act, the Board is harping on its contentions on a settled position of law. There is no dispute over statutory accounting procedures being followed by KSEB as per ESAAR 1985. The Commission has not refused to go by the account so prepared under ESAAR 1985 so far. The Commission has no objection to this. However, for tariff determination, as held by Hon. Supreme Court in WBERC Vs CESC reported in 2002(8) SCC 715 the Commission is not bound by the audited accounts of the licensee in deciding which all items of expenditure should be passed on to the consumers. This stand was further endorsed by Hon. APTEL in the appeal filed by KSEB itself in appeal No.94 of 2008.
- e) It is pertinent to note the reply letter dated 21-5-2010 of KSEB which states as follows:

*“The accounts of KSEB for the year 2007-08 and 2008-09 had also been prepared on similar lines and in the absence of any regulatory guidelines to the contrary we were considering the filing of truing up petitions for 2007-08 and 2008-09 based on the annual accounts, as done in the past. KSEB now feels that filing the truing up for the year 2007-08 and 2008-09 will again meet the same treatment as what had happened for the accounts for the financial year 2006-07. (emphasis added)*

This is not a tenable argument and cannot be accepted as a reason for not filing the truing up petition for subsequent periods. If the Board is aggrieved by the earlier Order, statutory remedies are available to the Board as per the Act to challenge the Order issued by the Commission at

the appropriate forum or prefer a review petition before the Commission. The position of the Commission has been made clear in the Order itself. The Board seems to be piqued by the stand taken by the Commission in the following matters in its order dated 14-5-2010 on the truing up petition for 2006-07 as can be made out from their letter dated 21-5-2010.

- i. Board's claim on return on equity
- ii. Provision for netting off dues between Government and KSEB
- iii. Shortfall in revenue for giving 20 paise rebate
- iv. Retaining the electricity duty collected by KSEB

As stated in the letter dated 21-5-2010, KSEB wants Government's clarification on these matters before filing the truing up petition. In fact it can be seen that the so called clarifications awaited from the Government need not delay the filing of truing up petitions. The comments on these issues as under:

- I. The Commission can allow the Board to earn a return on equity. However, as per the G.O (MS) No. 25/02/PD dated 09.10.2002 there is no equity in the Books of accounts of the Board. This was pointed out by C&AG as "*the equity capital accounted is against the provisions of Electricity (Supply) Act 1948 and in contravention to the G.O dated 19.10.2002*". But, the Commission has made it clear that the actual return on equity if any will be allowed as and when a case is presented by the Board and as an adhoc measure even allowed Rs.50 Crore. Hence the issue is not closed yet and it is for the Board to show its equity or any basis for calculating return on equity.
- II. Regarding the proposal of netting off dues and writing off of receivable from Government, the Commission stated the position considering the records placed before the Commission that no Government order was issued agreeing to the proposal. The

C&AG in his Comments on the Accounts of the Board for 2006-07, reported that *“The fact that the netting of dues to Government of Kerala require the approval of the Full Board and that of the Council of Ministers of Government of Kerala had neither been obtained nor disclosed adequately in the notes. Therefore the adjustment/netting off the Government dues/dues to Government to extent of 2483.05 Crore lacked proper authority”*. Further writing off is resorted to when debtors are insolvent. There is no merit in writing off the dues from a sovereign Government, so as to weaken the financial position of the Board. It was also stated that this issue can also be reconsidered by the Commission when necessary documents are placed before it.

- III. Regarding withdrawl of demand of 20 paise arising from the rebate on account of non-receipt of subsidy from Government is a more serious case of violation of the provisions of the Act which directly affects the finances of the Board. Board has allowed the rebate of 20 paise to domestic and commercial consumers till November 2007. Instead of taking steps to realise the amount from the Government, the Board has withdrawn the demand from the books, thereby weakening the position of the Board to claim subsidy from the Government. Further, by removing the demand from the books, the Board has reduced the tariff fixed by the Commission by 20 paise/unit, which amounts to violation of the Act since the Board has no authority to change the tariff decided by the Commission. If any amount is receivable from the Government same has to be realised from the Government rather than waiving it. The Commission can be moved to review the order on receipt of the amount from Government or its adjustment from the electricity duty payable to the Government.

- IV. Regarding electricity duty payable to the Government but retained by the Board, the Commission has stated the actual position. It was only an observation and no decision is taken which can aggrieve the Board. The Supreme Court decision submitted by the Board relates to whether interest on borrowings on non-receipt of subsidies can be taken as a part of ARR. This aspect has nothing to do with the issue now in question.
- f) Hence the argument that the clarifications that are necessary from the Government on issues raised by the Board do not appear to have much relevance since the Commission has addressed these issues. Further, the clarifications the Board now seeks from the Government are not new issues as far as the Board is concerned. It is pertinent to note that the Board has not sought a specific time for getting clarification from Government so as to file the truing up petition. If the Board has any interest in getting the clarification, they could have obtained it by this time since the Board themselves claim that they are just like a Government Department now. Even if such clarification is required it has to be provided in a time bound manner. The discussion above on the issues projected by the Board is done only to show the position of the Commission on these issues and their lack of relevance as regards filing of truing up petitions.
6. The stand taken by the Board in its letter dated 21-5-2010 that “*KSEB now feels that filing the truing up for the year 2007-08 and 2008-09 will again meet the same treatment as what had happened for the accounts for the financial year 2006-07*” overlooking the obligations under the Act shows the willful non-compliance attitude of the Board despite statutory remedies available. From the contention of the Board now presented before the Commission it appears that the Board considers itself immune from the provisions of the Electricity Act on the pretext that it is a Government Department as per GO(Ms)No.37/2008/PD dated 25.10.2008. They fail to understand that even if it is Government Department, under Clause 5 (1) and clause 5(5) of the said Government Order, it is a licensee under the provisions of the Electricity Act and all liabilities and obligations of a licensee have to be fulfilled.

7. The Commission found that there is substantial revenue surplus accumulated by the Board from 2006-07 onwards. In the Order dated 14-5-2010, the Commission after the truing up for 2006-07 arrived at a revenue surplus of Rs.1035.85 Crore. This was after allowing Rs. 50 Crore each for provisional returns and incentive for generating revenue by sales outside. On a tentative preliminary scrutiny of the available provisional accounts of 2007-08, the Commission observes that about Rs.1200 crore surplus is available in 2007-08. It is to be suspected that the intention of the Board is to indefinitely conceal and defer such surplus from being noticed by the consumers who may clamour against revision of tariff. It is to be remembered that the Board projected a deficit of Rs.2219 Crore in the ARR&ERC petition for 2010-11 which would have caused an increase of about 150 paise per unit. If the truing up was done in time from 2006-07 onwards, the Board would have found it difficult to claim such deficit which would necessitate drastic tariff revision.
8. In summary, based on the examination of the contentions, it is clear that there is no material reason advanced by the Board for not submitting the truing up petitions which are long overdue. The Board has no case that they have not finalized the petition or they are still collecting data/materials. By not-filing and delaying the truing up petitions, the Board is thwarting the efforts of the Commission to update the accounts of the Board as per the approved levels, thereby denying the opportunity to the Commission as well as the consumers to assess the exact revenue surplus/gap position in the previous years and this cannot be viewed lightly. It is quite unfortunate if the Commission has to struggle to obtain the truing up petition due in 2008 and 2009 even in 2010-11. It is evident that the Board is deliberately delaying and avoiding the filing of the truing up petition in the pretext of clarification from Government only to prevent the truing up exercise, the result of which they may like to withhold it from the public eye. Such an act of withholding information is as good as defrauding the consumers; it intentionally creates opacity, offends the principle of transparency and shows defiance of law and legal authorities, making the regulatory process a mockery.

9. As can be seen from the the above observations, the non-compliance of the directions of the Commission by the Board by not filing the truing up petitions for 2007-08 and 2008-09 is established and the Commission concludes that the Board has contravened the directions of the Commission willfully warranting action under Section 142 of the Act.

#### Orders of the Commission

10. On the basis of the finding noted above, the Commission decides to treat this case as a very serious instance of non-compliance and to impose an exemplary penalty for non-compliance of the directions of the Commission. The Commission, therefore imposes a penalty of Rs.1,00,000 (Rs.One lakh only) on the Board for not complying with the directions to file truing up petitions for the year 2007-08 and 2008-09. The Board is once again directed to file the above truing up petitions before 6<sup>th</sup> of September 2010. For any delay thereafter the Board shall pay an additional penalty at the rate of Rs. 5000/- (Rs. Five thousand only) for each day of delay. The penalty of Rs.One lakh should be deposited with the Secretary of the Commission within one month from the date of this Order. The penalty amount cannot be passed on to the consumers as a pass through item of expenditure.

This order is appealable under Sec 111 of the Act to the Appellate Tribunal for Electricity, New Delhi within a period of 45 days.

Sd/-  
M.P.Aiyappan  
Member

Sd/-  
C. Abdulla,  
Member

Sd/-  
K.J. Mathew  
Chairman

Approved for issue  
  
Secretary