

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM 695 003

PRESENT: Shri M.K.G. Pillai, Chairman
Shri C. Balakrishnan, Member

July 11, 2003

Petition No. DP4	Dy.No. 00110 dt.21-6- 2003	Binani Zinc, Binanipuram Secretary, Kerala State Electricity Board Special Officer, Revenue Kerala State Electricity Board	Petitioner Respondent
Petition No. DP9 (Extn. To DP4)	Dy. No. 00119 dt.1-7- 2003	Binani Zinc, Binanipuram Secretary, Kerala State Electricity Board Special Officer, Revenue Kerala State Electricity Board	Petitioner Respondent
Petition No. DP7	Dy. No. 00116 dt. 27-6- 2003	TCM Ltd., Kalamassery Secretary, Kerala State Electricity Board Special Officer, Revenue, Kerala State Electricity Board	Petitioner Respondent
Petition No. DP8	Dy. No. 00117 dt. 28-6- 2003	Kerala High Tension/Extra High Tension Industrial Electricity Consumers' sociation, Kalamassery Secretary, Kerala State Electricity Board Special Officer, Revenue Kerala State Electricity Board.	Petitioner Respondent

ORDER

1. Background:

1.1 The above petitions arise out of the Kerala State Electricity Board's notification B.O.(FM) No. 1462/02/TRAC/TO-1/2002 dated 24th October 2002, revising the tariff for various categories of consumers served by the Board with effect from 1.10.2002. The petitioners have stated in their petition that the revision of tariff by the Board was causing huge financial burden on the industry. It is stated that the latest revision in October 2002, as a matter of fact, was only a few weeks prior to the constitution of Kerala State Electricity Regulatory Commission. It is further contented that with effect from the date of enforcement of the Electricity Regulatory Commissions Act, 1998 (Central Act No. 14) which came into effect on 25.4.1998, the KSEB became bereft of power and jurisdiction to revise or re-determine the electricity tariff. It is also contented that if the State Government failed to constitute the Regulatory Commission, it would mean that the Electricity Board would be deprived of its right to revise the tariff applicable to electricity supply wholesale, bulk, grid or retail.

1.2 The petitioners have, therefore, requested the Commission to determine the tariff applicable to EHT/HT consumers as per the Electricity Regulatory Commissions Act, 1998 (Central Act No. 14 of 1998). The Petitioners have earlier approached the Hon'ble High Court of Kerala and the Court has issued the following directions in the matter.

"The petitioners are permitted to represent to the Commission. They may do so within 30 days from today (28.5.2003). In case the petitioners submit a representation, the Commission shall consider and examine it in accordance with law. The respondents in the present proceedings shall also be entitled to put forth their view point. It will be appreciated, if the Commission decides the matter as expeditiously as possible. Since we have expressed no opinion on the merits of the controversy, it shall be open to the parties to raise all such pleas as may be available under the law. After the decision by the Commission, the aggrieved party shall be entitled to seek its remedy, if any, before an appropriate forum."

In the light of the direction of the Hon'ble Court, the Commission issued notice to the Kerala State Electricity Board on 3rd July, 2003, directing it to file parawise replies to the points raised in the petition within 21 days. The Commission has also sought the views of the Government of Kerala in the matter. On receipt of the above details, the Commission will hold proceedings to hear the matter and dispose of the main petitions DP4, DP7 and DP8, as expeditiously as possible.

1.3 M/s Binani Zinc who is the petitioner in Petition No. DP4 have also filed an extension petition No. DP9 with the Commission enclosing the copy of the Judgement of the Hon'ble High Court of Kerala in W.P.C. 19678 of 2003P, subsequently filed by them. In this petition they have reiterated the points stated in

the original petition No. DP4. The petitioners have also enclosed a copy of the Judgement of Hon'ble Supreme Court of India in the case West Bengal Electricity Regulatory Commission Vs. CESC Ltd (2002) 8 SCC 715, inviting reference to paras 55, 56,57 and 58 of the judgement. The Petitioners have requested the Commission to consider the entire content of the original petition No. DP4 including the correctness of the tariff notified by the KSEB with effect from 1.10.2002, in the light of the directions of the Division Bench of the High Court.

1.4 In the Judgement on W.P.C. 19678 of 2003P, the Hon'ble Court has directed that the original petition should be disposed of by the Commission in accordance with law within three months and the Commission should pass appropriate orders on the steps initiated by the KSEB, within three weeks from the date of the Judgement (24.6.2003). In accordance with this directive, the Commission has sought the response of the Kerala State Electricity Board, specifically on the issues of disconnection of supply, by 10th July 2003.

1.5 The KSEB furnished the reply vide Affidavit dated 9th July 2003, which was received by the Commission on 11th July 2003. In this affidavit, the KSEB has stated that even in spite of repeated notices to the petitioners for payment of the dues based on the revised tariff, they continued to remit the charges at the pre-revised rates resulting in arrears to the extent of Rs 3,52,040,91/-. The Board is therefore left with no option but to initiate steps for disconnection of supply. The revision ordered by the KSEB with effect from 1/10/2002 was before the constitution of Kerala State Electricity Regulatory Commission. It was contented that the Board had the authority to revise the tariff as the Commission was non-existent at the time of notification of Tariff Revision. As per Section 59 of the Electricity (Supply) Act 1948, the Board is under statutory obligation to carry out its operations and adjust its tariffs in such a way as to ensure that the total revenues in any year of account shall, after meeting all expenses chargeable to revenue, generate a surplus of 3%. The Board contented that there was no real surplus and the Board had been incurring losses every year. The Board was therefore compelled to revise the tariff so as to ensure progressive minimizing of losses.

2. Hearing of the matter:

2.1 In the proceedings held by the Commission today, the parties to the petition No. DP9 were heard. The representatives of the petitioners reiterated the argument furnished in the petition. They argued that the KSEB had no right to revise the tariff as the Regulatory Commission Act came into effect on 25/4/1998. The power to revise the tariff after that date vested with the Electricity Regulatory Commission. The representatives of the petitioners also stated that the latest revision of tariff by the State Electricity Board with effect from 1/10/2002 was announced only a few weeks prior to the constitution of the Kerala State Electricity Regulatory Commission and the Government of Kerala had purposely delayed the constitution of the Commission, keeping this in view. The petitioners contented that the action of KSEB in revising the tariff was illegal. They also contented that they would be

incurring huge loss due to the tariff revision which would make the Company unviable. They, therefore, pleaded that the High Court Order for staying the steps taken for disconnection of power supply should be extended beyond the period granted by the Court.

2.2 The representatives of the workers' union of Benani Zinc supported the petition by stating that the Company would be forced to close down on account of the tariff revision by the KSEB and about 1000 workers might become jobless. They produced a copy each of the Government of Kerala order G.O.(Rt) No. 163/03/PD dated 24.4.2003 and G.O(Ms) No. 4/2003/ID dated 6.1.2003 and stated that the first G.O. offered a tariff concession of Rs. 3crores to the Indian Aluminum Co. and the second G.O. exempted the Travancore Cochin Chemicals Ltd. from the tariff revision effective from 1.10.2002. They alleged that since these companies were EHT consumers located in the same area as that of Binani Zinc, this amounted to discrimination against Binani Zinc.

2.3 The representatives of the Respondent, namely, the Kerala State Electricity Board argued that the Commission had no authority to consider the petition for extending the stay granted by the High Court of Kerala. They also argued that the tariff revision order was notified by the Board before the constitution of Kerala State Electricity Regulatory Commission and therefore the tariff revision order was legal and binding on the petitioners. They stated that the huge amount of arrears by the petitioners had adversely affected the financial position of the Board. They pleaded that the petition should be dismissed and directions issued to the petitioner to pay the arrears amount of Rs 3,52,040,91/- due to the Board forthwith.

3. Commission's Finding:

3.1 The Commission noted that the Standing Counsel of the KSEB had not complied with the order of the High Court in W.P.C. 19678 of 2003 P, to inform the Commission of the Court's direction in the matter. The KSEB also did not bring the direction of the Court to the notice of the Commission, till date.

3.2 The Commission held the view that it had the powers to consider the stay petition and the High Court order corroborated this. The Commission therefore examined in detail the request of the petitioners to extend the stay on the steps initiated by the KSEB for disconnection of power supply beyond the period granted by the High Court. The main point to be considered in this connection is the legality of the tariff revision order notified by the KSEB in October 2002. The Kerala State Electricity Regulatory Commission was constituted by the Government of Kerala on 14/11/2002 and the Commission assumed office on 29/11/2002. The constitution of the Commission and its timing were the prerogative of the Government of Kerala, as Section 17 of the Electricity Regulatory Commissions Act, 1998 was not mandatory on any State Government. It is well known that the Kerala State Electricity Board has been processing the revision of tariff for quite some time before the revision was finally notified in October, 2002. So, the argument that the tariff was revised just

prior to the constitution of the Commission does not hold good. Further it was a general revision applicable to all category of consumers and not aimed at the petitioners alone. As the State Government was processing the matter regarding the constitution of the Commission since the year 2001, there is no strength also in the argument that the constitution of the Commission was purposely delayed by the Government. In the Judgement the Hon'ble Supreme Court of India, cited by the petitioners, the apex court has opined that the State Commission is the sole authority in determining the tariff. However, this was relating to a case in a State where the Commission was already in existence. Since the Commission was not in existence in Kerala when the Board revised the tariff, the above Judgement of the Apex Court can not be taken as a guide in the instant case.

3.3 Prior to the constitution of the Commission, KSEB was empowered to determine the tariff in accordance with the provisions of section 49 and 59 of the Electricity (Supply) Act, 1948. As per Subsection (5) of Section 49 of the Act, the consumers are liable to pay the tariff framed or modified from time to time as per Sub-section (1) of Section 49 and as applicable to them. The petitioners have not questioned the authority of the KSEB under Section 49 and 59 of the Electricity(Supply)Act,1948.

4. Commission's Decision:

4.1 As the above provisions of the Electricity (Supply) Act, 1948 were valid on the day of notification of tariff revision by the Board, the action of the Board in revising the tariff is legally sustainable. The Commission, therefore, rules that **there is no ground calling upon the Commission to interfere with the processes of the KSEB consequent to the tariff revision notified by the Board vide B.O. (FM) No. 1462/02/TRAC/TO-1/2002 dated 24th October 2002.**

4.2 The contention of the representatives of the Binani Zinc Workers' union alleging discrimination on account of the Government of Kerala Orders cited by them will be considered by the Commission, after seeking necessary clarification from the Government of Kerala, at the time of processing the main petitions DP4, DP7 and DP8. The prayer of the petitioner in petition No. DP9 for considering the entire contentions raised in petition No. DP4 will also be considered at the time of processing of that petition. The petition No DP9 is disposed off accordingly.

4.3 Notwithstanding the above, the KSEB may comply with the direction of the Hon'ble High Court of Kerala in W.P.C. 19678 of 2003P.

C. BALAKRISHNAN
Member

M.K.G. PILLAI
Chairman