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20. Shri M. G. Prabakar, Secretary, FKCCI, Bangalore
21. Shri D. Narasimha Rao, Visiting Faculty, Indian Institute of Management, Bangalore
22. Shri Gautam Menon, ISEC Campus, Nagarbhavi, Bangalore
23. Shri A. Ramdas, Ex MLA, Karnataka
24. Shri K. Ravindra Prabhu, General Secretary, KIADB Industrial Area Mfrs. Association (KIMA), Mysore
25. Shri H. D. Raghavendra, President, Hebbal Industrial Estate Mfrs. Association (HIEMA), Mysore
26. Shri Sathyanarayana Udupa, Secretary, Bharitiya Kissan Sangha, Karnataka
27. Shri K. Ravindra Prabhu, Chairman, Energy Sub Committee, Mysore Chamber of Commerce & Industries (MCCI), Mysore
28. Secretary, Grama Panchayat, Kalakere, Karnataka
29. President, Grama Panchayat, Anadoor, Karnataka
30. President, Grama Panchayat, Balur Grama, Karnataka
31. President, Grama Panchayat, Karnataka Grama, Karnataka
32. Secretary, Grama Panchayat, Chambole Grama, Karnataka
33. Secretary, Grama Panchayat, Nandagavu Grama, Karnataka
34. Secretary, Grama Panchayat, Dubalagundi Grama, Karnataka
35. Secretary, Grama Panchayat, Talamadagi Grama, Karnataka
36. Secretary, Grama Panchayat, Belakera Grama, Karnataka
37. Secretary, Grama Panchayat, Konamalakunda Grama, Karnataka
38. Secretary, Grama Panchayat, Marakunda Grama, Karnataka
39. Secretary, Grama Panchayat, Madakatti Grama, Karnataka
40. Secretary, Grama Panchayat, Sundala Grama, Karnataka
41. Secretary, Grama Panchayat, Nagamarapalli Grama, Karnataka
42. Secretary, Grama Panchayat, Methimulakunda Grama, Karnataka
43. Secretary, Grama Panchayat, Ambesangavi Grama, Karnataka
44. Shri Shankar Sharma, Ramakrishnanagar, Mysore, Karnataka

... Respondents

Counsel for the Appellant : Mr. M. G. Ramachandran, Advocate,
Ms. Saumya Sharma and
Ms. Taruna Singh Baghel, Advocates

Counsel for the Respondents : Mr. Neil Hildreth, Advocate for
KERC, Mr. Rohit Rao, Advocate,
Mr. Ananga Bhattacharya, Advocate

Mr. M. G. Prabhakar, Managing
Committee Member for Federation of
Karnataka Chamber of Commerce &
Industry (FKCCI,

J U D G M E N T

1. This is an appeal preferred by Karnataka Power Transmission Corporation Ltd, a State of Karnataka undertaking, engaged in transmission of electricity in the State apart from discharging the functions of State Load Despatch Centre in the State. On 30.11.2005, the appellant moved the Karnataka State Regulatory Commission for approval of its annual revenue requirements for the financial year 2006-2007 (01.04.2006 to 31.03.2007) and also for determination of transmission tariff. After following the procedure prescribed and after holding public hearings, the Commission by its Order dated 07.04.2006 approved the annual requirements to the extent of Rs. 681.46 Crores as against the appellants' proposal of Rs. 991.74 Crores while leaving gap of Rs.310.28 Crores. Being aggrieved and also aggrieved by certain other disallowances the present appeal has been preferred by the appellant transmission utility advancing a number of contentions.
2. On behalf of the first respondent Commission a reply has been filed to reiterate and sustain its views and order. Respondent No. 20 also filed a detailed reply in support of the order appealed against.
3. Mr. M. G. Ramachandran the learned counsel appearing for appellant, advanced the following contentions:

- (i) The State Commission erred in disallowing interest and financial charges of Rs. 318.60 Crores claimed by appellant and restricting the same to Rs. 276.44 Crores.
- (ii) The State Commission ought not to have reduced the quantum of investment when it is within the domain of the utility to plan and estimate required capital investment for improvement of the system and its maintenance and when there is no imprudence, the Commission has no authority to interfere with such proposal, as at the appropriate time it is for the appellant to satisfy the Commission when it seeks for consequential return on investment, depreciation etc. The State Commission having issued several directions to improve quality of service and reliability of power ought not to have slashed down the proposal to invest to create the infrastructure on the inference and assumption that it may not be possible to implement the proposals as ambitious.
- (iii) The State Commission misdirected itself in appointing a Committee to review and examine the capital investment proposal and act on the recommendations of the said Committee, when such planning and proposal falls within the domain and internal management, in respect of which no one has the authority to interfere or review and give different proposal to invest less. It is submitted that when the appellant has technical experts and Engineers, on its employment, and it is their planning, estimate and proposal which deserve acceptance. Further merely because the investment was lesser in the earlier years, is not a ground to hold that the proposal is a day dream or too ambitious and not capable of achievement and slashed down the proposal without reason or rhyme. It is pointed out that even the Committee constituted by the State Commission has not pointed out, that those works are not required at all. The capacity of the appellant to execute the

work could be tested by allowing the investment and even if the work remains incomplete, no one else including consumer is prejudiced by such delay. The State Commission failed to appreciate the specific plea to invest is as required by the standards prescribed by the Central Electricity Authority to maintain the ratio of investments in transmission and distribution qua-generation, the ratio of substations to be maintained qua the area, automation of the system etc. The Commission failed to notice that the appellant has to cater to the unrestricted peak load of 7007 MW and peak capability of the transmission system of 6200 MW as detailed in the letter dated 21.03.2006 submitted by appellant.

- (iv) The State Commission erred in restricting depreciation to Rs. 120.33 Crores as against the claim of Rs. 260.85 Crores claimed for no valid and tenable reason.
- (v) The disallowance of ROE is a misdirection.
- (vi) The reduction of transmission loss to 4.06% is incapable and not called for.
- (vii) The reduction of employees cost is not called for and it is totally unjustified.
- (viii) The refusal to allow capitalisation claimed is erroneous.

4. Per contra the learned counsel for first respondent and Mr. M.G. Prabhakar representing FKCCI contested each and every one of the points urged by Mr.M.G.Ramachandran, as untenable, devoid of merits and no interference is called for in this appeal. In this appeal the following points arise for consideration :

A. Whether KERC acted with authority, fairly and reasonably in interfering with the internal management and domain of the appellant Transmission utility with respect to its commercial plan and proposal to invest Rs. 2700 Crores during 2006-2007 ?
Whether the consumers have any say with respect to proposal to

invest for up gradation of Transmission system better maintenance and quality service ?

- B. Whether the disallowance of ROE on reserves and surplus is sustainable and legal ?
 - C. Whether the disallowance of a portion towards labour cost is sustainable ?
 - D. Whether the disallowance of depreciation and rate of depreciation adopted by Commission is liable to be interfered in this appeal ?
 - E. Whether any interference is called for with respect to reduction of transmission loss directed by the Commission ?
 - F. To what relief, if any ?
5. On the first point the learned counsel for the appellant, while stating that it may not be possible to execute the work even if the entire amount claimed is approved in this appeal as substantial portion of the year is over. However, the learned counsel persuades us to settle the legal position as the very question may surface in the next year or following years. Hence we are examining the first point.
6. The functions of the State Commission are enumerated in Section 86 (1) (a) to (k) of The Electricity Act 2003. We notice from the above provision that the role played by the Commission in slashing the investment is not one of the enumerated function Section 86 (2) provides that the Commission shall advise the State Government on all or any of the matters enumerated in clauses (i) to (iv) of the said sub section. Section 86 (4) provides that the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy. Section 61 to 66 provides for framing Tariff regulations and determination of tariff. These provisions are also silent in this respect.

7. In contrast, Section 22 (2) of The Electricity Regulatory Commissions Act 1998, since repealed provided that the State Govt. may confer functions enumerated Clause (a) to (f) of Sub section (2) of Section 22. Section 22 (2) (a) reads thus :

“22.(2)(a) to regulate the investment approval for generation, transmission, distribution and supply of electricity to the entities operating within the State;”

xxx xxx xxx

There is no parallel provision in Section 86 or any other provisions in The Electricity Act 2003 which will enable the Commission to regulate the investment approval for generation, transmission, distribution and supply of electricity within the State, and it is not as if it is the repository of entire power or authority to control the whole spectrum of Transmission or Distribution including financial management of utilities or it has the power to micromanage the affairs of the utilities.

8. The learned counsel appearing for the contesting respondents is unable to point out any provision in this respect. Provisions of 2003 Act has made a deviation and that being the position we are at loss to know how the Commission could take upon itself to examine the sagacity of investment proposed by utility in development or up gradation or maintenance of its system, by engaging a team of experts to review or study the merits of the proposal or plans to invest.
9. The only provision, if at all which has a relevance is Section 86 (2), which is advisory in nature. This being the position it is obviously clear that the legislature has left it to the utilities to decide their plans of investment or improvement of system or expansion to meet the

demand of power within their area including up gradation and maintenance for a better and quality generation, transmission or supply as the case may be. It is the commercial decision of the utility and its source to raise funds which falls within the domain of the utility and not liable to be interfered, except at the stage when utility claims for return on such investment, interest on capital expenditure and depreciation. It is at that stage the Commission shall undertake a prudent check and if deemed fit allow the claim. In appropriate cases the Commission may disallow such claims of utility and it is for the utility to bear the brunt of such investment and it cannot pass it on to consumers.

10. We are unable to appreciate the procedure adopted by the Commission in appointing a Committee to examine the proposal or to find out whether it is feasible or not to implement the investment proposal. It is being commented as a day dream on the part of utility. Yet they are within the domain, commercial decision and internal management of the utility and there is time enough for the Commission to undertake prudent check when the utility comes forward to claim return on such investment. in its annual revenue requirement and till then the proposal to invest is well within the domain of the utility. It is sufficient if the utility confirms its proposal to invest.

11. Further when the Technical Experts and Engineers, have applied their mind with respect to their proposal and plan it is not for the Commission to examine by appointing another expert Committee. No expert agrees with another expert as presumably either add or comment. By this it shall not be taken that we are commenting upon the expert Committee appointed by Commission. Even the Committee did not opine that the proposed capital investments are not at all required or otherwise not suitable nor an efficient proposal.

12. All that it is being pointed that it may not be possible to execute. Here again it is within the domain and control of the utility. Assuming that the utility has a dream, it is expected that it will wake up with determination and act, lest the State which owns the undertaking will not spare and accountability of the utility is unending to the State, State Legislature and audit by The Accountant General. The power demand is increasing by leaps and bounds and quality has to be maintained and this compels the utility to update its transmission system including reduction in transmission loss ordered by the Commission. It is not for the Commission to throw its spanner in the wheels of the utility when it has proposed to invest for the improvement and expansion of system after a study by its Technical Team and when its board has approved the investment proposals.
13. Section 11 of The Karnataka Electricity Reforms Act, 1999 also does not spelt out such power on the Commission, as it only enables the Commission to require licensee to formulate eprerspective plans and schemes for promotion of transmission, generation etc. Section 12 of The Karnataka Electricity Reform Act saves the power of State Govt. to issue policy directives concerning electricity in the State including the overall planning and coordination. Thus viewed from any angle, the power of the Commission to interfere with the proposal of investment by the transmission corporation or for that matter a distribution licensee as well cannot be assumed.
14. The approach that consequent to the slashing of the investment proposal, interest and financial charges for the financial year 2007 has been reduced or saved at an average rate of 8.5% for six months amounting to Rs. 40.1 Crores is no reason at all. Mere proposal to invest will not involve the liability either interest or finance charges eo instanti, but such charges may have to be incurred only when the amount is actually invested as planned. Till the investment is complete

the utility is not entitled to claim either finance or interest or return on the investment.

15. The further approach that it is obligatory for the Commission to keep the cost of the power at the lowest possible level is not a proper approach. Being a regulator, the Commission has to approach such issues as a regulatory measure and not as if the Commission is there to protect the consumers alone. When the Commission expects the utility to upgrade its system of transmission or distribution or quality of service, it follows automatically that utility has to invest in upgradation, maintenance for providing quality service. This could be by way of balancing and not by approaching the issue as if the consumer has to pay at the lowest rate. When the consumer expects quality service, the consumer should be prepared to pay a reasonable charge and here the role of Regulator is vital and it has to balance between the two. If timely capital investment is not made to improve the system then the quality of service by the utility cannot be complained either by consumers nor it could be commented by Regulator. The appointment of an expert committee by the regulator at the stage of proposal to invest is neither warranted nor justified as the plan to invest, estimate of investment and the program of up gradation or extension or development of transmission system is exclusively within the domain of transmission utility.

16. Even if the proposal to invest is over ambitious, the utility might improve itself or act in such an improved speed to execute the work, but that does not mean that the utility or its managers or top brass should not have imagination or over ambitious which target they set up for themselves to achieve in the course of the year. It follows that as and when the project is executed and investment is made, the same will have financial implications on the sector and consumer tariff but that has to be balanced by the first respondent. The regulator is not going to approve the expenditure or approve the financial charges just

for asking and the regulator has to satisfy itself by a prudent check with respect to capital investment and in case they contribute for the quality or development or providing better service, the regulator may include and pass on the consequences of such investment to the consumers. Day by day demand increases and number of consumers are also increasing. The utility has to serve a number of metropolitan cities where the need for power is ever increasing. Therefore, the transmission utility has to estimate or at least imagine and estimate the requirements in advance for the future years to serve the consumers.

17. To decry the utility and its technical experts or engineers is also not called for as it is for them to rise up to their planning and implement it. The expert committee has not stated that the proposed investment is not required at all and none of the proposals have been commented as not called for by the expert committee appointed by the Regulator. The efficiency to implement the projects or investments, if the utility fails to achieve, then it cannot pass on the consequences of such investment to the consumers. The investment made on the earlier years cannot be a basis to restrict investment for the current year 2007 or the following years.
18. The reference made to the National Electricity Policy and in particular to the draft policy dated 16.03.2005 may not be of any consequence. The utility has proposed to undertake expansion of its network after a study. The draft tariff policy has not been understood properly and at any rate it was only a draft which will not supersede or over rule the statutory provisions of The Electricity Act 2003 or Regulations. Reliance made on Section 91(4) of The Electricity Act 2003 is a misconception. There is no quarrel with the impartiality of the regulator. It is the jurisdictional issue or the scope of regulator's power vis a vis the utilities internal management and functions and its plans. Legally there could be none who could complain about such proposals nor they could have a say.

19. A reference is made to license condition No.12, in our view such a condition referred to by the 1st respondent just provides that the licensee shall not make any investment except in economic and efficient manner. This will not in any manner could be used as a trump card to interfere with the proposals or future investment plans of the utility. The utility might have placed its investment plan before the Commission but this does not mean that the Commission has a full and complete authority to decide as to when and how the projects are to be executed or when it should not be executed. A condition might have been imposed in the license under the earlier enactment and The Electricity Act 2003 has made the difference. The claim of the 1st respondent that it is empowered to interfere with investment proposal made by the appellant and substitute its recommendations in respect of the same in our considered view is far fetched. If such a stand is to be sustained then utility will be a depart mart of the Commission and the Commission may not be exercising its power or functions as a regulator but as a head of the utility. This is not the object of the 2003 Act. It shall not be lost sight that the regulator has no budget or funds of its own to invest nor it could interfere with the micro management of the utility.
20. The preamble of the Act shall not be lost sight of, where in it has been emphasized that the object of the Act being to take measures conducive to development of the electricity industry, promote competition there in, protecting interest of consumers and supply with electricity to all areas etc. A question may be raised as to the effectiveness of capital investment and further question that if such investment is found to be a waste or otherwise not required which may result in waste of funds of utility. This over looks the fact that the utility being a State undertaking is controlled by its Board and responsible officials of the State and it is subject to the control and approval of the State in such matters which provides funds for such investments or

over see such investments. For all these reasons we are not persuaded to accept the line of reasoning assigned by the Commission.

21. The Commission overlooked the fact that the appellant being transmission utility transmitting power through out the State for the bulk supply as well as distribution as an obligation to maintain the supply as well as quality supply and when the demand increase, either at the level of distribution or at the level of bulk supply it is the transmission licensee who should provide for the supply. This obviously means that the transmission utility has to plan in advance and should be in a position to supply power as demanded from time to time. Section 42, 43 of The Electricity Act 2003 also should not be lost sight of. To meet the ever increasing demand consequent to development and improvement in the status of the consumer public, industrialization, computerization, heavy industries and requirement increases by geometric proportion, it is for the transmission utility or such other utility to estimate the future demands as well, besides improving the quality and standard of maintenance. This is possible only if the utilities have the freedom to plan with respect to their investment, standardization, upgrading of the system. For such a course it is within the domain of those utilities to undertake to plan, invest and execute the projects or schemes of transmission etc. If the view of the Commission is to be sustained, as already pointed out, the same would mean for each and every investment an approval has to be sought by the utility in advance which is not the objective of The Act.

22. The consumers interest also do not arise at this stage for consideration nor they could be an objector in respect of proposal or plan or investment by utility as the liability of the consumers, if any, arise or there could be a passing by way of return on equity or interest etc. as such contingency arises only when the Regulatory Commission subject

to its prudent check allows such expenditure, while fixing the annual revenue requirement and determining the tariff. Till then, the consumers have no say and there could be no objection from their side. When the consumers complain poor service or failure to maintain supply, to face such a situation the utility has to plan in advance, invest in advance, execute the project or scheme for better performance and maintain.

23. The Karnataka Electricity Regulatory Commission has not acted reasonably or fairly in interfering with the internal, commercial , management and domain of the transmission utility with respect to its commercial plan and proposal to invest a substantial sum. We have made ourselves clear and in the future years to come the Commission will take this into consideration and will act accordingly. The point 'A' is answered in the above terms.

24. Taking up the point 'B' it is the grievance of the appellant that return on equity is not given with respect to reserves and surplus. The Commission has allowed return on equity only for a sum of Rs. 682.55 Crore while the capital base of ROE was Rs. 897 Crore as affirmed in the previous year. In this respect the request of the utility has been negated on the ground that details have not been furnished. Even during the years 2005-06, the Commission has allowed ROE on reserves & surplus as well. Now there is no reason or justification to treat differently and deny the appellant with respect to its claim of ROE on reserves & surplus. Reserves & surplus also form part of the share capital and the Regulatory Commission ought to have allowed ROE on Rs. 143.14 Crores as well and disallowance with respect to Rs. 48 Crores or there about is not proper and we direct the Commission to allow Rs. 48 Crores and allow ROE 14% on the said sum. Point 'B' is answered in favour of the appellant and there will be consequential direction as prayed for.

25. Taking up the point 'C', the Commission has disallowed the portion of labour cost and we do not find any illegality or error on the said disallowance. The Commission has disallowed the labour cost such as bonus / exgratia, cost of supplying electricity to its employees to pass through in the tariff. Identical orders have been passed by the Commission in the earlier tariff orders and we do not see any justification to interfere with the said conclusion of the Commission as it is well founded.
26. Taking up point 'D' namely disallowance of depreciation and rate of depreciation, the appellant has claimed depreciation at 7.5% while the Commission has allowed depreciation @ 3% on the basis of the notification issued by CERC. The Commission proceeded on the premise that the appellant utility has to compute the depreciation for financial year 2006-07 as per rates indicated in the amended tariff regulations. It should not be forgotten that statutory regulations as framed by the 1st respondent is in force and it has to be implemented. It may be that CERC has modified the rate of depreciation but that does not over rule the statutory regulation which is binding on the Commission who has framed. The statutory regulation which was in force alone applies. Further reliance has been placed on Government of India draft tariff policy in the matter of depreciation by the Commission in support of its conclusion. The draft policy referred to also will not change the situation and it is the statutory regulation which was in force on the crucial date which has to be followed. But in our view so long the statutory Regulations are in force and remains un-amended, it is obligatory to allow depreciation at the rate provided in the statutory regulations. There cannot be a deviation from the Regulations. In the circumstances we modify the order of the Commission and direct that for the year 2006-2007 the appellant shall be entitled to 6% depreciation or at the rate as provided in the tariff regulations framed by KERC and the Commission shall implement the

same while under taking trueing up exercise. Hence, point 'D' is answered in favour of the appellant.

26. The amendment if any is after the crucial date and it has no application to the year in question and the amendment is not retrospective as well. The utility is well founded in seeking for depreciation as per the existing regulations. Hence, the view of the Commission deserves to be interfered and there will be a direction to allow depreciation in terms of regulations which existed on the date of application. Same reasoning applies to return on equity and in this respect there will be a modification of the tariff order both in respect of depreciation and return on equity and the regulator Commission shall while undertaking trueing up exercise shall give effect to this direction.
27. Taking up the point 'E' we are of the considered view that with respect to the direction issued by Commission to reduce the transmission losses, no interference is called for. The Commission has issued directions to reduce transmission losses to the level of 4.06% and this is not an impossibility. It is for the utility to improve its performance and reduce the transmission loss. The Commission is well founded in issuing direction in this respect and hence point 'E' is answered against the appellant.
28. In the result appeal is allowed in part in respect of point 'A', 'B' and 'D'. In other respects we decline to interfere with the order passed by KERC. The parties shall bear their respective costs in the appeal.

Pronounced in open Court on this 29th day of August 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E. Padmanabhan)
Judicial Member

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