

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

PRESENT: Sri.T.M. Manoharan, Chairman
Sri. K.Vikraman Nair, Member
Sri. S. Venugopal, Member

**In the matter of non- remittance of licence fee by Kerala State Electricity Board
Limited to the Commission.**

Order No. 540/Accs/2011/KSERC dated 07.06.2016

Background

1. As per the Kerala State Electricity Regulatory Commission (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006 and its amendment dated 16.12.2009, all licensees shall pay the licence fee to the Commission at the rate of 0.03% (subject to revision) of the revenue from sale of power for the previous financial year. Accordingly, all the distribution licensees including KSEB Ltd. were requested to remit the licence fee to the Commission for the period from 2006-07. All the licensees except KSEB Ltd. has remitted licence fee for the period from 2006-07 to 2016-17. KSEB had not remitted the licence fee on the contention that Government have exempted them from payment of licence fee vide G.O (MS) 34/2006/PD dated 16.12.2006. The Commission has directed KSEB to remit the licence fee from the financial year 2006-07 onwards vide Order No. KSERC/legal/Fee Regulation/2009 dated 13.11.2010. KSEB had filed a review petition against the order vide their letter dated 14.01.2011. The Commission vide order dated 5th April 2011 in petition No. RP2 of 2011 had dismissed the petition and ordered that the order dated 13.11.2010 stands unaltered. Although the KSEB has remitted licence fee from 2011-12 to 2015-16, arrears for the period from 2006-07 to 2010-11 amounting to Rs. 6.43 crores have not been paid. The Commission as per the letter No. 1795/CL/2010/KSERC dated 05.11.2013, had requested KSEBLtd. to furnish a comprehensive plan to clear the arrears of licence fee Rs. 6.43 crores, due for the period from 2006-07 to 2010-11. But KSEB has not cleared the arrears. The Commission has, in the light of the regulations and statutory provisions in force, brought to the notice of Government the anomalies of G.O (MS) 34/06/PD dated 16.12.2006. Government have as per G.O (MS) 25/2015/PD dated 15.07.2015, withdrawn

the relevant condition of exempting KSEB from paying the licence fee. While withdrawing that provision as per G.O dated 15.07.2015, the Government have exempted KSEB Ltd. from remittance of the arrears of licence fee amounting to Rs. 6.43 crore for the period from 2006-07 to 2010-11 and to adjust the licence fee of Rs. 7.95 crore remitted by KSEB to KSERC for the period from 2011-12 to 2014-15 towards the licence fee to be remitted during the ensuing years. The Commission has, vide its letter No. 540/Accs./2011/KSERC/1244 dated 14.10.2015, submitted before Government the anomalies of the said Government order dated 15.07.2015 and moved for rectification of the anomalies. The Commission has, vide letter No. 2329/F&T/2015 dated 05.04.2016, directed KSEB Ltd. to remit the licence fee. KSEB Ltd. vide its letter KSEB/TRAC/Tariff/Petition/2016-17 dated 08.04.2016 has submitted that licence fee cannot be remitted in view of G.O (MS) 34/2006/PD dated 16.12.2006 and G.O (MS) 25/2015/PD dated 15.07.2015. The issue has been examined by the Commission in detail, in the light of the relevant regulations and statutory provisions.

Analysis and decision of the Commission.

2. Section 86 (1) (g) of the Electricity Act, 2003, stipulates that the State Electricity Regulatory Commission may levy fees for the purpose of the Act. Section 103 of the Electricity Act, 2003, provides for the constitution of State Electricity Regulatory Commission Fund by the State Government. As per clause (b) of sub-section (1) of Section 103, the fees received by the State Commission under the Act is one of the three main sources of this fund.
3. In exercise of the powers conferred under Section 16 read with Section 181 (2) (d), the Commission has issued the KSERC (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006. Regulation 3 of the said regulations specifies that the general and special conditions of licence applicable to the existing distribution licensees shall be as specified in Form – 1 appended to the said regulations. As per condition 34 under Part V - Special Conditions in the said Form – 1, the existing distribution licensee shall pay every year a licensee fee at the rate of 0.03% of the revenue from sale of power for the previous financial year.
4. The Government had, vide G.O. (MS) No. 34/2006/PD dated 16.12.2006, issued directions to the effect that, since the remittance of the licence fee by KSEB might result in tariff hike KSEB may be exempted from payment of licence fee. However the Commission has not taken any action on the said directions and the Commission was of the view that KSEB is liable to pay the licence fee and hence the anomalies in the said G.O were brought to the notice of the Government by the Commission. The Government has, after due consideration of the proposal submitted by the Commission, issued G.O

(MS) No. 25/2015/PD dated 15.07.2015 by which the direction to exempt KSEB from the payment of licence fee has been withdrawn. However the Government as per the GO dated 15.07.2015 has issued the following three directions,-

- (i) Clause (v) of the GO dated 16.12.2006 exempting KSEB from remittance of the licence fee is withdrawn with effect from the date of order, i.e., 15.07.2015.
- (ii) KSEB is exempted from remittance of the arrears of licence fee amounting to Rs.6.43 crore for the period from 2006-07 to 2010-11.
- (iii) The amount of Rs.7.95 crore remitted by KSEB to KSERC towards the licence fee for the period from 2011-2012 to 2014-2015 will be adjusted towards the licence fee to be remitted during the ensuing years.

5. In this regard the Commission had, vide its letter No. 540/Accs/2011/KSERC/1244 dated 14.10.2015, submitted before the Government the anomalies in the said Government Order and the same should be rectified in view of the following facts and circumstances explained therein, a summary of which is given below,-

- (1) By the order GO (MS) No. 25/15/PD dated 15.07.2015, the Government had withdrawn clause (v) of G.O.(MS) No.34/2006/PD dated 16.12.2006. As per clause(2) of the said government order dated 15.07.2015, KSEB Ltd has been exempted from payment of the arrears of licence fee amounting to Rs.6.43 crore due from it to the Commission for the period from 2006-07 to 2010-11. As per clause (3) of the said order it has also been ordered that the licence fee of Rs.7.95 crore remitted by KSEB to the Commission during the period from 2011-12 to 2014-15 shall be adjusted towards the licence fee to be remitted by KSEB Ltd in the ensuing years. In nutshell, the Government has, as per the said order dated 15.07.2015, exempted the erstwhile Kerala State Electricity Board and its successor in interest namely, KSEB Ltd from the payment of licence fee for 9 years from 2006-07 to 2014-15 and thereafter till Rs.7.95 crore is adjusted. The Commission is thereby deprived of even its future income, especially when the Commission has already informed the Government that it does not require further budgetary support from Government for meeting its revenue expenditure, since government has constituted KSERC Fund under Section 103 of the Act, of which the major income is the licence fee from the transmission and distribution licensees in the State.
- (2) The said directions issued in the GO dated 15.07.2015 are not in tune with the statutory provisions in the Electricity Act, 2003, and the regulations made thereunder. The statutory provisions relevant to the issue under consideration are summarized hereunder.

As per Section 185 of the Electricity Act, 2003, the enactments namely, the Electricity Act, 1910; the Electricity Supply Act, 1948 and the Electricity Regulatory Commissions Act, 1998 have been repealed. The erstwhile Kerala State Electricity Board, which was constituted under Section 5 of the Electricity Supply Act, 1948, has been continuing under the provisions of the Electricity Act, 2003, as the State Transmission Utility (STU) and distribution licensee owning generation assets. As per the First Transfer Scheme notified as per G.O (MS) 37/2008/PD dated 25.09.2008 and published as SRO No.990/2008 in the Kerala Government Gazette Extra Ordinary, the assets, liabilities, rights and interests of the erstwhile KSEB were transferred to and vested in Government. The assets and liabilities of KSEB which were vested in Government as such, were managed by a management committee constituted by Government for this purpose, till the assets and liabilities were re-vested in KSEB Ltd. As per the Kerala Electricity Second Transfer Scheme (Re-vesting) 2013, notified vide GO (P) No. 46/2013/PD dated 30.10.2013 and published as SRO No.871/2013 in the Kerala Gazette Extra Ordinary No. 3103 dated 31.10.2013, the said assets, liabilities, rights and interests of the erstwhile KSEB have been re-vested in the Government company namely KSEB Ltd. The KSEB Ltd is the STU and the distribution licensee at present. Therefore the erstwhile KSEB, the management committee of Government and KSEB Ltd are bound by the statutory provisions of the Electricity Act, 2003, the Rules issued there under by the Government and the Regulations issued there under by the Commission. Section 86 of the Electricity Act, 2003, stipulates the functions of the State Electricity Regulatory Commission which include determination of tariff for electricity, regulation of electricity purchase and procurement by the distribution licensees, facilitating intra-state transmission and wheeling of electricity, issuance of licence for transmission, distribution and trading, promotion of cogeneration and renewable energy, adjudication upon the disputes between the licensees and generating companies, issuance of State Grid Code, and such other functions as specified therein. Section 50 of the Act empowers the Commission to issue the Electricity Supply Code and Section 57 of the Act empowers the Commission to issue regulations on the Standards of Performance of the licensees.

- (3) Section 181 of the Act authorizes the Commission to issue regulations on various matters stated therein. Clause (d) of sub-section (2) of Section 181 of the Act authorizes the Commission to specify by regulations the conditions of licence under Section 16 of the Act. Section 16 of the Act is quoted hereunder,-

***“16. Conditions of licence.-** The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:*

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.”

- (4) The erstwhile KSEB and the present KSEB Ltd are the State Transmission Utility and the distribution licensee in accordance with the proviso to Section 14 of the Electricity Act, 2003. The Commission had issued the KSERC (Terms and Conditions for the State Transmission Utility) Regulations, 2005 and the KSERC (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006, which specify the regulatory framework under which the State Transmission Utility and the existing distribution licensees including KSEB and KSEB Ltd shall function.
- (5) As per regulation 3 of the KSERC (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006, the general and special conditions of licence applicable to the existing distribution licensees shall be as specified in form –I. Condition 14 in the form-I, which deals with payment of licence fee is quoted hereunder,-

“14. Payment of licence fees.- (1) *During the tenure of Licence, the distribution licensee shall pay to the Commission the licence fees, mentioned in the special conditions in Part V by 1st April of the financial year.*

(2) *Where the distribution licensee fails to pay to the Commission any of the fees due under sub-clause (1) by the due dates,-*

(a) *without prejudice to other obligations, the distribution licensee shall be liable to pay interest on the outstanding amount at simple interest at twice the ruling bank rate payable for the period beginning on the day after 14 days from the date on which the amount became due, and ending on the day on which the payment is made to the Commission; and*

(b) *in the event of continued default by the distribution licensee, the Commission shall initiate action for revocation of licence.*

(3) *The distribution licensee shall be entitled to take into account any fee paid by it under this licence excluding however the interest for delayed payment as an expense in the determination of aggregate revenues to be charged to the tariffs”*

- (6) Condition 34 in the Special Conditions in Part V of Form-I of the KSERC (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006 as stated in clause (1) of condition 14 is quoted hereunder,-

“34. Licence Fee.- The Licensee shall pay every year Licence fee to the Commission at the rate of 0.03% (subject to revision) of the revenue from sale of power stated in the certified financial statement of the previous year.”

Thus, both KSEB and KSEB Ltd have the statutory duty and obligation to remit the licence fee at the rate of 0.03% of their revenue from sale of power

6. The direction No. (v) in the GO dated 16.12.2006 has to be examined in the light of the above statutory provisions. As per Section 12 of the Electricity Act, 2003, no person shall transmit or distribute electricity unless he is authorized to do so by a licence issued by the Commission under Section 14 of the Act. KSEB Ltd is the State Transmission Utility under Section 39 of the Act. KSEB Ltd is also a distribution licensee as per Section 14 read with Section 131 of the Act. It has been stipulated in the proviso to sub-section (1) of Section 39 that the State Transmission Utility shall not engage in trading of electricity. As per the second proviso to Section 14 of the Act State Transmission Utility is a deemed transmission licensee. As per the scheme of law it can easily be found that transmission and distribution business shall be carried out independently by State Transmission Utility and the distribution licensee, even if they are under the same corporate office of the Government Company namely KSEB Ltd. Clause (g) of sub-section (1) of Section 86 of the Act specifically empowers the Commission to levy fees for the purposes of the Act. As per the provisions in clause (g) in sub-section (1) of Section 86 of the Electricity Act, 2003, the State Regulatory Commission can fix the licence fee payable by the transmission and distribution licensees. Accordingly the Commission has issued regulations by which all distribution licensees shall pay every year a licence fee to the Commission at the rate of 0.03% of the revenue from sale of power as stated in the certified financial statement of the previous year. In the case of delay in remittance of licence fee, the licensee has to pay interest at double the ruling bank rate and in the case of continued default the Commission can initiate action for revocation of the licence. It is in this context, the KSEB refrained from remitting the licence fee for the period from 2006-07 to 2010-11. Thus the arrear licence fee has grown to the tune of Rs.6.43 crore. The Commission has been issuing directions to KSEB Ltd to remit the licence fee in fulfilment of their statutory obligation.
7. KSERC is an independent statutory body. For carrying out its functions efficiently, and impartially, the regulatory independence and financial independence of the Commission are inevitable prerequisites which have to be ensured. It is with a view to ensuring regulatory independence, the provisions relating to selection and appointment of Members and Chairperson, fixity of tenure, procedure for removal etc. of the Members and Chairperson of the Commission have been specifically stipulated in the Act itself. The powers given to Commission to levy fees from the licensees and

from the applicants / petitioners under clause (g) of sub-section (1) of Section 86 of the Act and the provision for establishment of the State Electricity Regulatory Commission Fund under Section 103 of the Act are with a view to conferring financial independence on the State Electricity Regulatory Commission. Section 103 of the Act is quoted hereunder,-

“103. Establishment of fund by State Government.- (1) *There shall be constituted a Fund to be called the State Electricity Regulatory Commission fund and there shall be credited thereto-*

- (a) *any grants and loans made to the State Commission by the State Government under Section 102;*
- (b) *all fees received by the State Commission under this Act;*
- (c) *all sums received by the State Commission from such other sources as may be decided upon by the State Government.*

(2) *The Fund shall be applied for meeting –*

- (a) *the salary, allowances and other remuneration of Chairperson, Members, Secretary, officers and other employees of the State Commission;*
- (b) *the expenses of the State Commission in discharge of its function under Section 86; and*
- (c) *the expenses on objects and for purposes authorised by this Act.*

(3) *The State Government may, in consultation with the Comptroller and Auditor-General of India, prescribe the manner of applying the Fund for meeting the expenses specified in clause(b) or clause (c) of sub-section (2).”*

8. As per clause (b) under sub-section (1) of Section 103, all fees received by the Commission shall be credited to the said fund. As per sub-section (3) of Section 103, the State Government has to prescribe rules for the management of the fund, in consultation with the Comptroller and Auditor General of India. Accordingly the Government has, as per GO (P) No.20/2013/PD dated 25.04.2013 published as SRO 382/2013 in Kerala Gazette Extra Ordinary No.1307 dated 09.05.2013, issued the Kerala State Electricity Regulatory Commission Fund Rules, 2013 and constituted the Kerala State Electricity Regulatory Commission Fund. Realization of fee and constitution of the KSERC Fund are absolutely necessary for the regulatory independence and financial independence of the Commission as envisaged in the scheme of law in the Electricity Act, 2003. KSERC has also informed the Government that it will not henceforth require continued budgetary support for meeting its day to day revenue expenditure. Government has, thus

recognized the need for realizing fee and constitution of KSERC Fund for maintaining the regulatory and financial independence of the Commission.

9. In view of the legal provisions explained above, it can be found that the clause (v) in GO(MS) No.34/2006/PD dated 16.12.2006 and the direction contained in GO (MS) No.25/15/PD dated 15.07.2015 are contrary to various provisions of the Electricity Act, 2003, the KSERC Fund Rules issued by the Government and of the KSERC (Terms and Conditions for the State Transmission Utility) Regulations, 2005 as well as the KSERC (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006, issued by the Commission. Therefore the impugned clause (v) in GO(MS) No.34/2006/PD dated 16.12.2006 and the directions in GO (MS) No.25/15/PD dated 15.07.2015 are contrary to the statutory provisions and hence they are *ab-initio* void and liable to be withdrawn.
10. The legal significance and the applicability of the directions issued to the CERC by the Central Government under Section 107 of the Act and the directions issued to the SERC by the State Government under Section 108 have been examined by the Hon'ble APTEL, various Hon'ble High Courts and the Hon'ble Supreme Court. It has been held that the directions issued by the Central and State Governments under Section 107 and Section 108 respectively of the Act are not mandatory in nature and they are only in the nature of guidance to the respective Commissions. Section 107 and Section 108 of the Act are quoted hereunder,-

“107. Directions by Central Government.- (1) In the discharge of its functions, the Central Commission shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.

“108. Directions by State Government .- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final”.

11. Regarding the nature of directions issued by Central and State Governments under Section 107 and Section 108 of the Electricity Act, 2003, the Forum Of Regulators (the co-ordination forum constituted under Section 166 of the Act) has obtained legal opinion dated 17.08.2009 from Shri. Goolam E.

Vahanvathi, the then Attorney General of India. The relevant portion of his opinion is quoted hereunder,-

- (1) *“Sections 107 and 108 provide for the discharge of functions by the Commissions. The Central and State Commissions shall, in matters of policy involving public interest, be guided by such directions given to them in writing by the Central or State Government respectively.*
- (2) *In the discharge of their functions, the Commissions are set up as independent bodies carrying out statutory functions. They decide both quasi judicial and adjudicatory matters. It is well settled that in the discharge of such functions they cannot be directed to decide matters in a particular manner. (See Orient Paper Mills v. Union of India, AIR 1969 SC 48)*
- (3) *Importantly, the word used, in Sections 107 and 108 is 'guided' and not 'bound'. To guide only means to 'show or indicate the way to'. It does not have the force of an order or command, which must be obeyed.*
- (4) *The word 'guide' can only be used to explain, amplify or supplement the functioning of the Commission in accordance with the relevant provisions of the Act. It cannot be said to require mandatory compliance in a manner that deprives the Commission of the power to make its own decision as, opposed, to what it may be guided to make. The distinction between a direction and guidance is well settled in Laker Airways Ltd. v. Department of Trade, [1977] 2 All E.R. 182, Lord Denning held as under:*

"Directions versus guidance "

The word 'directions' in s 4 is in stark contrast with the word 'guidance' in s.3. It is used again in ss 24(2), (6)(b) and 28(2). It denotes an order or command which must be obeyed, even though it may be contrary to the general objectives and provisions of the Act. But the word 'guidance' in s 3 does not denote an order or command. It cannot be used so as to reverse or contradict the general objectives or provisions of the Act. It can only be used so as to explain, amplify or supplement them. So long as the 'guidance' given by the Secretary of State, keeps within the due bounds of guidance, the authority is under a duty to follow his guidance. Even so, the authority is allowed some degree of flexibility. It is to perform its function 'in such a manner as it considers is in accordance with the guidance'. So, whilst it is obliged to follow the guidance, the manner of doing so is for the authority itself. But, if the Secretary of State goes beyond the bounds of 'guidance', he exceeds his powers, and the authority is under no obligation to obey him."

Therefore, while the Commissions ought to take into account the directions given by the Central or State Government, as the case may be, the manner of doing so is for the Commissions to decide.

- (5) *In any case, the legal position is settled by judgments of the Supreme Court.*

(A) In Real Food Products Ltd. v. A.P. State Electricity Board and Others, (1995) 3 SCC 295, the Supreme Court dealt with the question of whether the Electricity Board was bound to follow the direction of the State Government, where, according to the statute, the Board was to be guided by the direction of the State Government. The Court held as follows:

"8. The only surviving question is with regard to the nature and effect of the direction given by the State Government under Section 78A of the Act. The question has to be examined in the context of the facts of the present case which is confined to the charging of a flat rate per H.P. for agricultural pump sets. The nature of the function of the board in fixing the tariffs and the, manner of its exercise has been considered at length in the earlier decisions of this Court and it does not require any further elaboration in the present case. Section- 78A uses the expression "the Board shall be guided by such directions on questions of policy as may be given to it by the State Government." It does appear that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy, to which it relates. In the context of the function of the Board of fixing the tariffs in accordance with Section 49 read with Section 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government. Where the direction of the State Government, in the present case, was to fix a concessional tariff for agricultural pump sets at a flat rate per H.P it does relate to a question of policy, which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, if its conclusion be different, may not be obliged to be bound by. But where the Board considers even the rate suggested by the State Government and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would not be vitiated merely because it has accepted the opinion of the State Government even about the specific rate. In such a case the Board accepts the suggested rate because that appears to be appropriate on its own view. If the view expressed by the State Government in

its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself."

(B) In Chhittoor Zilla Vyavasayadarula Sangham v. A.P. SEB, (2001) 1 SCC 396, the question before the Court was whether the direction of the State Government on the question of policy was binding on the Electricity Board. After discussing the above case, the Court held that:

"25. Thus it is clear that the Board would not be bound to follow every policy direction. According to the Board, if tariff was charged at the rate of Rs. 50/- per HP per annum, as per the direction in question, loss to the Board would have been to the extent of Rs. 1,553 crores for the year 1996-97. This would have gone contrary to the obligation cost on the Board under Section 59. Section 59 mandates the Board to leave such surplus not less than 3% of the revenue, after meeting all its expenses referred to therein. This Board has not to supply electricity at such rate to be in deficit, leaving no hope for its extensions for the benefit of persons living in an uncovered area. It is for this and other reason statute mandates Board to maintain this surplus in every year. If it has to perform this statutory obligation, how can it do so, if it follows any such direction which takes it away from it. It is true government can to cater to the popular demand in order to earn its legitimate favour, give any such policy direction, but it should have to be within permissible limit."

(6) The appropriate Commission's are required to take a myriad of factors into account before coming to a conclusion. On certain aspects of policy the directions may be binding. However, the discretion of the Commissions is not taken away. The directions that are issued by the Central or State governments are one of many such factors that are taken into account by the respective Commissions. What weight is to be accorded to each factor is for the Commissions to decide, in the exercise of their statutory functions and in public interest. "

12. Therefore it can easily be found that the directions issued by the Government under Section 108 of the Electricity Act, 2003, are only for the guidance of the Commission and such directions shall not contravene any of the provisions of the Electricity Act, 2003. Further such directions shall be in the matters of policy involving public interest and in tune with the objectives of the Act and they shall be issued for the implementation of the provisions of the Act. The directions issued by the State Government under Section 108 of the Act are not mandatory in nature. It has been held that,-

"The Commission are set up as independent bodies carrying out statutory functions. They decide both quasi-judicial and adjudicatory matters and they cannot be directed to decide matters in a particular manner. The word 'guide' used in Sections 107 and 108 does not have

the force of an order or command, which must be obeyed. It is used to explain, amplify or supplement the functioning of the Commission with the relevant provisions of the Act. It cannot be said to require mandatory compliance in a manner that deprives the Commission of the power to make its own decision as opposed to what it may be guided to make. The directions issued by the Central or State Governments are to be taken account by the respective Commission. What weight is to be accorded to each factor is for the Commission to decide, in the exercise of the statutory functions and in public interest”.

Only when the Commission acts according to such directions by issuing necessary amendments to the existing regulations or by issuing necessary orders, the same can be implemented. In the present case no such consequential amendments or orders have been issued by the Commission. Thus, in fact, the directive of the Government in the case of levy of licence fee has not come into effect. Hence the KSEB and KSEB Ltd are liable to remit the licence fee in terms of the KSERC (Terms and Conditions for the State Transmission Utility) Regulations, 2005 and of the KSERC (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006.

13. Right from the beginning the Commission has been taking a consistent stand that the above said directions in clause (v) of the GO dated 16.12.2006 has no legal validity and the Commission is not bound to implement the same. The Hon'ble High Court, in its common judgment in WP (C) Nos. 13130/2007 and 14849/2007 has specifically held that the State Government cannot issue any directive to the Commission contrary to the statutory provisions and that any such directive would be *ultra vires* of the Act. The Attorney General of India has also opined that any direction issued by the Government under Section 108 of the Act does not require mandatory compliance in a manner that deprives the Commission of its powers to make its own decisions. In the light of the above opinion of the Attorney General of India and the decision of the Hon'ble High Court of Kerala, the Commission is of the view that a review of the impugned government orders dated 16.12.2006 and 15.07.2015 is necessary. The Commission has already submitted a comprehensive proposal to Government for re-examination of various directives contained in the GO dated 16.12.2006, as per this office letter No. 2147/CL/14/KSERC/716 dated 01.06.2015, which is under the consideration of the Government.

14. In this regard it should also be noted that there are several policy directives issued by the Central Government based on various Expert Committee Reports to the effect that financial independence is a pre-requisite for regulatory independence of the State Electricity Regulatory Commissions. Attention of Government is also invited to Government file No. 5411/A1/PD relating to Report of 14th Finance Commission. The 14th Finance Commission in its

recommendation No.86 reiterates the importance of financial independence of State Electricity Regulatory Commissions.

15. The policy directives issued by the Government as per G.O (MS) No.34/2006/PD dated 16.12.2006 and the directions issued in GO (MS) No.25/15/PD dated 15.07.2015 have to be examined and evaluated in the light of the above statutory provisions and the judgments of the Hon'ble APTEL and the Hon'ble High Courts.
16. The major source of income to the KSERC Fund as per the statutory provisions is the licence fee to be remitted by KSEB / KSEB Ltd and the other licensees. Exempting KSEB or KSEB Ltd the major licensee of the State alone from paying the statutory licence fee would be discriminatory and against the spirit of the Act. In this context it may be noted that KSEB Ltd is paying the licence fee from the financial year 2011-2012 onwards. The Commission has all along been requesting the Government to direct KSEB to remit the arrears of licence fee for the period from 2006-07 to 2010-11. The earlier request of the KSEB to the Commission for exemption from the payment of the above said arrears of licence fee has also been rejected by the Commission and KSEB was repeatedly directed to remit the arrears of licence fee. Since KSEB failed to remit the licence fee, the Commission, after observing the provisions of Section 130 of the Act, issued orders under Section 129 of the Act for the purpose of securing the compliance of the directions for remittance of arrears of licence fee.
17. The Government of Kerala issued the impugned policy directive to the Commission vide clause (v) of G.O (MS) No.34/2006/PD dated 16.12.2006 under Section 108 of the Electricity Act, 2003, on the ground that the levy of licence fee from KSEB would increase its revenue expenditure which in turn will increase the tariff. It was on the strength of the said directive, KSEB refrained from remitting the licence fee for the period 2006-2007 to 2010-11. The aggregate revenue requirement (ARR) and the expected revenue from charges (ERC) of KSEB / KSEB Ltd as approved by the Commission and the licence fee (LF) payable as per the regulations are compiled in the table below.

Financial year	ARR (Rs. in crore)	ERC (Rs. in crore)	LF (Rs. in crore)
2006-07	3997.51	3680.43	1.01
2007-08	4545.02	4114.91	1.20
2008-09	5734.03	4979.34	1.41
2009-10	6113.22	5013.94	1.45
2010-11	7503.98	5284.38	1.36
2011-12	7815.77	5607.10	1.51
2012-13	9638.12	6397.87	1.67
2013-14	11237.11	8478.44	2.29
2014-15	12057.62	9126.41	2.49

} paid

From the above data it can be seen that the impact of remittance of the licence fee on tariff can only be negligibly small and therefore the ground for issuance of the above impugned direction by the Government is not supported by any factual data.

18. In this regard it is most pertinent to note that the licence fee remitted by any distribution licensee is an item of expenditure approved in its ARR and therefore it is an item passed on to the consumers through tariff. Clause (3) of condition 14 of the Conditions of Licence issued under KSERC (Conditions of Licence for Existing Distribution Licensees) Regulations, 2006, quoted above does also stipulate that the licence fee paid excluding the interests for delayed payments is an expense accounted in the aggregate revenue requirements to be charged to the tariffs. The tariff is determined after public hearings on the proposal submitted by KSEB / KSEB Ltd. No consumer or association of consumers has so far raised any objection against inclusion of the amount of licence fee in the ARR of KSEB / KSEB Ltd. Therefore there is absolutely no rationale behind the reluctance on the part of KSEB / KSEB Ltd to remit the licence fee payable as per the statutory provisions cited above.

19. It may be noted that as per Section 86 (1) (g) of the Act the Commission is authorized to levy fee for the purpose of the Act. As per Section 103 of the Act SERC fund shall be constituted by the respective SERC from the fees, grants, loans and other sums received by the Commission. The fund shall be applied for meeting the salary, allowances and other remunerations of the Chairperson, Members, Secretary and other officers and employees and to discharge its functions as per the Act. As per the provisions of the Act the Commission can fix the licence fee payable by the transmission licensee and the distribution licensee. Accordingly the Commission has issued the regulations applicable to the State Transmission Utility and the existing distribution licensee as stated earlier. As explained earlier the licensee shall pay every year, to the Commission the licence fee at the rate of 0.03% of the revenue for the previous financial year. All licensees in the State except KSEB, are remitting the license fee regularly as notified by the Commission.

20. The licence fee to be levied from KSEB / KSEB Ltd is a small amount compared to the volume of business handled by them and payment of the licence fee will not result in a tariff shock to the consumers. A major share of revenue of KSERC is the licence fee to be remitted by the licensee. For carrying out proper and smooth functioning of the Commission funds are required for which a clear cut provisions are there in the Act. The KSERC fund is constituted of the income from the licence fees, the fee for filing petitions and tariff applications etc.

Exempting one licensee of the State alone from the payment of the statutory licence fee would be discriminatory and against the provisions of the Act and the regulations made thereunder.

21. The failure on the part of the Commission to realise the licence fee as per the provisions of the Act and the regulations has invited audit objections from the C&AG as could be seen in the audit reports for the relevant financial years.
22. In view of the above cited legal provisions, policy and the facts as explained above, the Government has now withdrawn directive No. (v) from the above said GO with effect from 15.07.2015 by GO (MS) No.25/15/PD dated 15.07.2015. From the Government order dated 15.07.2015, it can be seen that Government is convinced about the legal issues explained above and the necessity for remittance of the licence fee by KSEB / KSEB Ltd as per the regulation concerned. That is why the Government has withdrawn clause (v) from G.O (MS) No.34/2006/PD dated 16.12.2006. As explained earlier the impugned directive in clause (v) of G.O (MS) No.34/2006/PD dated 16.12.2006 is contrary to the statutory provisions and hence should have been withdrawn with effect from 16.12.2006 itself since it is *ab-initio* void as explained earlier. A direction which is *ab-initio* void does not have any legal force and hence the withdrawal of the same will operate with effect from 16.12.2006 itself. The three directions in GO dated 15.07.2015 as stated earlier would amount to continuance of such irregular directive during the period from 16.12.2006 to 15.07.2015 and afterwards. There is no justification to the decision of the Government to keep the irregular directive valid for the period from 16.12.2006 to 15.07.2015 and afterwards. Therefore the impugned three directions of the Government in GO dated 15.07.2015, are in violation of the relevant legal provisions as stated in earlier paragraphs and that the withdrawal of clause (v) of GO dated 16.12.2006 should be with effect from the date of original order dated 16.12.2006 itself and not from a subsequent date. This fact has already been submitted before the Government. It can also be easily seen that the second direction exempting KSEB from the payment of licence fee during the period from 2006-07 to 2010-11 is also not maintainable in view of the legal provisions explained above and is liable to be cancelled, on the above grounds.
23. It is stipulated in the third direction in the GO dated 15.07.2015 that the Commission has to adjust the licence fee already received from KSEB towards the licence fee to be remitted by KSEB in the ensuing years. In this regard it has to be specifically noted that the fee for filing application for determination of tariff and the licence fee are items of expenditure included in the administration and general expenses claimed by KSEB Ltd as a part of its aggregate revenue requirement. It has been specifically stated in para 8.6.1 of the application for approval of ARR and ERC for 2013-14 that statutory fee including payments to SERCs is included in the A&G expenses of KSEB Ltd. It has also been

submitted therein that all such items of expenditure are inevitable for the performance of the obligatory duties and functions of KSEB Ltd. Similar statement has been submitted by KSEB Ltd in para 7.6.1 of the application for approval of ARR and ERC for 2014-15. The Commission has approved the amount of such fees as per the request of KSEB Ltd. The Commission has thus allowed the amounts of such fee remitted by KSEB Ltd to be passed on to the consumers by way of tariff for retail sale of electricity. Thus KSEB Ltd has already realized from the consumers the fee remitted by it to the Commission. After having realized from the consumers the amount of fees to be remitted by it to the Commission, KSEB Ltd cannot now turn around and take a stand to the effect that the amount of fee already remitted should be adjusted towards the future fee. A licensee can continue the distribution or transmission functions only if it complies with the conditions of licence. Prompt remittance of licence fee to the Commission is one of the inevitable conditions for continuance as a licensee. After having claimed the licence fee as a part of ARR and after having realized it through tariff, the KSEB Ltd cannot now demand that they should be exempted from payment of the licence fee from 2011-2012 to 2014-15 and thereafter. Therefore the contentions of KSEB Ltd claiming exemption from payment of licence fee are irrational and unfounded.

24. In this context the legal significance of GO (MS) 34/2006/PD dated 16.12.2006 should also be properly appreciated. The said GO is only an administrative order issued by the Government and therefore it cannot supercede the statutory regulations.

25. KSEB Ltd has submitted that payment of licence fee by it for the year 2016-17 would attract audit objection in view of the GO dated 12.06.2006 and the GO dated 15.07.2015. KSEB Ltd has been remitting the fee relating to 5 years from 2010-11 to 2014-15 when the G.O (MS) No. 34/2006/PD dated 16.12.2006 was very much in existence. It is not known whether the C&AG has objected to such payment of statutory licence fee to the Commission. KSEB Ltd has not produced any documents to substantiate their claim that the payment of statutory licence fee would attract audit objection. As already indicated licence fee is an amount which has been approved by the Commission for recovery through tariff. Therefore the C&AG cannot have any valid objection to the payment of licence fee by KSEB Ltd.

26. In the above circumstances, the Commission has, as per its letter No. 540/Accs/2011/KSERC dated 14.10.2015 moved the Government to review G.O.(MS) No.25/15/PD dated 15.07.2015 and to withdraw the directive no.(v) and certain other direction with effect from the date of original order dated 16.12.2006

itself. Taking into consideration the legal provisions and facts explained above, the Commission anticipates that the Government will accept the request of the Commission and issue necessary orders.

Order of the Commission

27. The Commission therefore directs KSEB Ltd to remit Rs.6.43 crore being the arrears of licence fee for the period from 2006-07 to 2010-11 and Rs.7.38 crore being the interest till 2015-16 for belated remittance. The statement of calculation of arrear licence fee and interest there on is attached. KSEB Ltd is also directed to remit the licence fee pertaining to the financial year 2016-17. It is also brought to the notice of KSEB Ltd that only licence fee remitted would be included in the ARR for recovery by way of tariff. The interest for belated remittance shall be borne by KSEB Ltd itself.

Sd/-

Sd/-

Sd/-

K. Vikraman Nair
Member

S. Venugopal
Member

T.M.Manoharan
Chairman

Approved for issue,

Santhosh Kumar. K. B,
Secretary

Statement of calculation of arrear License Fee & Interest thereon

Particulars			Amounts in Crores					Total
License Fee Due			1.01	1.20	1.41	1.45	1.36	
Financial Years	Normal Rate of Interest (%)	Interest at double the rate (%)	Interest Due from 2006-07 to 2015-16					
			2006-07	2007-08	2008-09	2009-10	2010-11	
2006-2007	6.00	12.00	0.12					
2007-2008	6.00	12.00	0.12	0.14				
2008-2009	6.00	12.00	0.12	0.14	0.17			
2009-2010	6.00	12.00	0.12	0.14	0.17	0.17		
2010-2011	6.00	12.00	0.12	0.14	0.17	0.17	0.16	
2011-2012	6.00	12.00	0.12	0.14	0.17	0.17	0.16	
2012-2013	9.00	18.00	0.18	0.22	0.25	0.26	0.24	
2013-2014	8.50	17.00	0.17	0.20	0.24	0.25	0.23	
2014-2015	8.50	17.00	0.17	0.20	0.24	0.25	0.23	
2015-2016	8.25	16.50	0.17	0.20	0.23	0.24	0.22	
Total Rupees (LF+Int.) in Crores ==>			2.43	2.74	3.05	2.97	2.62	13.81
Less License Fees			1.01	1.20	1.41	1.45	1.36	6.43
Total Interest due in Crores			1.42	1.54	1.64	1.52	1.26	7.38