

**APPELLATE TRIBUNAL FOR ELECTRICITY  
(APPELLATE JURISDICTION)**

**Dated 18<sup>th</sup> - August, 2010**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**Appeal No. 5 of 2009**

**In the matter of:**

**Kerala State Electricity Board  
Vydyuthi Bhavanam  
Thiruvananthapuram-695 004 ... Appellant**

**Versus**

**Kerala State Electricity Regulatory Commission  
KPFC Bhavanam, CV Raman Pillai Road  
Vellayambalam  
Thiruvananthapuram-695 010 ... Respondent-1**

**Kerala High Tension and Extra High Tension  
Industrial Consumer Association,  
Productivity House,  
Jawaharlal Nehru Road,  
Kalamassery P.O.,  
Ernakulam Distrit  
Kerala State-683 104 ... Respondent-2**

**M/s Binani Zinc Limited,  
Binaipuram,  
Ernakulam District,  
Kerala State-683 502 ... Respondent-3**

**Counsel for the Appellant : Mr. M.G. Ramachandran  
Mr. M.T. George  
Ms. Smitharani  
Ms. Swapna Seshadri**

**Counsel for the Respondents : Mr. Ramesh Babu for R-1  
Mr. Kunal Verma for R-2  
Mr. Amarjit Singh Bedi  
for R-3**

## **JUDGMENT**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. The Kerala State Electricity Board is the Appellant herein. The Kerala State Electricity Regulatory (State Commission) is the Respondent.

2. The Kerala State Electricity Board has filed this Appeal as against the order passed by the State Commission on 19.04.2008 in the petition filed by the Appellant for determining the Aggregate Revenue Requirement (ARR) and Expected Revenue from Charges (ERC) for the tariff period FY 2008-09. The relevant facts of the case are as follows.

3. The Appellant is a deemed licensee under the Electricity Act, 2003 in regard to various activities which require licenses under the said Act. After coming into force of the Electricity Act, 2003, the Appellant had been filing petition for determination of Aggregate Revenue Requirement (ARR) and Expected Revenue from Charges (ERC) from time to time. Accordingly, the State Commission passed its tariff order provisionally.

4. On 21.12.2007, the Appellant filed a Petition for determining the Aggregate Revenue Requirement (ARR) and Expected Revenue from Charges (ERC) in respect of the period FY 2008-09. After observing the formalities and conducting public hearing, the State Commission passed the impugned order dated 19.04.2008 allowing most of the claims made by the Appellant and rejecting some of the claims.

5. On 04.06.2008 the Appellant filed a Petition for Review of the said order dated 19.04.2008 seeking for the review of the

rejection of those claims. The said Petition was admitted by the State Commission in RP-3/08 on 20.06.2008. During the pendency of the said Review Petition, the State Government issued a direction to the State Commission through letter dated 15.07.2008 to allow the claim of the KSEB in respect of its head 'Depreciation' as per the rates notified by Ministry of Power in the Gazette dated 29.03.1994 and to book Section 3(1) duty as per KED Act, 1963 as Revenue Expenditure under Administrative & General (A&G) expenses of the Board. Again after holding public hearings on the Review Petition, the State Commission passed order dated 29.08.2008 dismissing the said Review Petition. Under those circumstances, the Appellant has filed this Appeal before the Tribunal challenging the main order dated 19.04.2008.

6. In this Appeal, the following issues are raised for consideration:

- (i) Disallowance of interest and Finance Charges;
- (ii) Disallowance of Depreciation claim by the Appellant;
- (iii) Disallowance of prior period charges;

- (iv) Fixation of Transmission and Distribution losses
- (v) Reduction in Power Purchase Cost due to the fictitious calculation of transmission and distribution losses;
- (vi) Disallowance of Other Debits; and
- (vii) Disallowance of Administrative and General Expenses/Electricity duty.

7. On these issues, the Learned Counsel for the Appellant has made elaborate submissions. Let us now refer to those submissions.

8. The first issue is relating to “Disallowance of Interest and Finance Charges”. The contention of the Appellant on this issue is as follows.

“The State Commission has approved capital investment of Rs. 1146.09 crores proposed by the Appellant. However, towards meeting the interest cost for existing loans for the period FY 2007-08 as well as the loan for the investment proposed for FY 2008-09, the State Commission has allowed

only an amount of Rs. 19.55 crores as interest as against Rs. 61.49 crores claimed by the Appellant. The Appellant had been making deposit up to December 2007 for effecting repayment of existing capital liabilities. Thereafter the deposits were made with a view to create a Corpus for the proposed Pension and Gratuity Fund for the Appellant's employees. The deposit amounts were not available to the Appellant for meeting capital expenditure. In fact, the Appellant is eligible for the interest on the normative loan amount of Rs. 669.20 crores for the FY 2007-08 and Rs. 802.26 crores for the FY 2008-09. The interest for the above loan works out to Rs. 101.68 crores. As against this amount the Appellant had only claimed Rs. 61.49 crores but the State Commission has allowed only an amount of Rs. 19.55 crores as interest charges. This is wrong.”

9. The second issue is relating to the “Disallowance of Depreciation” claimed by the Appellant. In respect of this issue the

following submissions have been made by the Learned Counsel for the Appellant.

“The Appellant claimed amount of Rs. 459.30 crores as depreciation for the FY 2008-09. However, the State Commission has allowed depreciation of Rs. 290.69 crores only by ignoring the notification issued by the Ministry of Power dated 29.03.1994. The Government of Kerala issued a policy directive through letter dated 16.12.2006 under Section 108 of the Electricity Act, 2003 directing the State Commission to allow the Appellant’s depreciation as per Ministry of Power Notification dated 29.3.1994. In addition to this, the State Government issued letter dated 15.07.2008 to allow depreciation as per the Ministry of Power notification dated 29.03.1994 during the pendency of the review. Even then, the State Commission, having ignored all their directions has merely adopted the Central Commission Regulation, 2004 and allowed Rs. 290.69 crores only. This is not in consonance with the judgment of the Hon’ble Supreme Court in 2007(3)

SCC 33 (*Delhi Electricity Regulatory Commission Vs. BSES Yamuna Power Limited*).

10. The next issue is “Disallowance of Prior Period charges”. On this issue, the Learned Counsel for the Appellant has made the following submissions.

“The State Commission has not allowed the Prior Period charges of Rs. 41.26 crores to the Appellant on the ground that these are based on the estimates, each year they have deferred and, therefore, it is difficult to allow this claim. The exact assumption under this head of expenses was not available due to reasons beyond the control of the Appellant. It is not practicable to predict such an expense while projecting the expenses under various heads. When the Appellant has provided data concerning the Prior Period Expenses for the last 10 years and had made a reasonable assumption of estimation under this head for the FY: 2008-09, the State Commission simply disallowed the same



observing that this claim can be considered at the time of truing up. The State Commission ought not to have rejected this entire claim at this stage.”

11. The next issue relates to the “Disallowance of Reduction in Power Purchase Cost due to fictitious calculation of Transmission and Distribution loss”. On this point, the Learned Counsel for the Appellant would make the following submissions.

“The State Commission fixed the transmission and distribution loss at 17.92% though the transmission and distribution loss target proposed by the Appellant Electricity Board for FY 2008-09 is 18.48%. The State Commission has factored the additional target of 0.56% equivalent to 110 million units of energy. The State Commission has not approved the power purchase of 110 million units and adjusted the power purchase price therefor from the costliest power plant i.e. from Naptha based BSES station. Based on such adjustment from the costliest power plant, the State

Commission reduced the power purchase cost from 2674.65 crores to Rs. 2603.92 crores. The above factoring is fictitious computation. Even if the transmission and distribution loss was reduced to the extent fixed by the State Commission, the sales would remain the same. In other words, even if any adjustment is ought to be made on account of 0.56%, such adjustment should be made on the basis of the pooled power purchase cost rather than the price of the costliest power purchase.

12. The next issue is relating to the “Fixation of Transmission and Distribution losses”. On this issue, the following submissions are made by the Learned Counsel for the Appellant.”

“The State Commission does not employ any mathematical or scientific mechanism to assess the target at which transmission and distribution losses have to be fixed. In the ARR for FY 2008-09, the Appellant gave the transmission and distribution loss reduction target from 20.11% in the

year FY 2007-08 to 18.48% for the year FY 2008-09. This is a reduction of 1.63% from FY 2007-08 based on the actual figures achieved up to September 2007. The said proposal was given for the loss reduction target at 18.48% for the year FY 2008-09, considering the capital works in transmission and distribution including faulty meter replacements, etc; during the remaining part of the year FY 2007-08 and FY 2008-09. However, the State Commission in the impugned order has fixed the loss reduction target as 17.92% only for the FY 2008-09. The State Commission fixed the transmission and distribution reduction loss at 19.55% for the year FY 2007-08. Now the State Commission adopted the same as base for arriving at the transmission and loss reduction losses for the year FY 2008-09 at 17.92%. Over the years, the State Commission had been fixing the transmission and distribution loss level targets without any scientific study and correct mathematical calculations. As such, the State Commission, has been penalising the Appellant for not achieving such targets. Due to the

continuous efforts taken by the Appellant, the transmission and distribution loss has been considerably reduced by 10.66% in the last 6 years but this aspect has not been taken into consideration.”

13. The next issue relates to “Disallowance of Other Debits”. The gist of the submissions on this issue, made by the Learned Counsel for the Appellant, is as follows.

“The State Commission has disallowed an amount of Rs. 402 crores for the FY 2008-09 proposed to be written off by the Appellant which is not likely to be recovered as this amount related to prior to the constitution of the State Commission.

The following facts are relevant in this regard:

(A) As On 31.03.2006, an amount of Rs. 4098.32 Crores was due from the State Government to the Appellant as subsidy for maintaining 3% rate of return as per section 59 of the Electricity Supply Act 1948. In addition to the

above, subsidy of Rs. 387.03 crores was due from the State Government for allowing tariff concessions for maintaining pre-1992 tariff to the industrial consumers for a period of 5 years from 01.01.1992. The Appellant had to pay Rs. 2483.05 crores towards as electricity duty payable, guarantee commission, State Government loan, etc. Thus the net amount due to the Appellant from the State Government as on 31.03.2006 was Rs. 2002.30 crores.

(B) The State Government had constituted a Committee to suggest suitable ways to the Government to settle the dues of the Appellant from the Government. The Committee, after discussions, submitted its recommendations to the Government on 25.11.2006.

(C) The Government through the order dated 09.10.2002 had decided to net off the dues between the Appellant and the

State Government. The State Commission was constituted thereafter and it assumed its office on 29.11.2002.

(D) The Committee constituted by the State Government recommended that the balance after netting of dues of Rs. 2002.30 crores will be written off by the Appellant in 5 years starting from FY 2006-07 @ Rs. 400 crores each year. After providing the write off of Rs. 400 crores, if the Appellant goes into revenue deficit in any of these 5 years, the gap in revenue will be covered by the Government by providing subsidy, if the same is ordered by the State Commission. Such a subsidy will be paid in cash by the State Government. Pursuant to the above, the Board of the Appellant on 25.05.2007 accepted the netting off dues as per the State Government's order dated 25.11.2006. Despite the above position, the State Commission in the impugned order has not approved the amount proposed to be written off for the FY 2008-09."

14. The next issue is with reference to the “Disallowance of Administrative and General (A&G) expenses/electricity duty”. This issue has been explained by the Learned Counsel for the Appellant in the following manner.

“The State Commission has refused to allow electricity duty paid by the Appellant under section 3(1) of the Kerala Electricity Duty Act as a pass through in the A&G expenses by wrongly relying on the section 3(3) of the Kerala Electricity Duty Act. The State Commission has failed to appreciate that the Appellant has necessarily incurred this expenditure and there is essential cash outflow of Rs. 76.45 crores on account of Electricity Duty. The Government of Kerala specifically issued a clarification to the State Commission with regard to the Electricity Duty under section 3(1) of the Act to be booked as revenue expenditure under Administration and General Expenses. This has been wrongly ignored by the State Commission.

15. In reply to these above submissions, the Learned Counsel for the Respondent argued at length in defending the impugned order and filed Written Submission pointing out the reasons in justification of the finding with regard to disallowance of various claims in the impugned order.

16. In the light of the above rival contentions, the following questions will arise for consideration.

- (i) Whether the State Commission erred in not admitting in full the interest estimated for the additional borrowings for the FY 2007-08 and FY 2008-09?
- (ii) Can the State Commission ignore the direction issued by the State Government by a policy directive under Section 108 of the Electricity Act, 2003 to allow the Appellant to count depreciation as per rates notified by the



Ministry of Power, Government of India through  
Notification dated 29.03.1994?

(iii) Whether the State Commission erred in denying Prior  
Period Expense which is a necessary accounting entry as  
per the prevailing accounting practices?

(iv) Whether the State Commission was right in reducing the  
Power Purchase cost due to difference in transmission and  
distribution loss reduction target set up by the  
Commission and the proposed loss reduction by the  
Appellant?

(v) Whether the State Commission erred in fixing transmission  
and distribution loss reduction target on a general  
presumption basis without any study and analysis?

(vi) Whether the State Commission has any authority to deny  
the amount proposed to be written off by the State

Government which was a decision taken well before the constitution of the State Commission?

(vii) Can the State Commission deny the Electricity Duty payable by the Board to the Government which forms part of the Administration & General Expenses of the Board, which is a revenue expenditure?

17. On these questions we have heard the arguments at length advanced by the respective Learned Counsel for the parties. We have carefully considered the same. Let us now deal with each one of the issues framed above.

18. Let us first take up the issue relating to the Disallowance of Interest and Finance Charges. According to the Learned Counsel for the Appellant, the State Commission approved capital investment of Rs. 1146.09 crores as proposed by the Appellant but towards meeting the interest cost for additional borrowings for 2007-08 and 2008-09 required for capital works, the State Commission has merely approved Rs. 19.55 crores as interest

charges as against the claim of Rs. 61.49 crores. On going through the impugned order, it is clear that the State Commission has provisionally provided interest and finance charges as Rs. 365.6 crore while analysing the ARR for the FY 2008-09 even though the proposed claim by the Appellant was only Rs. 357.31 crores. This means, the State Commission allowed more amount than what was proposed. What is disallowed is the exaggerated figure of interest on additional borrowings. If there is borrowing of additional capital, it can always be adjusted in the truing-up proceedings. The Appellant is aggrieved over the allowance of mere Rs. 19.55 crores as against the claim of Rs. 61.49 crores under the head interest for additional borrowings for the year FY 2007-08 and FY 2008-09. While analysing this claim, the State Commission has relied upon the Petition filed by the Appellant for determining the ARR & ERC and it was found out that there were large amounts of short-term deposits in the Balance Sheet shown in the ARR petition. Further, the expected income from deposits is also shown as non-tariff income. As per the provisional accounts of the Appellant submitted later, the total short-term deposits

shown is Rs. 1448 crores and Rs. 963 crores respectively for the year FY 2007-08 and FY 2008-09. At the time of issuing orders, the audited accounts were not available and the data based on the Petition only were available and they were relied upon. On the basis of data submitted by the Appellant, on comparison of actual, the State Commission has decided the estimate of interest and financing charges. The actual borrowing was almost nil compared to the projections made by the Board in their Petition.

19. The next question is relating to the Disallowance of Depreciation claimed by the Appellant. On this issue, it was contended by the Learned Counsel for the Appellant that there is a policy directive dated 16.12.2006 issued by the State Government under section 108 of the Electricity Act 2003, whereby the State Government directed the State Commission to allow the Appellant's depreciation as per rates notified by Ministry of Power through the notification dated 29.03.1994 and the State Commission did not follow this direction. In the present case the claim for depreciation was made to the tune of Rs. 459.30 crores

and the State Commission allowed the depreciation amounting to Rs. 290.69 crores based on the Central Commission guidelines. In this case para 5.3 (c) of the National Tariff Policy 2006 published by the Government of India is quite relevant. The same is as follows:

*“The Central Commission may notify the rates of depreciation in respect of generation and transmission assets. The depreciation rates so notified would also be applicable for distribution with appropriate modification as may be evolved by Forum of Regulators. The rates of depreciation so notified would be applicable for purpose of tariffs as well as accounting”*

20. It is noticed from the records that the Secretary of the Forum of Regulators communicated to the State Commission that the depreciation rates as specified in the CERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 may be treated as the rates of depreciation for the purpose under para 5.3 (c) of

National Tariff Policy dated 06.01.2006. Hence as per the provisions under the Electricity Act, 2003, the depreciation rates for determination of tariff and for accounting for all practical purposes would be the rates notified by the Central Commission in relation to the generation, transmission and subsequently adopted for distribution by the Forum of Regulators. Further, the National Tariff Policy, 2006 clearly states that these rates of depreciation will be used for the purposes of tariff as well as accounting. The Appellant has contended that the Government of Kerala has issued a direction under Section 108 as a policy directive directing the State Commission to allow the Appellant the amount of depreciation as per the rates notified by the Ministry of Power in 1994 and the State Commission has not acted under this direction.

21. The depreciation is an important element in the tariff fixation. Under section 61 of the Electricity Act, 2003, the Appropriate Commission shall specify the terms and conditions for the determination of tariff and in doing so, shall be guided by the principles and methodology specified by the Central

Commission for determination of the tariff applicable to generating companies and transmission licensees and the Tariff Policy. Therefore, the State Commission is well within its right to follow the Central Commission guidelines.

22. It is settled law as laid down by this Tribunal as well as by the Hon'ble Supreme Court, that all the policy directions are not binding on the State Commission since the State Government cannot curtail the powers of State Commission in the matter of determination of tariff. We will refer to some of the judgments on this point. The first judgment is in Appeal No. 4, etc. of 2005 (*SIEL Limited Vs. Punjab State Commission*). In this judgment the Tribunal decided that the State Commission has the powers to determine the tariff and the orders under section 61 and 62 of the Act relating to tariff will bind the State Governments. It is also held in this decision that the Commission is an independent statutory body and its directions being in terms of the Act are definitely binding on the Board whose *de jure* owner is the State.

The relevant extract of this judgment are reproduced below:-

*“The Appropriate Commission while determining tariff under section 16 of the Act is required to be guided by the factor and parameters enshrined therein. One of the factors on the basis of which tariff is to be determined is the consumer interest. Sub-clause (d) of Section 61 requires the Commission to safeguard the interest of the consumers and ensure that the recovery of the cost of electricity is effected in a reasonable manner. This was also one of the requirements under Section 2(2)(e) of the Act of 1998.*

*The aforesaid provisions of the Act of 2003 and the Act of 1998 are not hedged in with the limitation that in case the State Government or any other authority has allocated an unwarranted cost to the generator or a licensee, it can not be interfered with, even when such a cost may be imprudent and unjust and not in the interest of the*



*consumers. Otherwise the cost loaded by the State Government on the Board will have to be allowed by the Commission for the purposes of tariff and the ARR of the Board. In case such a limitation is read, into the aforesaid provisions, the purpose of the Act including section 63 will be frustrated. Since the Commission has the power to determine the tariff and the ARR of a utility, it has all the incidental and ancillary powers to effectuate the purpose for which power is vested in it. Consequently, directions or orders or the Regulatory Commission made for the purpose of determination of tariff and ARR in consonance with the provisions of the Act are binding on all the concerned parties including the State and the Board.*

*There is nothing in sections 61 and 62 of the Act of 2003 to show that orders relating to tariff will not bind the State Government. The State is not above law and it is bound to respect the mandate of the legislature. Otherwise tariff determination will not be in consonance with the various*

*factors and parameters specified in Section 61. The Commission is an independent statutory body and its directions being in terms of the Act are definitely binding on the Board whose de jure owner is the State. The ultimate end effect shall be on de jure owner viz., the State of Punjab.*

*In view of the aforesaid analysis, we hold and direct that:-*

*(i) Commission is not powerless to issue orders and directions relating to matters having a bearing on and nexus with the determination and fixation of tariff and its directions shall be binding on all persons and authorities including the State Government in this case. [Emphasis supplied]”*

23. The Hon’ble Supreme Court in 1995 (3) SCC 295 (*Real Products Limited Vs. A.P. State Electricity Board*) has held as

*follows:*

*“ Where the direction of the State Government, as 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.”*

24. The next decision is 2001 (1) SCC 396 *Chittor Zilla Vyavasayadarula Sangham vs. A.P. State Electricity Board & Ors.*

The relevant observation is as follows:

*“ It is clear that the Board would not be bound to follow every policy direction. .... It is for this and other reasons that the statute mandates the 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 the Government can (sic has) 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 a permissible limit.”*

25. Further, when the direction regarding the depreciation is to be applied, it can only be under section 65 of the Act. In that event, the difference between the depreciation calculated on the basis of the Government direction and the amount determined by the State Commission shall be paid in advance by the State Government.

26. In view of the above principles, we are of the view that the State Commission is perfectly in its right to disregard the directive through a letter by the Government, on rates of depreciation as applicable for determination of ARR and ERC. Therefore, the contention of the Appellant would fail.

27. The next issue is disallowance of Prior period Expenses. The Learned Counsel for the Appellant, on this point, contended that the State Commission ought to have allowed Prior Period Expenses at the stage of tariff fixation itself and it ought not to have deferred it to the stage of truing up which may take more than 5 to 6 years. With regard to the claim of Rs. 41.26 crores made by the Appellant as Prior Period charges for the FY 2008-09, the State Commission has observed that the expenses under this head cannot be projected at this stage accurately. The Board has also not provided any substantiation for projecting various items. These charges could be captured only at the stage of truing up and not at the time of passing tariff order on the basis of the estimates.

28. The State Commission has rightly observed that expenses under this head cannot be projected accurately. The Commission has already stated in the impugned order that the prior period charges could be covered in the truing up exercise. Therefore, the disallowance of the Prior Period charges at this stage is perfectly justified.

29. The next issue is relating to the disallowance of reduction in the Power Purchase cost. On this point, the Learned Counsel for the Appellant submitted that this point is already covered by the Tribunal in its judgment dated 12.11.2009 in Appeal No. 94/09 and also in judgment dated 04.12.2007 in Appeal No. `100/07 wherein the Tribunal accepted the contention of the Appellant and therefore the same relief should be granted in this case also. We have gone through these two judgments. Those judgments cited by the Learned Counsel for the Appellant will not be applicable to the present fact of the case.

30. The point covered in the above judgment is that while estimating power purchase cost, the additional cost of purchase of power due to the difference in loss reduction target and the proposed loss reduction by the utility can be denied but then the Commission should not add revenue on the basis of the imaginary sale from the additional power purchased. In this case, such a question has not arisen. In the present case, the State Commission

has not added the revenue on the basis of imaginary sale of power on the basis of additional power purchased and, therefore, the case cited by the Appellant is not applicable to the present case.

31. In the Regulations, 2006 dated 23.03.2006 relevant provisions have been made with regard to distribution loss and power purchase cost. As per clause 9(2), the Commission shall approve the loss target for the year under consideration based on the opening loss levels, licensee's filings, submissions and objections raised by the stake-holders and this approved loss target shall be used for computing power purchases/sale of power to consumers for that year. Clause 10(2) provides that the Commission shall not consider the additional power purchase beyond the approved level of power purchase. As per clause 10(5) the Commission, based on merit order dispatch may allow the licensee to procure power from generating companies/other sources in order to optimize the cost of power procured. Therefore, in accordance with clause 9(2), 10(2) and 10(5) of the Regulation 2006, the State Commission acted in accordance with the said

regulation. It is also to be noted that the impugned order has been passed by the State Commission on power purchase cost, after taking into consideration all relevant factors and provisions of law and the contentions of the affected parties. Therefore, there is no merit in the claim of the Appellant.

32. Let us now take the next issue relating to the Fixation of Transmission and Distribution losses. According to the Learned Counsel for the Appellant, the State Commission does not employ any mathematical mechanism to assess the target at which transmission and distribution losses is to be fixed and therefore, the Tribunal has to devise a mechanism by which to assess the target for fixing the transmission and distribution losses and the State Commission should not be allowed to fix the same at its whims and fancies.

33. One of the key areas of performance improvement required for any utility seeking to operate according to commercial principles is in the area of transmission & distribution losses. The



Kerala State Electricity Regulatory Commission (Terms & Conditions of Tariff for Retail Sale of Electricity) Regulations, 2006 dated 23.03.2006 set out the manner in which losses will be regulated, as under:

*“9. Distribution Loss – (1) The licensee shall carry out proper loss estimation studies as required by the Commission, to set a realistic base line of loss estimates at different voltage levels and in relation to different consumer categories.*

*(2) The Commission shall approve a loss target for the year under consideration based on the opening loss levels, licensee’s filings, submissions and objections raised by the stakeholders. This approved loss target shall be used for computing power purchases/sale of power to consumers for that year.*

*(3) The licensee shall have to share with the consumers part of the financial gains arising from achieving higher loss reduction vis-à-vis the target. Losses on account of*

*underachievement of loss reduction target shall be entirely borne by licensee.*

34. The State Commission has, on numerous occasions, directed KSEB to conduct relevant baseline studies and submit the results to the Commission for its consideration. However, the Board has consistently refused to comply with these directives. Hence the Commission has, as per section 9(2) of the relevant regulations, set loss targets for the Appellant.

35. The State Commission has accepted the loss reduction target suggested by the Appellant as 1.63%. The difference in the requirement of power is due to the method of calculation. The State Commission has taken previous year's figure as estimated whereas the Board has taken the actual figure without achieving the loss reduction target for the previous figure. The loss reduction target fixed by the Commission is based upon the proposal of the Appellant itself. Even now the Appellant has not initiated detailed study of estimate on technical and commercial loss in the system,

even after repeated directions by the Commission. In the absence of proper study and estimates projected by the Appellant, the Commission was constrained to rely upon the data submitted by the Appellant. The Aggregate Revenue Requirement and Expected Revenue from Charges proceedings are meant to assess the financial requirement of the utility as realistic as possible and fix the tariff accordingly. The figures are on the basis of projections. The actual figures are available at the time of truing up proceedings. Unless the projections decided by the State Commission are substantially wrong, which can result in change of tariff, the order impugned can not be interfered with. According to Regulation 2006 dated 23.03.2006, the licensee shall carry out proper loss estimation study as required by the State Commission. As such, it cannot be said that the State Commission has fixed the transmission and distribution losses on its whims and fancies. In view of the above there is no merit in this claim. Hence there is no merit in this claim.

36. The next issue relates to the disallowance of other debits. According to the Learned Counsel for the Appellant, the State Commission has disallowed an amount of Rs. 402 crores for the FY 2008-09 relating to subsidy due from State Government proposed to be written off by the Appellant which is not likely to be recovered as the amount relates to prior to the constitution of the State Commission.

37. In the meeting held between State Government and Chairman of the Board held on 25.11.2006 it has been proposed to write off the dues from the Government over a period of five years against the surplus. The Government proposal mentions that if the write off leads to revenue deficit in any of these 5 years, the gap in revenue will be covered by the Government through cash subsidy if the same is ordered by the State Commission.

38. It has been observed that no operative order was issued by the Government by endorsing the decision taken in the meeting for writing off dues. The concurrence of the CAG also was not

obtained. As a matter of fact, the Additional Secretary of the Power Department of the State of Kerala was present before the State Commission and stated that the issue of writing off dues is under the consideration of the Government. In these circumstances, the writing off has no legal status. The Appellant has made the claim completely in an improper manner without proper authority as certified by the CAG. The illegal acts cannot be allowed as defence in the ARR estimates and later correct in the truing up. If that is done, it would mean that the consumers have to pay in advance which would have to be returned. In view of the said situation, the State Commission decision not to accept the proposal of writing off the dues is correct.

39. The dues from the Government to the Appellant are on account of unpaid subsidy commitment. As per section 65 of the Electricity Act, 2003, if the Government requires grant of subsidy to any consumer category, the Government has to provide the monetary compensation to the licensee concerned in advance. The

Section 65 of the Act reads as follows:

*“65. If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government.*

*Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard”.*

40. Thus, it is clear the Appellant should not provide the subsidy to the relevant consumer category in the absence of advance subsidy payment made by the State Government. As such, the very act of the Appellant in providing subsidy in the absence of the payment towards meeting the net realisation on account of providing subsidy, is against the Electricity Act, 2003. The proposed write off of the dues from the Government to the Appellant involves approximately a sum of Rs. 400 crores per annum which becomes a component of ARR. The proposed write off is merely an attempt by the Government and the Appellant to pass on the financial burden by providing the subsidy to certain consumer category to the entire consumer base of the Appellant. Therefore, disallowance of the other debits is perfectly justified.”

41. The next issue is with reference to the disallowance of Administration & General Expenses/Electricity Duty. This issue has already been dealt with by the Tribunal in its earlier judgment

dated 12.11.2009 in Appeal No. 94/09 and rejected the claim. As such, this point has already been decided as against the Appellant.

42. According to the Appellant, the Electricity Duty payable to the Government of Kerala is Rs. 76.45 crores which forms a significant portion of the A&G expenses for the FY 2008-09. It is also the case of the Appellant that the total A&G expenses proposed by the Appellant for the FY 2008-09 are Rs. 140.06 crores and despite the increase in the above expenditure over the years, the percentage of the total revenue expenditure is more or less the same. As a matter of fact, the State Commission has disapproved the Electricity Duty payable to the State Government on the ground that according to section 3 of the Kerala Electricity Duty Act, the duty payable by the licensee to the Government will be on account of licensee and the same should be borne by the licensee alone and shall not be passed on to the consumers. Therefore, the State Commission has approved only Rs. 61.99 crores towards A&G expenses. As indicated above, this issue has



already been decided as against the Appellant in Appeal No. 94 of 2008 dated 12.1.2009. As such there is no merit in this issue.

**43. SUMMARY OF OUR FINDINGS**

- (i) **The Appellant claimed interest cost for existing loan as Rs. 61.49 crores but the State Commission approved Rs. 19.55 crores. In fact, the proposed claim by the Appellant in the ARR for the FY 2008-09 was Rs. 357.31 crores. However, the State Commission has provisionally approved interest and finance charges as Rs. 365.6 crores. That means the State Commission allowed more amount than what was proposed. What is disallowed is the exaggerated figure of interest on additional borrowings. If there is additional borrowings, it can always be adjusted in the truing up exercise. At the time of issuing orders the audited accounts were not available and the data**

based particulars given in the Petition were only available and they were relied upon. On the basis of the data submitted by the Appellant, the State Commission decided the interest and finance charges. If there is a borrowing of additional capital, the same can be considered at the time of truing-up proceedings. Therefore, the amount allowed by the State Commission with reference to interest and finances is justified.

- (ii) The State Government directed the State Commission by the directive dated 16.12.2006 to allow the Appellant's depreciation as per rate notified through the notification dated 29.03.1994. However, in this case, the State Commission allowed a depreciation only to the extent of Rs. 290.69 crores based upon the Central Commission guidelines as provided in para 5.3(c) of the National Tariff Policy, 2006, even though the Appellant claimed

**depreciation of Rs. 459.30 crores. The grievance of the Appellant is that the direction under section 108 of the Act has not been followed by the State Commission. The depreciation is an important element in the tariff fixation. Under section 61 of the Act, the Appropriate Commission shall determine the tariff and in doing so, shall be guided by the methodology specified by the Central Commission and the Tariff Policy. This Tribunal as well as the Hon'ble Supreme Court have held that policy directive issued under section 108 are not binding on the State Commission since the State Commission is the competent authority in the matter of determination of tariff and the State Government cannot curtail the powers of the State Commission. Therefore, the State Commission is perfectly right in following the National Tariff Policy and the Central Commission guidelines in**

**preference to the directive issued by the Government through the letter.**

**(iii) With regard to claim on Prior Period charges, the State Commission deferred the issue to the stage of truing-up. The State Commission observed that the expenses under this head cannot be projected at this stage accurately. The Commission has rightly held that the prior period charges could be covered in the truing up exercise. Therefore, disallowance of Prior Period charges at this state is perfectly justified.**

**iv) In the present case, the State Commission has not added revenue on the basis of the imaginary sale of power on the basis of additional power purchased. Clauses 9(2), 10(2) and 10(5) deal with the Power Purchase Cost. As per clause 9(2), the State Commission shall approve the loss target for the year under consideration based on the opening loss**

**level, licensee's filings, submissions and objections raised by the stakeholders. This approved loss target shall be used for computing the power purchase/sale of power to consumers. Under clause 10(2), the State Commission shall not consider the additional power purchase beyond the approved level of power purchase. Under clause 10(5), the State Commission may allow the licensee to procure power from generating companies in order to optimize the cost of power procured. In accordance with these clauses of Regulations 2006, the State Commission acted and accordingly the impugned order has been passed by the State Commission on power purchase cost. Since the finding is on the basis of the Regulations, it does not warrant interference.**

- v) With regard to the issue of Fixation of Transmission and Distribution losses, the State Commission have**

accepted the loss reduction target as suggested by the Appellant as 1.63%. The difference in the requirement of power is due to the mathematical calculations. The State Commission has taken the previous year's figure as estimated, whereas the Appellant has taken the actual figure without achieving the loss reduction target for the previous year. The State Commission has on numerous occasions directed the Appellant to conduct relevant baseline studies and submit the results to the State Commission for its consideration, but even then the Appellant has consistently refused to comply with this directive. The loss reduction target fixed by the State Commission is based upon the proposal of the Appellant itself. Till now the Appellant has not initiated the detailed study of estimates on technical and commercial loss in the system. In the absence of the proper study and the estimates, the State Commission was constrained to rely upon the data

available before it, as submitted by the Appellant for fixing the Transmission and Distribution losses. Hence, the finding on his aspect by the State Commission is correct.

- vi) According to the Learned Counsel for the Appellant, the State Commission has disallowed an amount of Rs. 402 crores for the FY 2008-09 against other debit proposed to be written off by the Appellant. The dues from the Government to the Appellant are on account of unpaid subsidy commitment. The proposal of the Committee constituted by the Government is to write off the dues from the Government as against the surplus without affecting the tariff determination. If the writing off leads to any revenue deficit in any of the written off period, the same will be covered by the Government through cash subsidy. The Additional Secretary of the Power Department of the State of Kerala, who was present before the State

**Commission, had admitted before the State Commission that the issue of writing off dues has not been yet decided and is still under the consideration of the Government. No operative order has yet been issued by the State Government. The concurrence of CAG has also not been obtained. In these circumstances, the writing off has no legal status. In view of the said situation, the State Commission is right in not allowing the writing off. Under section 65 of the Act, if the Government require grant of subsidy to any consumer category, the Government has to provide the monetary compensation to the licensee concerned in advance. The proposed write off of the dues from the Government to the Appellant involves approximately Rs. 400 crores per annum which becomes a component of ARR. This huge sum cannot be allowed to be passed on from certain consumer category to the entire consumer base of**



**the Appellant. Therefore, disallowance of the other debits is perfectly justified.**

- vii) The total Administrative & General Expenses proposed by the Appellant for FY 2008-09 is Rs. 140.06 crores. The State Commission has disapproved the electricity duty payable to the State Government on the ground that Section 3 of the Kerala Electricity Duty Act provides that the duty payable by the licensee to the Government will be on the account of licensee and the same should be borne by the licensee alone and the said amount should not be passed on to the consumers. Therefore, the State Commission approved only Rs. 61.99 crores towards A&G expenses. This finding, in our view, is correct.**

44. In view of the discussions made in the foregoing paragraphs and also summary of our findings, we do not find any ground to

interfere with the findings of the State Commission with reference to various claims referred to above.

45. As such the Appeal is liable to be dismissed and is accordingly dismissed.

No Costs.

**(RAKESH NATH)**  
**TECHNICAL MEMBER**

**(JUSTICE M. KARPAGA VINAYAGAM)**  
**CHAIRMAN**

REPORTABLE/NON-REPORTABLE

**Dated: 18<sup>th</sup> August, 2010**