

KERALA STATE ELECTRICITY REGULATORY COMMISSION

THIRUVANANTHAPURAM

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

Date : July 20, 2007

Petition DP No.34	Dy.No. 00305 Dated 22-03-07	M/s Reliance Communications, 1 st Floor, Vazhvelil buildings Kesavadasapuram, Thiruvananthapuram Vs Kerala State Electricity Board	Appellant Respondent
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ORDER

1. Background

- 1.1. The Appeal was filed by M/s Reliance Communications on the Orders of the Electricity Ombudsman dated 1-3-2007. The facts of the case are as follows:
- 1.2. The appellant is a leading telecom service provider having licence for providing various telecommunication services such as Basic, UASL, NLD and ILD business in the State of Kerala. The appellant is charged by the respondent KSEB under LT-VII (A) Commercial tariff for the LT connections and HT-IV Commercial tariff for the HT connections as per the existing tariff orders dated 24-10-2002 and 16-1-2006. According to the appellant, as per the present tariff, he has to be charged under industrial tariff. The appellant requested the Chairman, KSEB for a change of tariff from LT-VII(A) Commercial to LT-IV Industrial for the LT connections and from HT-IV Commercial to HT-I Industrial for the HT connections. The respondent declined the request stating the reason that Industrial tariff is applicable only to IT units which manufacture hardware or develop new software.

1.3. Appellant filed a petition before the Consumer Grievance Redressal Forum Kottarakkara on 18-9-2006 (OP No.110/2006) to reconsider the request for change of tariff on similar grounds. The Forum in its letter dated 28-12-2006 communicated the Order stating that the complaint does not merit reconsideration as the same is inline with the tariff structure approved by Kerala State Electricity Regulatory Commission and the Commission alone is empowered to make changes in existing tariff. Aggrieved by the decision of the CGRF, Kottarakkara, the petitioner filed an appeal on 24-02-2007 before the Electricity Ombudsman. The Electricity Ombudsman rejected the appeal vide Order dated 1-3-2007 with the remarks that the question as to whether telecommunication service is to be categorized under industrial category has to be decided by the Regulatory Commission. The appellant preferred this appeal before the Commission challenging the conclusions and findings of the Electricity Ombudsman as they are based on erroneous impressions and data. The appeal was admitted by the Commission on 23-03-2007 and notice was issued to the respondent KSEB.

2. Hearing on the Appeal

2.1 The appeal was heard on 29-6-2007. Mr. Krishnamoorthy, the authorized representative of the Appellant stated in the hearing that the appellant's business is focused towards IT and telecom which is not included under Commercial tariff and hence wrongly classified under Commercial. He prayed before the Commission to set aside the decision of the Electricity Ombudsman and direct the respondent to charge the appellant under HT-I and LT-IV tariff for HT and LT connections respectively.

3. Response of KSEB

3.1 The respondent KSEB forwarded their remarks on the petition vide their letter dated 5-6-2007. In the hearing, they objected to the grounds stated by the Appellant and argued for rejection of the appeal.

4. Commission's Findings

4.1 The Commission has considered the arguments put forwarded by both parties. It is pertinent here to note that, the respondent KSEB has not raised the issue of maintainability of the appeal before the Commission considering the recent

developments. After hearing both parties in detail and examining the material before the Commission, the main issue involved in this appeal is whether the present appeal is maintainable before the Commission or not ?

- 4.2 The appellant had filed this appeal before the Commission on 22-03-07 and the Commission admitted the same on 23-03-2007, by virtue of the powers under the Clause 29 of KSERC (Consumer Grievance Redressal Forum and Electricity Ombudsman) Regulations, 2005 notified on 6-10-2005. Clause 29 of the Regulation is reproduced below:

“29. Appeal - The Commission may look into the grievances of the consumer if such grievances are not settled within the specified time frame or such grievances remain even after the consumer has exhausted remedies provided by the Act viz., Forum and the Ombudsman. While doing so the State Commission is required to give similar treatment to similar cases as the Section 86(3) of the Act mandates that the State Commission shall ensure transparency while exercising its powers and discharging its functions.”

- 4.3 Similar provisions were included in the Regulations specified by other State Regulatory Commissions also. Hence, when the appeal was filed, the said Regulation was in force and the Commission by virtue of it admitted the appeal. The issue whether appeal on the Orders of Ombudsman should lie with the State Commission was debated in the country and the Hon. Appellate Tribunal for Electricity, while deciding on number of similar cases have categorically ordered that Electricity Act, 2003 does not provide such powers to the State Regulatory Commissions. In the Order dated 30-3-2007 on Appeal 220 of 2006, M/s Polyplex Corporation Limited Vs Uttaranchal Power Corporation and Ors., the Hon. Appellate Tribunal of Electricity has stated that:

“No provision has been brought to our notice under which a consumer can file a petition before the Regulatory Commission against the award of the Ombudsman. The same also applies to the orders of the Consumers’ Grievance Redressal Forum and the Appellate Committee. Therefore we hold that a Regulatory Commission has no jurisdiction to entertain a cause arising from the Orders of Ombudsman, Consumers Grievance Redressal Forum and the bodies like Appellate Committee.”

- 4.4 Considering the Orders/observations made by the Hon. Appellate Tribunal for Electricity and to incorporate the provisions made in the Electricity Rules, 2005, the Commission amended the said Regulations. Accordingly KSERC (Consumer Grievance Redressal Forum and Electricity Ombudsman) (First Amendment) Regulations, 2007 were notified on May 3, 2007. In the amendment the Clause 29 was omitted. The question now is whether at the time of disposal of the petition, the Commission has the power to decide on the Appeal. The respondent failed to raise the issue pertaining to the maintainability of the petition to be heard by the Commission which ought to have been raised, as the preliminary issue before the Commission. At the time of disposal of the appeal, the Commission by virtue of the amendments made in the Regulation, does not possess the authority to decide on the appeal as the present petition is preferred by the Appellant as an appeal on the Orders of the Electricity Ombudsman.
- 4.5 However a pertinent question remains. The appellant has filed the appeal when the Regulation was in force. Now the question is whether, the Commission can decide on the Petition at a later date using the retrospective provision of the Regulation which was amended later. The Commission is of the unanimous view that authority to decide on the petition depends on the law, rules and regulations in force at the time of the disposal of the petition. The Commission cannot draw powers with retrospective effect. The Hon Appellate Tribunal for Electricity in the recent order on Global Energy Vs CERC and Ors. (Appeal No.6 of 2007 dated 7-6-2007) have dealt with the similar issue. The Hon. Appellate Tribunal of Electricity has noted as follows:

“It is no doubt true that the appellant filed the application for grant of licence before the amendment of the Regulations but the appellant cannot be said to have acquired a vested right in having the application decided under the un-amended provision of the Regulations. It cannot be stated that on the date of the filing of the application, the appellant was having legitimate expectation that he would be able to secure the licence on the basis of the requirements of the statute as existing on that date. Even if we entertained such an expectation it seems to us that it did not create any vested right on the appellant to claim consideration of its application on the basis of the provision of the regulations existing on the date of the filing of the application. A claim based on alleged expectation or vested right cannot be setup against an Act or Regulation framed thereunder. The application was

required to be dealt with in accordance with the Regulation in force on the date of the decision of the application”.

- 4.6 The Hon. Appellate Tribunal of Electricity has also cited some of the case laws of the Hon. Supreme Court such as Howrah Municipal Corporation & Ors. Vs Ganges Rope Co. Ltd. and Ors. (2004) 1 SCC 663, Union of India & Ors Vs. Indian Charge Chrome & Anr. (1999) 7 SCC 314 and the State of Tamil Nadu Vs M/s Hind Stone & Ors (1981) 2 SCC 205 to conclude that in the absence of vested right in anyone, the application must be considered and decided in accordance with the provisions applicable on the date of decision.

5. Commission’s Decision

- 5.1 In the present case, the appellant did not argue that they possess a vested right to consider the petition on the basis of the regulation which were in force on the date of application. Hence, the issue that the Commission’s jurisdiction to entertain the appeal, the Commission hold that the present appeal cannot be decided by the Commission under the provisions of the existing law and hence rejected.

The Appeal is disposed of accordingly

Sd/-
M.P.Aiyappan
Member(F)

Sd/-
C.Balakrishnan
Chairman

Authenticated copy for issue

Secretary (in charge)