

KERALA STATE ELECTRICITY REGULATORY COMMISSION

THIRUVANANTHAPURAM

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

November 10, 2011

Petition RP No.11/2011

In the matter of
Review Petition on the Order on Truing up of Accounts of KSEB for 2008-09

Kerala State Electricity Board

- **Petitioner**

Background

1. Kerala State Electricity Board (hereinafter referred to as the Board or KSEB) filed a petition for review of the order on the truing up of accounts of the Board for the year 2008-09. The Order on truing up of accounts of KSEB for the year 2008-09 was issued by the Commission on 10-6-2011. On being aggrieved by certain decisions in the Order, the petitioner KSEB filed a review petition on 4-08-2011. The petitioner has raised several issues for reconsideration such as Disallowance on the cost of power purchase, disallowance of rebate for prompt payment for traders, disallowance of interest on electricity duty, disallowance of interest on security deposit, disallowance of depreciation, disallowance of Section 3(1) Duty, disallowance of the provision for bad and doubtful expenses, disallowance of prior period credits and disallowance of return on equity for the year 2008-09. The petition was admitted and numbered as RPNo.11/2011. The petition was uploaded in the website of the Commission and a press release was issued to inform the public. The hearing on the petition was held on 4-10-2011.

Hearing on the petition

2. In the hearing held on 4-10-2011, KSEB presented the review petition. The petitioner stated that in the impugned order, the Commission did not consider the factors such as power cut/load shedding and the change in consumption pattern

of HT-EHT consumers, while deciding on the loss reduction. Further deciding on the average power purchase cost, the cost of RGCCP and BSES scheduled for sale outside was included. Similarly, the cost of energy scheduled for meeting the excess consumption was also considered. The cost of internal generation was not included while arriving at the average power purchase cost. If these factors are considered the average cost would have been Rs.1.98/unit instead of Rs.3.28/unit arrived at by the Commission. Another issue taken up by the Board is the rebate allowed to the traders for prompt payment of electricity charges to the tune of Rs.8.76 crore, which was disallowed by the Commission on the presumption that the amount has not been paid. In order to support the claim, the Board has presented details of invoices raised by KSEB and the amount paid by the traders, which is net of the discount allowed. The Board requested for allowing the rebate amount actually incurred.

3. Next issue is the disallowance of interest of Rs.50.25 crore booked for the electricity duty retained by the Board. According to the Board the netting of issues is not yet concluded and the electricity duty is retained with the Board. Upto 2008-09, the Board has retained Rs.991.90 crore as duty. The amount is utilized for capital investment and repayment of capital liabilities. The Board accounted an interest of Rs.50.25 crore at the rate of 9% though the Chief Electrical Inspector has been demanding interest at a rate of 18%. The Commission ordered that since retaining the duty is a reciprocal arrangement for non receipt of subsidy, interest cannot be allowed. The Board has stated that charging interest on the dues with the Government is not possible and the duty retained by the Board cannot be treated as a source of income without any cost.
4. The Board has taken up the issue of disallowance of interest on security deposit which was not paid/incurred. The Board has stated that since the accrual system of accounting is followed the amount provided has to be allowed. The Board also claimed depreciation as per the accounts as against CERC norms followed by the Commission. According to the Board, many Commissions in the Country are still not using CERC norms hence the same needs to be allowed. According to the Board section 3(1) duty shall also be allowed as part of the truing up process.
5. Next item is the disallowance of the provision created for bad and doubtful debts. According to the Board, the provision of Rs.317.39 crore was created as per the remarks of C&AG. The Board has given additional arguments supporting the provisions made. The Board also stated that miscellaneous losses and write off to the tune of Rs.2.38 crore was disallowed which needs to be allowed. Another argument is on disallowance of prior period credit amounts to Rs.33.51 crore on account of withdrawl of duty based on judgments of the Supreme Court and the

High Court. The Board has also taken up the issue of return on equity, which was provisionally allowed by the Commission. Finally, the Board has taken up the issue of adjustment of revenue gap against the revenue surplus of 2007-08.

6. The HT-EHT Association submitted a request for allowing time till 14-10-2011 for filing objections on the petition. The Commission allowed the request and permitted time till 14-10-2011 for filing the objections with a copy to the petitioner. The Association since submitted their written objections on 14-10-2011. In the written objections, the Association argued that the petition has to be rejected since there are no grounds made in the petition consistent with the review jurisdiction.
7. In the case of average cost of purchase of power, the Board could not find any apparent error and the argument that decrease in energy consumption of the HT& EHT category cannot be a reason for increase in T&D losses. There was an overall reduction in the sales by 6.38% than the approved level. This would actually have resulted in reduction in T&D loss. Further load shedding during the peak hours for LT and HT&EHT consumers imposed in 2008-09 would also have reduced the T&D loss. Hence the Association stated that there is no merit in the argument of the Board. Regarding the average power purchase cost, as per KSERC (Terms and Conditions for Determination of Tariff for Distribution and Retail Sale of Electricity under MYT Framework) Regulations 2006 merit order has to be followed while approving the cost of power purchase. Accordingly, the Commission has deducted the marginal costly thermal purchase which is about Rs.10 per unit, for the purpose of disallowance of power purchase cost. The Commission has considered purchase from all sources and the stand taken by the Commission is correct. According to the Association, the judgment of ATE in Appeal No.100/2007 and 9/2008 is not relevant in the present case. There can be many methods for taking average rate for disallowance of excess T&D loss. The internal generation and revenue from sale outside cannot be considered for arriving at the average rate.
8. Regarding the rebate for prompt payment, the Commission has already mentioned in the order that if the payment is actually made it is eligible to be passed on to the tariff. According to the Association, a review petition is for correcting the apparent error, and there is no apparent error in the matter. In this situation, KSEB should raise the claim in subsequent ARR&ERC or truing up petition.
9. The disallowance of interest on electricity is also justifiable. The argument of the Board that additional borrowing would have been resorted to if duty is not used, is

not a valid argument. The duty is not paid because, there are dues from the Government. The additional borrowing is required because of non-payment by the Government, for which consumers cannot be burdened.

10. The interest on security deposit should be as per actual. The Board could not point out any error apparent regarding the disallowance of depreciation. The same has to be as per the order of ATE in Appeal No. 5 of 2009. The issue of section 3(1) duty is a settled matter as per appeal No. 94/2008. The Board did not have a consistent policy on writing off of bad debts. The matter was analysed by the Commission before issuing the order. There is no change required in this regard. According to the Association, it will be a wrong practice to pass on expenses incurred by the Board towards compensation for injuries, death etc to the consumers. There has to be incentive to reduce /eliminate the accidents. Regarding electricity duty, the amount is collected from the consumer and should have been paid to the Government and if excess amount is collected the same has to be adjusted against the Government and not on the consumer's account. The Commission has analysed the matter and decided that it will not qualify for passing on in the ARR. Hence the request is to be rejected.
11. In the case of disallowance of return on equity also there is no error apparent. The decision of the Commission is not final. According to the Association, point raised by the Board on adjustment of revenue gap with previous surplus is not related to the decision on the truing up order. Hence it does not merit consideration. Based on the above arguments, the Association pointed out that KSEB could not show any 'apparent error' in the review petition and they have only raised new arguments other than those raised in the truing up petition which are not allowable. Hence, the petition should be rejected summarily.

Analysis and decision of the Commission

12. The Commission has considered the arguments of the Board and the written objections of the Association. Power of review available with the Commission is as per the provisions of Section 94(1)(f) and clause 67(1) of KSERC (Conduct of Business) Regulations, 2003. The said clause in the regulation provides that:

67. Powers of Review, Revision etc.,-(1) The Commission may either on its own motion or on an application made by any interested or affected party, within 90 days of the making or issuing of any decision , direction, order, notice, or other document or the taking of any action in pursuance of these regulations, review revoke, revise, modify, amend, alter, or otherwise

change such decision, direction, order, notice, or other document issued or action taken by the Commission or nay of its officers.

13. As per section 94(1)(f), review of decisions, directions and orders are as per the Code of Civil Procedure 1908. The application and the scope of the review of an Order is circumscribed under Order 47, Rule 1, of Code of Civil Procedure. The review power, under the aforesaid provision is reproduced below: -

“Application for review of judgment – (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed; or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the Court which passed the decree or made the order”.

14. The review petition has to be dealt with as per the powers conferred upon the Commission for the review. The deliberation, on the merits of the issues discussed in the original order are not contemplated in a review proceedings. So also it is not for deliberating new contentions on the issues which were taken up in the original proceedings. The review jurisdiction is limited power to be exercised when new facts which could not be reasonably produced at the time of the order or to consider any apparent error on the face of record. The Commission is also bound by the decisions of Hon. Appellate Tribunal for Electricity in Appeal No.94 of 2008 (KSEB Vs KSERC & Ors), Appeal NO. 5 of 2009 (KSEB Vs KSERC) and Appeal No.177 of 2009 (KSEB Vs KSERC) on some of the same issues raised in the review petition. Based on this, the issues in the present petition have been analysed.

15. First issue in the review petition is on the disallowance of power purchase cost to the tune of Rs.26.87 crore. In this regard Board has argued that T&D loss

reduction approved could not be achieved due to changes in consumption pattern and the average power purchase cost considered by the Commission does not include the internal generation cost. The Commission has taken the cost of energy scheduled for sale outside for arriving at the average power purchase cost. In this regard, the Commission is of the view that the Board could not provide any grounds for necessitating a review. The matter is already settled in terms of the decisions of Hon. APTEL in Appeal No.94 of 2008 and Appeal No.177 of 2009. In the Order on Appeal No.94, Hon. APTEL has ordered as follows:

*22) The power purchase cost is a reality. So are the actual sales. The appellant has actually not earned any revenue by sale of the units which it should have been able to sell with T&D target at 26.5%. **In our view it is more reasonable to disallow the cost incurred for purchasing the additional units of energy on account of failure to meet the target for T&D loss** reduction than to penalize the distribution licensee by adding assumed revenue from the sale of the additional units of power purchased.*

*23.....The Commission should disallow **the additional cost for purchase of additional power** rather than adding on the revenue side the amount which could be earned by achieving the T&D loss target.*

16. In Appeal No.177 of 2009 on the truing up order for 2005-06 for KSEB, though the Board has raised the issue of considering the average cost of power including internal generation, the same was not considered by the APTEL. The Commission has not changed the methodology of arriving at the average power purchase cost in any of the truing up orders issued so far. A consistent methodology has been adopted for estimating the average power purchase cost. In this connection, it is to be noted that the present arguments were not brought before the Commission in the original proceedings. Entirely new arguments cannot be raised in a review petition. The situation in 2005-06 was similar when there was considerable export of power. The issue of average power purchase cost was settled in the appeal No.177/2009, before the Hon, APTEL. Hence, the matter of disallowance of excess T&D loss and its method of assessment are a concluded issue and arguments made by the Board in this regard are not sustainable.

17. The Commission is in the process of developing regulations under section 61. The arguments on consideration of excess T&D loss and assigning the value can be raised during that proceedings and suitable decisions will be arrived at.

18. The next issue raised in the review petition is on the rebate allowed for prompt payment by traders. The Commission in the impugned order, has already discussed it clearly. Para 41 of the said order states as follows:

“42.....The Board as in the previous years claimed that the rebate allowed at the rate of 2% to traders for prompt payment is as per CERC norms. The Commission in the truing up order for 2007-08 has examined the claim and found that there is no such provision in the CERC regulations which permits rebate for prompt payment to traders for export of energy. The Commission is of the view that the claim can be allowed at actuals only if it is a condition made for prompt payment in a commercial contract. The Commission notes that the payment is not yet made. Accordingly, the same is not included in the approved truing up. It will be allowed as and when it is paid.”

19. The Commission in the said order has mentioned that if the amount is actually paid, the same can be allowed. The issue hence will not come within the purview of a review petition. As part of the review petition, the Board has provided the details of invoices on this account to support the claim that rebate has actually been paid as the traders have remitted amount less the rebate allowed. Based on the materials provided, the Board is eligible for the rebate as provided in the original order.

20. Next issue is the interest on electricity duty booked by the Board. Now the Board has stated that a total of Rs.991.90 crore is payable as electricity duty for which interest at an average rate of 9% has been provided. It is noted that the statement of the Board as per the details provided is not correct since the provision of Rs.50.25 Crore does not match with the statement of the Board. The Commission has examined this matter in detail in para 44 of the impugned order. Hence no review is required in this matter.

21. In the case of disallowance of interest on security deposit, the matter is already settled as per the Order in Appeal 177 of 2009. The relevant portion of the order is given below:

“The only item disallowed in the truing up is interest on security deposits. Even according to the Appellant through its reply dated 31.10.2008 to the State Commission the actual disbursement of interest as security deposit for the year 2005-06 was only Rs. 3.26 crores as against the approved amount of Rs. 35.40 crores. Therefore, the State Commission has rightly allowed the amount actually disbursed. As such these findings on this claim is perfectly justified.

22. As stated above, the Board is eligible for the amount actually incurred in this regard and there is no scope for review on this issue. Regarding the argument on depreciation the Board could not produce any convincing arguments for a review. The issue of depreciation as per CERC guidelines has been raised on many occasions. It is pertinent to note that the Board has been following the CERC norms for depreciation in all the ARR&ERC proceedings from 2010-11. In any case, the matter is settled in terms of the Order in Appeal No.5 of 2009. In the said order Hon. APTEL has ruled as follows:

21. The depreciation is an important element in the tariff fixation. Under section 61 of the Electricity Act, 2003, the Appropriate Commission shall specify the terms and conditions for the determination of tariff and in doing so, shall be guided by the principles and methodology specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees and the Tariff Policy. Therefore, the State Commission is well within its right to follow the Central Commission guidelines.

23. Next issue is on the section 3(1) duty. This matter is also settled in terms of the judgments of Appellate Tribunal in Appeal No.94 of 2008 and Appeal No.177 of 2009. The relevant portions of the Order on Appeal No. 94 is reproduced below:

28.....The Commission can make no concession in respect of duty payable under section 3 which is imposed statutorily on the appellant. Nor can the Commission allow the duty payable as pass through in tariff. In this regard we are constrained to agree with the view of the Commission.

29) Mr. Ramachandran submits that in a cost plus method of tariff fixation, we cannot burden the distribution licensee with any expenditure lawfully incurred. According to him electricity duty payable under section 3 of the KED Act should be part of the general expenses as has been done in the past. Mr. Sibal submits that if it is so done, the burden of the duty will eventually fall on the consumer and would not be permissible as

per the proviso quoted above. We entirely agree with Mr. Sibal's contentions. The provision of the legislation cannot be frustrated by such manipulation. Even if in some year/years the duty in question has been included in the A&G expenses, the same cannot be adopted as a practice. There can be no estoppel against statute. Hence the Commission's view in this regard needs to be upheld.

The relevant portion of Order on Appeal No.177 of 2009 is given below:

The Appellant claimed the A&G Expenses of Rs. 113.84 crores, in the truing up petition, as against the approved ARR figure of Rs. 90.70 crores. Out of Rs. 113.84 crores Rs. 63.26 crores was on account of the electricity duty to be paid to the Government under Section 3(1) of Kerala Electricity Duty Act which cannot be passed on to the consumers as held by this Tribunal in Appeal No. 94 of 2008.

24. Next issue is on the disallowance of the provision for bad debts of Rs.317.39 crore. The Commission has examined this matter in detail in para 64 of the impugned order. The Commission has allowed Rs.51.86 crore as bad debts and miscellaneous losses. The Commission has also commented that there is no uniform policy followed by the Board in this regard and the present practice will be reviewed in next year. In this case, the Board could not furnish any material for necessitating a review of the decision of the Commission.
25. Next issue is the disallowance of prior period credits amounting to Rs.33.51 crore for the year 2008-09. According to the Board it is a withdrawal of electricity duty charged earlier on account of the Orders of Hon. Supreme Court and High Court. This matter has also been examined by the Commission in the impugned order under para 63. As pointed out by the objectors, withdrawal of the duty has to be on Government's duty account and not on the income statement of KSEB. Hence, on this account also the argument of the Board is not sustainable.
26. Regarding the return on equity, the matter is deferred since it is under the examination of the Commission as a separate issue. Hence the matter is still open and return allowed is only on a provisional basis. On this count also no review is required.
27. As regards the Board's contentions about the adjustment of approved revenue gap of Rs.429.62 crore in 2008-09 against the revenue surplus of Rs.1338.93 crore for the year 2007-08 the Commission reiterates its position that the

adjustment of the revenue gap through the years shall not be final.. The method of final adjustment has not been specified in the said order mainly for the reason that some of the issues are still open and the exact revenue gap/surplus is not yet final.

Orders of the Commission

28. In the light of the above analysis of all the points raised by the Board as well as the objector, the HT-EHT Association, the Commission is of the view that there are no sufficient grounds placed by the petitioner for a review of the Order dated 10-6-2011 on the truing up of accounts of the Kerala State Electricity Board for 2008-09, under Section 94(1) (f) Electricity Act 2003. Accordingly, the petition stands dismissed.

Sd/-

**P.Parameswaran
Member**

Sd/-

**Mathew George
Member**

Sd/-

**K.J.Mathew
Chairman**

Approved for Issue

Secretary