

KERALA STATE ELECTRICITY REGULATORY COMMISSION

THIRUVANANTHAPURAM

Present : **Shri K.Vikraman Nair, Member**
Shri S.Venugopal, Member

Petition RP No.2/2017

In the matter of : Review of the Order on Truing up of Accounts of KSEB for the year 2011-12

Petitioner : Kerala State Electricity Board Limited,
Thiruvananthapuram

ORDER DATED 07/09/2017

Background

1. Kerala State Electricity Board Limited (*hereinafter referred to as KSEB Ltd or the licensee*) filed on 15-5-2017 a petition for review of the order dated 16-3-2017 on the truing up of accounts of the KSEB for the year 2011-12. The defects in the petition such as insufficient fee and delay were notified to the petitioner as per the letter dated 16-5-2017 and 6-6-2017. The defects were cured by the licensee vide letter dated 25-5-2017. A petition for condonation of delay was also filed on 13-6-2017. After considering the petition for condonation of delay, the Commission decided to condone the delay and admit the petition as RP No.2/2017. The petition was uploaded in the website of the Commission and a press release was issued to inform the public. The petitioner has raised several issues for reconsideration such as disallowance of interest and financing charges, disallowance of R&M expenses & A&G expenses, disallowance of depreciation and disallowance of return on equity.

Hearing on the petition

2. The hearing on the petition was held on 18-7-2017 at the Office of the Commission. During the hearing the representatives of KSEB and representatives of Kerala HT-EHT Industrial Electricity Consumers Association were present. Shri. Bipin Shankar, Deputy Chief Engineer representing KSEB Ltd presented the petition and responded to the queries of the Commission.

3. According to KSEB Ltd, the Commission disallowed some of the claims and made factual errors in assessment while approving certain expenses. Under interest and financing charges an amount of Rs.92.54 crore has been disallowed by the Commission from the audited expenses. Out of this, Rs.4.96 crore is on account of interest on loan under R-APDRP, which was wrongly worked out by KSEB Ltd at an interest rate of 11.50% instead of 9%. This was pointed out by the audit. Accordingly, the excess debit in 2011-12 was corrected in the next year's accounts (2012-13) by crediting the same under prior period income and necessary rectification entries were made, which was disclosed in the accounts properly. According to KSEB Ltd, the disallowance of excess interest charges of Rs.4.96 crore in 2011-12, and also accounting the prior period income fully in the subsequent year ie., 2012-13, would result in disallowance of the said amount twice. Hence, KSEB Ltd has requested to consider any one item.
4. With respect to interest on security deposits, the Commission allowed the actual disbursement of interest to the consumers and disallowed Rs.9.82 crore from provision for interest on security deposit created for that year. According to the petitioner, actual disbursement during 2011-12 is made against the provision created for previous year ie., 2010-11, hence, actual disbursement has to be made against the provision for the previous year only. Regarding interest on overdrafts of Rs.82.25 crore, KSEB Ltd stated that the Commission has not considered the need for the borrowing requirement other than working capital. The heads 'working capital' and 'interest on working capital' in the accounts are as per the provisions of the Electricity Supply Annual Accounts Rules, but KSEB Ltd uses the borrowing booked under this head to finance revenue deficit. The total revenue deficit is much more than the working capital borrowing, which is on account of the financial strategy adopted by the KSEB Ltd ie., use the internal resources before borrowing at lowest possible interest. KSEB Ltd further stated that being a regulated entity increase in provident fund balance, and non-cash flow expenses like depreciation, return on equity etc., do not create cash availability unless there are allowed to be fully recovered through tariff. Hon. APTEL allows carrying cost on the unbridged revenue gap. The stand taken by the Commission is not as per the spirit of the orders of APTEL in 11-11-2011. KSEB Ltd also stated that they are eligible for carrying cost for the approved revenue gap. KSEB Ltd is eligible for carrying cost on Rs.1982.72 crore where as the actual borrowing was only Rs.1114.36 crore and hence borrowing is well within the limits. Based on the above, KSEB Ltd requested to review the decision to disallow the interest on overdrafts in its entirety and to approve the sum actually paid during the year.

5. Further, KSEB Ltd also pointed out that the Commission disallowed Rs.23.30 crore on account of return on equity as the Commission allowed only 14% RoE against 15.5% as per the directions of APTEL. KSEB Ltd mentioned that though they has not challenged the order separately for the year 2011-12, it cannot be inferred that the APTEL has not extended the relief for 2011-12 alone among the five years from 2009-10 to 2013-14.
6. The petitioner further stated that though APTEL has not interfered with the decision of the Commission in R&M expenses and A&G expenses, the disallowance on these expenses based on the methodology followed by the Commission, does not consider business growth of the utility thus resulting in disallowances of the considerable O&M expenses actually incurred as per the audited accounts. Further methodology based on inflation does not consider the business growth of the utility.
7. Further ageing of assets which is a relevant factor that impacts R&M expenses was not considered while approving the expenses. The R&M expense allowed by the Commission is much lower than the actuals. Similarly the A&G expenses disallowed was about 26% of the actual amount spent, though most of the items of A&G expenses such as rent, taxes, insurance, conveyance, audit charges, legal expenses, professional charges etc., are not strictly controllable and the item of expenses incurred in the base year 2008-09 is not the same as the items of expenses in 2011-12. Further, the duty under section 3(1) of the Electricity Act was also not approved.
8. KSEB Ltd also stated that the Commission has disallowed the depreciation amounting to Rs.135.40 crore on account of OYEC charges, which is to be reviewed. Further the Commission has allowed the employee costs attributable to the staff strength as on 31-3-2009 without considering the actual manpower, though APTEL has ordered that State Commission should have at least allowed the actual basic pay and DA increase, pay revision and terminal benefits over the actual base year expenses without accounting for increase in man power from 2008-09 to 2012-13. Further, the Commission though determined the revenue gap for the year, the order is silent as to the treatment of the approved revenue gap and requested the Commission to specify the same too
9. The Kerala HT &EHT Industrial Electricity Consumers' Association in their letter dated 23-7-2017 brought to the notice of the Commission that the Association has filed an appeal petition on the orders of Truing up of accounts for 2011-12 and 2012-13 before the APTEL.

10. Sri. Dijo Kappan representing the Consumer Education Trust presented the view and objections on the review petitions filed by KSEB Ltd. He stated that there is no urgency in disposing of the review petitions when the Post of the Chairperson of the Commission is vacant. He also stated that there is delay in filing the petition and such petitions shall not be a reason for allowing unreasonable expenses which are ultimately borne by the consumers. Further allowing controllable expenses over and above the approved limit is also not correct. He also pointed out that there is a need to expedite the collection of arrears of electricity charges and submitted that proper and effective measures may be initiated for the same. He further pointed out that the Commission should have a look into the unnecessary expenses incurred by the licensee and ensure that directions issued by the Commission are properly complied with. Sri, Ratheesh Kumar A, on behalf of the HT-EHT Association stated that the Commission may issue order on the review petition only after the appeal filed by the Association before the APTEL is finalized.
11. During the hearing the Commission sought certain additional details to adduce further confirmations on the review petition from KSEB Ltd and allowed time till 4-8-2017. KSEB Ltd furnished the details only on 21-8-2017.

Analysis and decision of the Commission

12. The Commission carefully noted the arguments given by KSEB Ltd in the review petition and the objections raised by the stakeholders. At the outset, it needs to be mentioned that the Commission functions as per the powers conferred upon it under the provisions of the Electricity Act 2003 and the Regulations issued thereon. It is to be noted that the power of review available with the Commission is as per the provisions of Section 94(1)(f) of the Electricity Act, 2003 and Regulation 67(1) of KSERC (Conduct of Business) Regulations, 2003. As per section 94(1)(f) of the Electricity Act 2003, the Commission may review of decisions, directions and orders as per the provisions of Code of Civil Procedure 1908. The provisions of the KSERC (Conduct of Business) Regulations 2003 provides that:

“67. Powers of review,-

(1) Any person or party affected by a decision, direction or order of the Commission may, within forty five days from the date of making such decision, direction or order apply for the review of the same.

(2) An application for such review shall be filed in the same manner as a petition under Chapter III of these regulations.

(3) The Commission may after scrutiny of the application, review such decisions, directions or orders and pass such appropriate orders as the Commission deems fit within forty five days from the date of filing of such application:

Provided that the Commission may, at its discretion, afford the person or party who filed the application for review, an opportunity of being heard and in such cases the Commission may pass appropriate orders as the Commission deems fit within thirty days from the date of final hearing:

Provided further that where the application for review cannot be disposed of within the periods as stipulated, the Commission shall record the reasons for the additional time taken for disposal of the same”

13. As per section 94(1)(f) of the Electricity Act 2003, review of decisions, directions and orders is to be as per the Code of Civil Procedure 1908, which provides for review on discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the parties 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 reasons. Hence, the review petition has to be dealt with as per the powers conferred upon the Commission. The agitation on the merits of the issues presented in the original petition is not contemplated in the review proceedings. It is beyond doubt that the review jurisdiction is a limited power to be exercised to consider any new facts which could not be reasonably produced at the time of the original order or to consider any apparent error on the face of record. Based on this, the issues in the present petition have been analysed.

14. Shri. Dijo Kappan stated that there is no urgency in hearing the matter as the post of the Chairperson is vacant. Generally review petitions are to be dealt with by the persons who heard the original petitions. Vacancy if any in the Commission is to be dealt with as per existing legal provisions and that cannot be a reason for delay in disposing of the petition.

15. Hon Supreme Court in *Reliance Industries Ltd. vs. Pravinbhai Jasbhai Patel & Ors.* [1997 (7) SCC 300] explained the object and scope of review applications as under:

"It has to be kept in view, that review petitions are not by way of appeals before the superior Court but they are by way of requests to the same Court which decided the matter, for persuading it to recall or reconsider its own decision on grounds which are legally permissible for reviewing

such orders. As laid down by O. XLVII R. 5, CPC as far as possible the same two learned Judges or more Judges who decided the original proceedings have to hear the review petition arising from their own judgment. Thus in substance a review amounts to reconsideration of its own decision by the very same Court. When the Court sits to review its own order, it obviously is not sitting in appeal over its judgment but is seeking to have a fresh look at its own judgment of course within the limits of review powers, but still invoking for that limited purpose the very same jurisdiction which it exercised earlier. It is axiomatic that if a Division Bench of two learned Judges deciding the appeal had exercised appellate powers and when its decision is sought to be reviewed it can be said to be required to reconsider its own decision within the limits of review jurisdiction but still in exercise of the same appellate jurisdiction which it earlier exercised.

Similarly when a decision rendered in exercise of original jurisdiction by a Bench of two learned Judges is sought to be reviewed the learned Judges exercising review jurisdiction subject to the limitations inhering in such an exercise, can be said to be called upon to reconsider their decision earlier rendered in exercise of the very same original jurisdiction. In that review jurisdiction takes colour from the nature of the jurisdiction exercised by the Court at the time when the main judgment, sought to be reviewed, was rendered. Review jurisdiction, therefore, cannot be said to be some independent jurisdiction sought to be exercised by the Court de hors the nature of the jurisdiction exercised by it when the judgment sought to be reviewed was rendered by it."

15. In this context the relevant provisions of CPC viz., Order 1 Rule 47 (1), (4) & (5) providing for review are to be examined. It is detailed below:

"1. 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,

(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 or 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 to the Court which passed the decree or made the order

. X x x x

4. Application where rejected.--(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Application where granted.--Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that –

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and x x x x

XXXXXXXXXXXX

5. Application for review in Court consisting of two or more judges. --Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.”

16. Thus, Order 47 Rule 5 of the Code, provides that the review petition shall be heard only by the Judges who passed the order if the said Judges continues or continue attached to the Court (at the time when the application for review is made) and are not precluded by absence or other cause from considering the application for a period of six months. Hon Supreme Court in the Order dated 11-10-2011 in Civil Appeal No. 8525 of 2011 (*Malthesh Gudda Pooja Vs.State of Karnataka & Ors*) had explained the rule 5 and held that :

“The words "continue attached to the Court" mean available to perform normal duties and has not been transferred or away on deputation. The words `absence or other cause for a period of six months' in Rule 5 of Order 47 of the Code and the words `by reason of death, retirement or absence....”

In the same judgment it was also held that

“13. Order 47 Rule 5 of the Code and Rule 5 of the Chapter 3 of the High Court Rules require, and in fact mandates that if the Judges who made the order in regard to which review is sought continue to be the Judges of the court, they should hear the application for review and not any other Judges unless precluded by death, retirement or absence from the Court for a period of six months from the date of the application. An application

for review is not an appeal or a revision to a superior court but a request to the same court to recall or reconsider its decision on the limited grounds prescribed for review. The reason for requiring the same Judges to hear the application for review is simple. Judges who decided the matter would have heard it at length, applied their mind and would know best, the facts and legal position in the context of which the decision was rendered. They will be able to appreciate the point in issue, when the grounds for review are raised. If the matter should go before another Bench, the Judges constituting that bench will be looking at the matter for the first time and will have to familiarize themselves about the entire case to know whether the grounds for review exist. Further when it goes before some other Bench, there is always a chance that the members of the new bench may be influenced by their own perspectives, which need not necessarily be that of the Bench which decided the case. Benjamin Cardozo's celebrated statement in the Nature of Judicial Process (page 12) is relevant in this context:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions;In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eye except our own."

.....

In the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same court. Any attempt to too readily provide for review applications to be heard by any available Judge or Judges should be discouraged.

17. Thus the review jurisdiction is a limited jurisdiction and as far as possible it has to be heard by the same persons who heard the original petition. Hence, the contention of Shri. Dijo Kappan is not sustainable as per the existing provisions of law.

18. Prima facie, the Commission notes that most of the issues raised were addressed in the original proceedings itself and KSEB Ltd had raised many issues which were already settled by the APTEL or has been outside the legal provisions. Though review proceeding is not a forum for agitating on merit the issues which already were raised in the original proceedings, the Commission has decided to examine the issues raised in detail.
19. First issue raised in the review petition is on the disallowance of interest and financing charges to the tune of Rs.92.54 crore. Out of this Rs.4.96 crore is on account of the audit observation on the overstatement of interest charges under R-APDRP. According to KSEB Ltd the same has been rectified by appropriate entries in the accounts of 2012-13 under prior period income. The Commission has noted the explanation given by KSEB Ltd. The Commission in the original order had disallowed Rs.4.96 crore on account of excess debit of interest and financial charges as per the audit observation for year 2011-12. The Commission in the truing up of accounts for the year 2012-13, had taken into consideration the entire prior period income for the year 2012-13, which included this Rs.4.96 crore of 2011-12, thereby in effect causing disallowance twice. The Commission is of the view that this has to be rectified and accordingly, the said amount of Rs.4.96 crore is allowed in the year 2011-12.
20. Regarding interest on security deposits, KSEB Ltd stated that the provision created for 2011-12 is based the closing balance of security deposits as on 31-3-2011, which is meant for disbursement for succeeding year hence there is a mismatch. The Commission noted the argument of KSEB Ltd. The Commission allows the actual interest paid to the consumers as pass through in the tariff, whereas the accounts figures denotes the provision made for the interest payments. The interest on security deposit booked as well as actually disbursed are allowed based on the details furnished by KSEB Ltd only. The mismatch pointed out by KSEB Ltd is continuing for last several years and the same was not brought before the Commission so far. The only issue raised by KSEB Ltd is that the actual disbursements in a year, is pertaining to the provisions made for the previous year. If the practice is to be changed, the interest allowed for the previous years should also be corrected. Since the Commission is allowing the actual disbursements in a year on a regular basis, the present practice can be followed.
21. Regarding interest on overdrafts, the Commission has, in detail addressed the matter in the original order, and KSEB Ltd has not furnished any new facts which

warrants review on the matter. The Commission has in detail analysed the requirements of working capital in the impugned order. It can be seen that the Commission has allowed an additional amount of Rs.4.91 crore towards interest charges to meet the capital expenditure fully. The requirement of working capital for funding the revenue deficit as argued by KSEB Ltd is also not true as the net current assets /working capital for the year 2011-12 was negative Rs.3909.75 crore as pointed out in the impugned order, whereas the cumulative revenue deficit as per the contention of KSEB Ltd itself is only Rs.1352.73 crore, which is much lower. According to KSEBLtd out of the revenue gap of Rs.1352.73 crore, Rs.731.71 crore is on account generation and power purchase cost. It is to be pointed out that KSEB Ltd has consistently failed to invoke the provisions of KSERC (fuel surcharge formula) Regulations for year end adjustment of power purchase cost on account of mix change and other factors. Further, it is also pertinent to point out that the Government of Kerala has allowed KSEB Ltd to retain the electricity duty collected from the consumers. Considering all these factors into consideration, it is not fair to load additional burden on to the consumers.

22. In the case of return on equity, KSEB Ltd has claimed 15.5% return as the APTEL has allowed the same in the previous and subsequent years. According to KSEB Ltd it cannot be inferred that the APTEL did not want to extend the relief for 2011-12 alone as for other years RoE of 15.5% was allowed. In this context it is to be noted that the Commission has allowed 14% RoE as per the provisions of the existing regulations for 2011-12, whereas the APTEL had allowed RoE as per the provisions of CERC regulations for the year 2010-11 and 2012-13 and subsequently applied the same principle for the years 2009-10 & 2013-14. It is also to be pointed out that the APTEL had allowed only a return on 14% on ROE for the year 2014-15 in terms of the Order in Appeal No. 247 of 2014 dated 18-11-2015. Hence the argument of KSEB Ltd cannot be sustained, since there is no specific order pertaining to 2011-12, the same cannot be allowed and accordingly there is no scope for review on this matter.

23. KSEB Ltd has also sought review on disallowance of R&M expense, A&G expenses and depreciation for assets created out of consumer contribution. However, KSEB Ltd could not produce any material before the Commission to enable the provision for a review.

24. The approval of electricity duty under section 3(1) of Kerala Electricity Duty Act and employee cost as per the orders of the APTEL were also raised by the KSEB

Ltd in the review petition. Regarding electricity duty, the statutory provision under Section 3(1) of the Kerala Electricity Duty Act provides that the amount cannot be passed on to the consumers. The Commission cannot ignore statutory provisions as has been held by the APTEL in Appeal No.94 of 2008. Hence the said amount cannot be passed on to the consumers.

25.Regarding employee costs, the Commission has followed the directions of APTEL in Appeal No. 1 and 19 of 2013, and estimated the employee costs for the year 2011-12 strictly as per the orders of APTEL and allowed the same. Hon. APTEL while endorsing the rightful concern of the State Commission on the high employees cost, mentioned that atleast the expenses of the no. of employees at 2008-09 level should be allowed, as the Commission was not able to establish the magnitude, in the absence of a specific finding about the excess manpower and non-availability of Regulations. The Commission has allowed the employee cost as per the directions of APTEL for the year 2011-12. KSEB Ltd did not object to the methodology followed by the Commission for the estimation of employee costs as per the Orders of the APTEL, but has stated that employee cost for the entire employees is to be allowed. The Commission does not intend to go beyond the scope of the APTEL Order. Hence, it is needless to point out that these issues are beyond the scope of review petition.

26.Finally, KSEB Ltd has stated in the review petition that the order of the Commission is silent on the treatment of approved revenue gap. As per the provisions of Electricity Act and the KSERC (terms and conditions for retail sale of electricity) Regulations 2006, if the Expected Revenue from Charges (ERC) is insufficient to meet the Aggregate Revenue Requirements (ARR), the licensee shall indicate in the ARR&ERC filing for the ensuing financial year the manner in which the gap shall be filled up. Further if the gap is to be filled up through tariff revision, tariff petition has to be filed. As per Section 64 of the Electricity Act 2003, the licensee shall make the application before the Commission for tariff revision. These provisions are amply sufficient for the licensee for approaching the Commission for bridging the revenue gap if any determined after the truing up process. However, KSEB Ltd has not so far approached the Commission with such proposals.

27.Thus based on the above, the Commission is of the view that there is no scope for review at this stage, except for the interest and financing charges of Rs.4.96 crore as allowed in para 19.

Orders of the Commission

28. In the light of the above analysis of all the points raised by KSEB Ltd as well as the objectors, the Commission is of the view that there are no sufficient grounds placed by the petitioner for a review of the Order dated 16-3-2017 on the truing up of accounts of the Kerala State Electricity Board for 2011-12, under Section 94(1)(f) Electricity Act 2003, except as allowed in para 19. Accordingly the revenue gap approved for the year would be Rs.1391.93 crore.

29. With the above, the petition disposed of, ordered accordingly.

Sd/-
K.Vikraman Nair
Member

Sd/-
S.Venugopal
Member

Approved for issue
Sd/-
Santhosh Kumar.K.B
Secretary