

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 25 of 2011

Dated 30th May, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member
Hon'ble Mr. V.J. Talwar, Technical Member

In the matter of:

Kanan Devan Hill Plantations Company Pvt. Ltd.
KDHP House,
Munnar – 685612

...Appellant(s)

Versus

1. Kerala State Electricity Regulatory Commission
C.V. Raman Pillai Road, Vellayambalam,
Thiruananthauram – 695010
Kerala
2. Kerala State Electricity Board
Vydhuthi Bhavan, Pattom,
Thiruananthauram – 695010
Kerala

...Respondent(s)

Counsel for the Appellant (s) : Mr. Joseph Kodianathara,
Sr. Advocate
Mr. M.P. Vinod
Ms. Neelam Saini

Counsel for the Respondent(s) : Mr. M.T. George,
Mr. Ramesh Babu
Mr. Sreenivasan for R-2

1

Appeal No.107 of 2011

In the matter of:

Kinsesco Power and Utilities Private Limited
306, CFC Building, Kusumagiri,
Kakkanad, Kochi – 682030

...Appellant(s)

Versus

1. Kerala State Electricity Regulatory Commission
C.V. Raman Pillai Road, Vellayambalam,
Thiruananthauram – 695010
Kerala
2. Kerala State Electricity Board
Vydhuthi Bhavan, Pattom,
Thiruananthauram – 695010
Kerala

...Respondent(s)

Counsel for the Appellant(s) : Mr.Anand K.Ganesan &
Ms. Swapna Seshadri

Counsel for the Respondent(s) : Mr. M.T.George for KSEB
Mr.Ramesh Babu for R-1

Appeal No.127 of 2011

In the matter of :

Cochin Special Economic Zone (CSEZ),
Ministry of Commerce & Industry,
Department of Commerce,
Government of India,
Kakkanad, Kochi-682 037,
Kerala, represented by its Development Commissioner
Mr.C.J.Mathew

...Appellant(s)

Versus

1. Kerala State Electricity Regulatory Commission
C.V. Raman Pillai Road, Vellayambalam,
Thiruananthauram – 695010
Kerala
2. Kerala State Electricity Board
Vydhuthi Bhavan, Pattom,
Thiruananthauram – 695010
Kerala

...Respondent(s)

Counsel for the Appellant (s) : Mr. Joseph Kodianathara,
Sr. Advocate
Mr. M.P. Vinod
Ms. Neelam Saini

Counsel for the Respondent(s) : Mr. M.T. George,
Mr. Ramesh Babu
Mr. Sreenivasan for R-2

Appeal No.151 of 2011

In the matter of :

Cochin Port Trust,
Willingdon Island,
Cochin, Kerala-682009
Represented by
The Chief Mechanical Engineer,
Capt. Paul.N. Joseph

...Appellant(s)

Versus

1. Kerala State Electricity Board
Vydhuthi Bhavan, Pattom,
Thiruananthauram – 695010
Kerala
Represented by
Chief Engineer (Commercial & Tariff)

2. Kerala State Electricity Regulatory Commission
C.V. Raman Pillai Road, Vellayambalam,
Thiruananthauram – 695010
Kerala
Represented by its Secretary

...Respondent(s)

Counsel for the Appellant (s) : Mr.P.C.Abraham
Mr. Ritin Rai
Mr. Siddhartha Jha

Counsel for the Respondent(s) : Mr. M.T. George,
Mr. Ramesh Babu for R1
Mr. Sreenivasan for R-2

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. A volley of questions while deciding the four appeals arise: a) whether the Commission can determine or enhance the bulk supply tariff at a flat rate applicable to different licensees in their respective areas of distribution? ,b) whether the parameters laid down in section 61 of the Act should not be followed?, c)whether, more particularly, criteria such as costs, expenses, availability of power, consumer base, consumer mix, efficiency of operations, financial viability of each licensee, distribution loss, geographical position which would vary from licensee to licensee should not have been considered?, d) whether there can be a uniform increase of bulk supply tariff applicable to the different licensees, e) whether in revising the bulk supply tariff the consumers of different licensees have really subsidized the consumers of the Kerala State Electricity Board?, f) whether there can be a provisional hike in bulk supply tariff as done by the Kerala State Electricity Regulatory Commission

in the impugned order?, g) whether there can be increase of bulk supply tariff without increase or revision of retail supply tariff of each distribution licensee purchasing power from the Kerala State Electricity Board?, h) whether the Commission is absolutely unlawful on the facts and circumstances of the case as was presented before it by the KSEB in revising the Bulk Supply Tariff ? In the body of this judgement we will be addressing to these questions.

2. appeal No 25 of 2011, appeal No 107 Of 2011, appeal No. 127 of 2011 and appeal No. 151 of 2011 preferred by Kanan Devan Hills Plantations Pvt. Ltd., Kinesco Power & Utilities Pvt. Ltd., Cochin Special Economic Zone, and Cochin Port Trust respectively are being disposed of by this Judgment and order in view of all the four appeals being directed against the order dated 13.12.2010 common to all the appellants(as also others who have not come up in this appeal) passed by the Kerala State Electricity Regulatory Commission in a suo motu proceeding whereby the Commission increased the Bulk Supply Tariff (BST) chargeable against these appellants and others, who are all distribution licensees, by the Kerala State Electricity Board, one of the respondents herein, who qua the appellants are suppliers of electricity.

3. In all the appeals some grounds are common while some are alleged to be special and peculiar in respect of the respective appellants. So far as the Kerala State Electricity Board and the State Commission are concerned, their approach is uniform vis-à-vis the appellants. For proper appreciation of the merit of each of the appeals it is better to mention the facts pleaded by each of the

appellants where after upon recording the contentions of the respondents we will proceed to the deliberations of the four appeals.

4. Contention of the appellant in appeal No. 25 of 2011. This appellant, a successor in interest of M/S Tata Tea Limited is said to be a employee-owned company with a total labour strength of 13,000 and 97% of them are shareholders of this company. It supplies electrical energy to its tea estates, factories, residence of the employees, and other utilities in and around Munnar in the State of Kerala. On 24.7.2009 the Board filed a tariff application before the Commission proposing therein a flat increase of 25% in the existing BST applicable to the licensees and bulk consumers but the Commission in its tariff order dated 2.12.2009 deferred the revision of BST as was proposed by the Board till the Commission was able to examine the ARRs and ERCs for the year 2010-2011. Then, the Commission suo motu took up the matter after the ARRs and ERCs for the year 2010-2011 of the licensees were finalised. Like other appellants the present appellant also had put in objections but the Commission after overruling the objections passed the impugned order enhancing the BST uniformly at 15% in energy charges which according to the appellants, has serious financial impact upon its distribution business. The grounds urged before the Commission as also this Tribunal are as follows:

- a) BST should be based on the consumer mix of each licensee and no uniform increase of tariff should be implemented.
- b) The appellant's Aggregate Revenue Requirement & Expected Revenue Charge for Financial Year 2010-11 reflects a surplus of only Rs.6.23 lac even after incorporating the increase in the

appellant's BST as envisaged in the previous revision with effect from 1.12.2007.

- c) The surplus of Rs 6.23 lac is still on higher side as it was estimated by disallowing certain genuine expenses and arbitrarily enhancing the income.
- d) This enhancement would entail power purchase cost of Rs 165 lac causing deficit of Rs.159 lac.
- e) The appellant serves the rural hilly terrain mainly to plantation labourers consuming power at the subsidized minimum domestic tariff and to the tea factories operating in the area which are not at all conducive to, nor warranted by the enhancement of the BST.
- f) Actual cost of distribution of the appellant has not been considered.
- g) The proposed tariff at Rs.3.12 per kWh (Rs3.28 per kWh less 5% rebate) is irrational, illegal and without justification. The tariff of Rs.3.12 per kWh would amount to Rs.3.63 per kWh of saleable units after providing for the permitted line loss of 14%. In the year 2009-10 out of 34.57 million units kWh actually sold /self consumed only 4.16 million units were billed at a energy tariff of more than Rs3.63 per kWh. This would lead to a precarious situation whereby the appellant will have to purchase power for supplying power to the tea factories operating in the area at Rs.3.63 per unit and supply to them at Rs3.00 per unit thereby rendering the entire operations unviable.
- h) The small amount of surplus would be exhausted within a period of few months if BST is increased in the case of the appellant

5 The Kinesco Power and Utilities Private Limited, the appellant in the appeal no 107 of 2011 has its own history of creation though

for the purpose of the merit of the appeal the facts are not too large. This appellant now engaged in the business of distribution of electricity at the industrial parks at Kakkanad, Kalamassery and Palakkad areas in the State of Kerala is an outcome of a Joint Venture Agreement dated 24.7.2008 executed by and between the Kerala Industrial Infrastructure Development Corporation (KINFRA) and M/S NTPC Electricity Supply Company Limited (NESCL), each holding 50% share. Pursuant to this, the appellant was incorporated in September, 2008 to take over the distribution license and assets of M/S KINFRA Export Promotion Industrial Parks (KEPIP) in the aforesaid three places of the State of Kerala. KEPIP is said to be the wholly subsidiary company of KINFRA and, consequently is a Government of Kerala undertaking. Prior to the appellant taking over the distribution functions in its area of supply the areas were being catered through distribution by KEPIP. It is contended that the appellant did not take over KEPIP but only took over the specified distribution assets of KEPIP or its business as a going concern. However, on 30.11.2009 the State Commission passed an order issuing license to the appellant for distribution of electricity at the industrial parks in the three areas of the State. It is contended that the transfer of assets from KEPIP to the appellant on its balance sheet is under process and is pending for procedural compliances and approvals. The said distribution assets in the area of operation of the appellant previously held by KEPIP are with effect from 1.2.2010 being operated and maintained by the appellant and being utilized for the distribution and retail supply activities of the appellant. The appellant is also in the process of expanding its distribution network to cater to the increasing demand within its area of operations. But the appellant has not succeeded to any surplus

alleged to be in the hands of KEPIP. Only the distribution assets of KEPIP were to be transferred to the appellant and the appellant was not taking over the KEPIP as a company or its liabilities and obligations. In this background the Commission's order dated 13.12.2010 increasing bulk supply tariff that affects the appellant suffers from following infirmities:-

- a) The Commission overlooked the fact that no part of the liabilities or other assets including cash and bank balances etc. were transferred to the appellant.
- b) The alleged surplus of Rs7.55 crore was not in the hands of the appellant when the appellant started the distribution business on taking over from the KEPIP.
- c) The Commission overlooked the fact that only the distribution assets of the KEPIP were to be transferred to the appellant and the appellant did not take over the KEPIP as a company.
- d) The KEPIP continued as a corporate entity with various other functions of the State Government for industrial promotion in the State.
- e) Surplus, if any, ought to be passed on to the consumers and not by way of revising the bulk supply tariff.
- f) The Commission erred in assuming the surplus to the account of the appellant and consequently increasing the bulk supply tariff payable to the Board.

6. The appellant in appeal no 127 of 2011, Cochin Special Economic Zone caters to the need of 134 consumers in the Zone and 90% of them are said to be the HT consumers and it has a Power Purchase Agreement with its bulk distributor Kerala State

Electricity Board for a contract demand of 10,000 KVA with effect from 1.1.2010. So far, the Board had been supplying power at the grid power of Rs2.75 per unit and Rs245 per KVA/month with effect from December,2007. According to the appellant, the impugned order dated 13.12.2010 by which the BST was increased by 15% is assailable on the following amongst other grounds:-

a) Any revision of the BST has to be based on the ARR & ERC projections of the Board and no uniform increase of tariff should be implemented.

b) The Commission failed to appreciate that 90% of the power purchased by the appellant is supplied to HT consumers and the remaining to the LT consumers.

c) The tried up figures of the appellant for FY 2008-09 showed a surplus of Rs134.03 lac setting apart the disputed amount of Rs.39.60 lac for refund towards the faulty metering. This is arrived at without apportioning any return on the investment of Rs12 crore made out of Consolidated Fund of India. The KERC Regulations permit 8% interest on $\frac{2}{3}$ rd of the investment and 14% dividend on Rs.4 crore and after effecting the said reductions the net surplus comes only Rs14.03 lac and even a nominal increase in the BST would upset the distribution viability of the appellant.

d) The appellant caters to a very adverse consumer mix which is not at all conducive to the enhancement of the BST.

e) The proposed tariff at Rs.3.16 per kWh is irrational, illegal and without justification. The retail supply tariff for HT consumers who constitute 90% of the appellant's consumers is Rs3.00. For the year 2010-11 the revenue of the appellant from the sale of power is Rs2395.41 lac and the expense is Rs.2239.89 lac thus rendering a

surplus of Rs.155.52 lac which is solely due to the better efficiency of the appellant by cutting down management costs and distribution loss .For the FY 2011-12 the expected revenue of the appellant is Rs.2585.42 lakh and the expense is Rs2663.72lac thereby incurring a loss of Rs78.3 lac.

f) The Commission failed to note that the Board has been inefficient in providing quality power to the units within the appellant's zone. The appellant, it being a SEZ, requires uninterrupted quality power from the Board but it failed.

g) The Commission erred in holding that the licensees are enjoying cross-subsidy.

i) The average cost of supply to the licensees/bulk consumers works out to Rs2.28 per unit as per the ARR & ERC of the Board for the FY 2010-11 after duly accounting for the transmission loss at 5% and allocating 10% of the employees' cost and other general expenses on the energy supply, whereas the Board charges the licensees at Rs.3.16 per unit.

k) The Board is being periodically compensated for by way of fuel surcharge.

l) There was no surplus available with the appellant which can be adjusted towards increase in the bulk supply tariff payable to the Board even if it is assumed though not admitting that there was surplus in the hands of the appellant.

7. Cochin Port Trust, the appellant in appeal No.151/2011 who is also a deemed distribution licensee under Section 14 of the Act and is alleged to have been affected by the Bulk Supply Tariff Order dated 31.12.2010 assails the impugned order on the following grounds:-

- a) The provisional hike of Bulk Supply Tariff by 15% results in violation of Clause 11(c) of Power Purchase Agreement which specifies that the appellant is entitled to power at rates which are lower than prevailing EHT tariff which is only Rs.2.90 per unit while the provisional hike in the result is to pay by the appellant Rs.3.16 per unit.
- b) The appellant's Aggregate Revenue Requirement & Expected Revenue Charge for Financial Year 2010-11 clearly indicated a revenue deficit of Rs.53.11lakh and not a surplus and this figure of Rs.53.11lakh will mount up to Rs.1.85crore on account of this provisional increase at 15%. As a result, this will make it unviable for the appellant to pass on / share this additional burden with the consumers in view of the uniform tariff policy now prevalent in the State.
- c) The assumption that most of the licensees have substantial revenue surplus is clearly not applicable to the appellant and further the revenue surplus in the previous years was utilised for system development with a view to rendering better service to the consumers. In appeal No.121 of 2007 and appeal No. 51 of 2010, this Tribunal held that when there is deficit in succeeding years, the surplus in the previous years cannot be passed on to the Board and in terms of the Retail Supply Regulations, 2006, if at all surplus is to be shared / passed, it should be shared or passed to the consumers and not to the Board.

- d) Sufficient surplus was available with the Board.
- e) The appellant had not been receiving supply at subsidized rate and is receiving supply at a single point.
- f) T & D loss in case of the appellant is less than 3% and the load profile is beneficial to the Board.
- g) The argument that the appellant does not have universal service obligation is wrong because the appellant is required to supply power to every consumer in its area of service irrespective of the type of consumer.
- h) The tariff hike that affects the appellant does not entitle the appellant to pass on the burden to the consumers.
- i) True-up petitions were filed periodically by the appellant according to the law and it is the Commission that has to pass order.
- j) The Commission failed to appreciate that since there is no additional cost for the Board in supplying power to bulk licensee as compared to supply of power to other consumers like EHT consumers and in view thereof, there is no cause to single out bulk licensees for unfair treatment.
- k) Appellants' power consumption is less than 10% of the energy supplied to the appellant. EHT tariff is only Rs.2.90 per unit, whereas the hike in Bulk Supply Tariff will result in

the appellant paying Rs.3.16 per unit and this would be contrary to the Power Purchase Agreement.

8 We have so far recorded the contentions of the four appellants in the manner as we find from their respective Memorandum of appeal. The Commission did not file any counter affidavit but filed a written note of submissions covering all the four appeals and the grounds taken in the written note of submissions are sought to be uniformly made applicable in respect of each of the appellants. It is contended as follows:-

- a) As per the provisions of the Electricity Act, 2003 , the Commission has to decide the price of power to be purchased by the distribution licensees either from the Generation Companies or licensees, and as per Section 86(1) (a) of the Act, the Commission has the power to decide the tariff for generation, supply, transmission, wheeling, wholesale, bulk or retail. The impugned order is perfectly in conformity with the principles of law. Sale of electricity by the Board and purchase of electricity by the licensees in bulk can be treated either as a sale by a Generation Company or a distribution licensee.
- b) In a batch of appeals being appeal No.24 of 2007, appeal No. 33 of 2007 and appeal No.101 of 2007, this Tribunal considered the matter of determination of Bulk Supply Tariff and held that determination of BST was valid and the facts of the appeal No.101 of 2007 are similar to the present case and the Tribunal held, while determining Bulk Supply Tariff, that the Commission can include in

addition to the cost of power, other costs such as demand charges, operation, financial and administrative costs for supplying power.

- c) The Board filed a petition before the Commission as far back as 24.7.2009 for increase in Bulk Supply Tariff but the Commission deferred the proposal of the Board till the Aggregate Revenue Requirement and ERC of all the licensees were examined. By October, 2010, the Aggregate Revenue Requirement and ERC of most the licensees were examined and truing up petitions were under the process of consideration and at this stage the Commission decided to examine the original petition of the Board after due process was complied with and then only the order impugned was passed on 13.12.2010.
- d) The Commission examined the revision of Bulk Supply Tariff based on the principle of uniform retail supply tariff as provided in Para 8.4.2 of the National Tariff Policy. The Power Purchase Cost is the major item of expenses of the small licensees and in a situation of uniform retail supply tariff and uniform Bulk Supply Tariff, the surplus generated by the small licensees depends on their consumer mix and Bulk Supply Tariff. The appellants having the cream of commercial industrial consumers can generate surplus even without improvement in their respective existing efficiency level. The surplus generated by the appellants is mainly on account of low power purchase cost which is at the expense of more than 98% of the consumers of the State being served by

the Board. Accordingly, the Bulk Supply Tariff had to be aligned with the cost escalation.

- e) Upon examination of the account of the appellants after truing up the Commission found that surplus is available in their book of accounts. As the appellants are eligible only to reasonable return after meeting allowable expenses, the Commission found that there is a case for revision of Bulk Supply Tariff of the appellants and accordingly, Bulk Supply Tariff was revised with enhancement at 15% in energy charges.
- f) The Commission at paragraph 22 of the order clearly observed that the tariff was purely provisional and in the Review Order dated. 24.3.2011, the Commission emphatically stated that the present revision of Bulk Supply Tariff was only temporary and Bulk Supply Tariff would be reviewed once the truing up of all the appellants are finalized and then the appellants would be given a chance to again present their case.
- g) The present provisional increase was necessary because there was no tariff increase since the year 2007 and the appellants were enjoying unrealistically low cost of power.
- h) The Commission is now following the policy of Uniform Retail Tariff for consumers in the State. The appellants themselves stated that over the years surplus has been generated which beyond the reasonable return the appellants are not entitled to.
- i) The main reason for increase was increase in the cost of procurement of power by the Board by the liquid fuel power stations, power exchanges and short term markets. Retail

Supply Tariff for the licensees was not recovered corresponding to the increase in the BST since based on the submission of the licensees themselves, most of them have substantial revenue surplus over and above the reasonable return. Accordingly, the Commission increased the Bulk Supply Tariff by 15% in energy charges only as a provisional measure; the Commission has also embarked upon a detailed study of the operations and functions of small licensees by engaging a professional consultant.

9. The above is the summary of the written note of submissions of the Commission covering all the appeals but in respect of the appeal No.107 of 2011, the Commission filed a separate counter affidavit contending as follows:-

- a) As per the truing up petition filed by the appellant for the period prior to the transfer of the license, surplus revenue was available with the transferor KEPIP. The Clause 6.0 of the Joint Venture Agreement dated. 24.7.2008 amongst KINFRA, KEPIP and NTPCECS Ltd. resulting in the formation of the appellant company specifies the condition of transfer of assets and as per the agreement all the assets and liabilities of the transferor company were taken over by the transferee company. It is, therefore, not possible for the appellant to submit that they are not accountable for the surplus, for otherwise, a utility making surplus in a particular year can transfer the license to a newly formed company and keep the surplus to themselves.

- b) The Commission examined the revision of the Bulk Supply Tariff based on the principle of Uniform Retail Supply Tariff as provided in paragraph 8.4.2 of the Tariff Policy. The power purchase cost is the major item of expense of the small licensees. In a situation of uniform retail supply tariff and uniform Bulk Supply Tariff, surplus generated by the small licensees depends on their consumer mix and Bulk Supply Tariff. The appellant having the cream of commercial and industrial consumers can generate surplus even without any improvement in their existing efficiency level.
- c) Though there has been an increase in the cost of power since the year 2007, there had been no correspondent increase in the Bulk Supply Tariff. The surplus generated by the small licensees including the appellant is mainly on account of low power purchase cost which is at the expense of more than 98% of the consumers of the State being served by the Board. The surplus generated by the appellant and similar other distribution licensees have to be distributed to all the consumers belonging to all the categories in the State.
- d) So far as the appellant in appeal No.107 of 2011 is concerned, substantial surplus is available in the books of accounts of the licensee as per the records of the licensee and M/s KEPIP.
- e) As a going concern, the appellant cannot take over only part of the assets of the distribution business of M/s KEPIP. The appellant has not furnished the closing balance sheet of the distribution business and opening balance sheet as on 1.2.2010 when the transfer of license took place. As a going concern, the appellant ought to have all the assets, liabilities and obligations of the concern that it inherits. It has not been

denied by the appellants that there is surplus in the books of accounts and the only point is that the surplus was not handed over by M/s KEPIP. It is not the case of the appellant that the assets would not be handed over to it and as per Clause 8.1 of the Joint Venture Agreement, the transfer scheme has to be completed within 150 days.

- f) It was a case of transfer of license with effect from 1.2.2010 and the appellant has simply admitted that the transfer scheme is not yet completed.
- g) In the Joint Venture Agreement, there are provisions to protect the interest of the consumers. Clause 5.2.6 provides that KINFRA shall have the option to bring in their equity by way of transfer of assets, land and balancing cash. Clause 6.0 and Clause 8.12 make the position very clear.
- h) The appellant itself has stated that over the years surplus to the tune of Rs.755.12 crore has been created which is more than the reasonable return entitled to by the appellant.
- i) The Joint Venture Agreement does not provide for qualified transfer of assets and the surplus was generated due to lower Bulk Supply Tariff or due to favourable consumer mix.
- j) The transferor cannot be allowed to take over the surplus and it is the duty of the transferee to asset in the surplus and get it transferred.
- k) Since the State follows a policy of uniform retail supply tariff in terms of Para 8.4.2 of the Tariff Policy, tariff of the consumers of the appellant alone cannot be decreased to utilise the surplus. So, the Commission has adjusted the Bulk Supply Tariff as an interim measure based on a petition from the Board for enhancing the Bulk Supply Tariff.

- l) If the Bulk Supply Tariff is not adjusted properly, all the consumers of the Board which is 98% of the total consumers in the State have to bear the burden since under recovery will have to be borne by them. Therefore, surplus is to be reasonably passed on to the consumers by properly adjusting Bulk Supply Tariff.

10. The Kerala State Electricity Board filed counter affidavits separately for each of the appeals but majority of the grounds are common to all of them. In fact, the grounds advanced by it before the Commission have also been advanced before this Tribunal and they are as follows:

- a. The last revision of Bulk Supply Tariff was made by the Commission in December, 2007 by considering the cost and revenue gap of KSEB for the year 2007-2008.
- b. The cost of power purchase from Central Generating Station and traders since then has increased considerably. There has been an increase of 28.8% in 2008-2009, 30.79% in 2009-2010 and 53.88% in 2010-2011.
- c. The average cost of supply of the KSEB has also increased from 3.31/kwh in 2007-2008 to Rs 4.00/kWh in 2010-2011. The revenue gap has increased to Rs0.44/ kwh.
- d. Since the BST has not increased correspondingly, the licensees are enjoying cross subsidy to the tune of 11.25% to 16.75% as compared to the average cost of supply.
- e. As and when the cost of purchase of power is increased, KSEB has to pay the increase, where as the licensees

sourcing power from the KSEB is insulated from the increase and the burden is borne by the KSEB.

- f. If the cost of the KSEB is not competitive, the licensees may be allowed to source power from any source of their choice by availing open access facility by paying transmission/wheeling and cross subsidy surcharge.
- g. Even if 25% increase is effected, effectively tariff will be only 4% to 10% above the average cost of supply of the KSEB.
- h. The licensees have more advantage in terms of consumer mix as compared to the KSEB. The distribution margin of the licensees ranges from Rs. 0.30 per unit to about Rs. 2.81 per unit.
- i. As per the ARR & Expected Revenue Charge approved by the commission and the truing up petition filed by the licensees, all licensees have cash surplus.
- j. If the licensees procure power directly from traders or generating companies, the cost will be higher than the present BST rates. Hence, the licensees may be made to pay the additional cost incurred by the KSEB. In future, BST shall be revised in line with increase in power purchase cost of the KSEB.

11. Now, the Board has appended to the replies a few charts/tables common and applicable to all the appellants in support of justification of increase in BST by 15% in energy charges and hence, before going to consider separately the counter of the Board in respect of each of the four appeals it is found proper and convenient to place the tables, and importantly, the figures and data furnished

in the tables following admitted of no denial or dispute as because basically the figures are assimilation of what are matters of records.

Table 1
Annual consumption of Licensees in Kerala procuring power from KESB (as per the ARR)

Year	Consumption of other licensees MU	Annual increase %
2007-2008	356.62	
2008-2009	317.47	-10.98
2009-2010	394.00	24.11
2010-2011	417.00	5.84

Table 2
Actual annual consumption of Licensees for the year 2009-2010

Sl. No.	Category	Contract Demand(MVA)	Consumption (MU)
1	Techno Park	20.00	47.19
2	Rubber Park	3.00	14.95
3	Kanan Devan Hills Plantations Company Private Limited	7.00	40.94
4	Trichur Corporation	24.00	115.58
5	Cochin Port trust	6.50	29.72
6	Kinesco Power Utilities Private Limited	9.00	40.38
7	Cochin Special Economic Zone	8.00	43.32

Table 3

Bulk Supply Tariff with effect from 1.12.2007

Supply voltage	Demand Charge (RS/Kva/ month)	Energy Chare (Rs/Kwh)
11kv	270	2.85
66kv	260	2.75
110kv	245	2.75

Table 4

**Cost of power purchase over the year 2007-2008
(Based on the KSERC orders on ARR)**

Year	Total Power Purchase (MU)	Cost (Rs. Cr)	Unit rate (Rs/kWh)	Increase over 2007-2008
2007-2008	7717.31	1734.65	2.25	
2008-2009	8994.34	2603.92	2.90	28.80
2009-2010	9467.00	2781.99	2.94	30.74
2010-2011	9944.00	3439.56	3.46	53.88

Table 5

**Comparison of avg. cost, revenue and revenue gap
(As approved in the orders on ARR)**

Year	Avg. Cost of supply	Avg. Revenue (including Non tariff income)	Revenue Gap
2007-2008	3.31	3.57	-0.27
2008-2009	3.76	3.75	0.00
2009-2010	3.84	3.60	0.24
2010-2011	4.00	3.56	0.44

Table 6
Avg. Bulk Supply Tariff and subsidy
Allowed in tariff of Licensees for the year 2010-2011

Licensees	Dem and Charge	Energy Charge	Average Power Purchase cost of Licensees as per approved ARR	Avg. Cost of supply of the Board for 2010-2011(as per approved ARR)	Subsidy allowed in Tariff
	(Rs/kVa/month)	(Rs/kWh)	(Rs/kWh)	(Rs/kWh)	(%)
Techno Park	245	2.75	3.30	4.00	17.50
Rubber Park	245	2.75	3.74	4.00	6.50
KDHPCPL	270	2.85	3.03	4.00	24.25
Trichur Corporation	245	2.75	3.25	4.00	18.75
Cochin Pot Trust	245	2.75	3.67	4.00	8.25
KPUPL	245	2.75	3.23	4.00	19.25
CSEZ	245	2.75	3.35	4.00	16.25

Table 7

Licensee	Average per unit realization	Average per unit realization of KSEB	% difference in average realization
TMC	5.36(2009-2010)	3.69 (2009-2010)	45.26
Technopark	4.03(2010-2011)		9.21
Rubber park	4.69(2010-2011)		27.10
KPUPL	3.87(2010-2011)		4088
CSEZ	4.04(2010-2011)		9.49
Cochin Port Trust	6.29(2010-2011)		70.46
KDHPCPL	3.95(2009-2010)		7.05

Table 8

Distribution margin allowed to the bulk licensees

Sl.No.	Bulk Licensee	Cost of power purchase from KSEB	ARR	Distribution margin (Cost except power purchase cost)	Remarks
	(1)	(2)	(3)	(4) = (3) –(2)	
1.	TMC	3.25	4.49	1.24	2009-10
2.	Technopark	3.30	3.93	0.63	2010-11
3.	Rubber park	3.74	4.25	0.51	2010-11
4.	KINESCO	3.23	3.74	0.51	2010-11
5.	CSEZ	3.35	3.70	0.35	2010-11
6.	Cochin Port Trust	3.67	6.48	2.81	2010-11
7.	KANAN DEVAN	3.03	3.33	0.30	2009-10

Table -9

ARR, Revenue and Surplus allowed to the distribution licensees

Sl.No.	Licensee	ARR (Rs./kWh)	Revenue (Rs/kWh)	Surplus (Rs/kWh)	Remarks
	(1)	(2)	(3)	(4) = (3) – (2)	
1)	KSEB	4.00	3.69	-0.31	
2)	TMV	4.49	5.36	0.87	For the year 2009-10
3)	Technopark	3.93	4.03	0.10	2010-11
4)	Rubber Park	4.25	4.69	0.44	2010-11
5)	KINESCO	3.74	3.87	0.13	2010-11
6)	CSEZ	3.70	4.04	0.34	2010-11
7)	Cochin Port Trust	6.48	6.29	-0.19	2010-11
8)	KANAN DEVAN	3.33	3.95	0.62	2009-10

Table -10Cash surplus available with distribution licensees as found by
KSERC

Licensee	Cash surplus (as estimated by KSERC) : (Rs. Lakh)
M/s Cochin Port Trust	625.40
M/s Cochin Special Economic Zone	698.99
M/s Kanan Devan Hills Plantation Company Private Limited	55.43
M/s Kinesco Power Utilities Private Limited	755.21
M/s Rubber Park India (P) Limited	99.48
M/s Technopark	205.85
M/s Thrissur Municipality	1606.00

12. Now, let us consider the counter affidavit of the KSEB separately in respect of each of the four appeals. In appeal No.25 of 2011, it contends as follows:-

- a) Cost of power purchase of the Board has increased considerably during the last few years on account of the tariff hike of the Central Generating Stations approved by the Central Electricity Regulatory Commission, increase in fuel costs and cost of electricity in the short term open markets.
- b) Even though there was considerable increase in the cost of power purchase, the Bulk Supply Tariff applicable to the licensees remained the same.
- c) Average cost of supply of the Board increased on account of increase in the cost of power purchase.
- d) As and when there is an increase in the input cost of central generators or the IPPs due to fuel cost variations, any increase allowed by the Central Electricity Regulatory Commission in the fixed cost and energy charges, the entire cost is automatically passed through to the Board on monthly basis.
- e) It is the Board by whom the burden of increase in fuel cost of the generating stations is borne to meet the obligations to fuel suppliers.
- f) The appellant is totally insulated from any escalation in the cost of power purchase.

- g) In case, there is a gap between the cost of power purchase and the revenue under distribution of such power, such differences have to be bridged only by the Commission.
- h) In the case of the appellant, the major consumption is self-consumption for its own tea factories and associated township. Table 7 clearly gives out a picture showing the average rate of realization of retail sale of the Board vis-à-vis. the licensees.
- i) The appellant has considerable revenue surplus.
- j) Even though uniform retail tariff has been followed across the State, the Commission has made it clear that each licensee could be given a separate retail tariff structure.
- k) If the appellant directly purchases power from sources other than the Board, then obviously the cost of power purchase will be higher than the present Bulk Supply Tariff now being made applicable.
- l) The distribution area of the appellant comprises their plantations and factories and residences of the labourers and a few commercial outlets totalling around 15,000 consumers in addition to Munnar town which is known as centre for tourist attraction.
- m) The tea plantation and factories manufacturing marketable tea is the main core business of the appellant and electricity distribution is simply a function to facilitate their principal business.
- n) The appellant has a surplus of Rs.6.23 lakh over and above the reasonable profit allowed to the licensee for the year 2010-11 as per the order passed by the Commission approving the Aggregate Revenue Requirement and

Expected Revenue Charge for the said year. Similarly, based on the true-up petitions filed by the appellant, it has been found by the Commission that the appellant was retaining a surplus of Rs.55.43lakh over and above the reasonable surplus allowed for the financial years from 2005-06 to 2008-09 and 2010-11.

- o) The Commission assessed the annual additional liability of the appellant at Rs.172.62lakh and since the Bulk Supply Tariff is made applicable with effect from 1.12.2010, the financial impact of the order on the licensee for the Financial Year 2010-11 is only Rs.57.54lakh. Thus, the additional financial impact on the appellant for the Financial Year 2010-11 is comparable to the excess amount held by the licensee.
- p) The argument of the appellant that earlier tariff revision effective from 1.12.2007 applicable to the appellant was quashed by the Kerala High Court in W.P. (C) 4963/2008 is wrong because the High Court only directed the Board to file fresh petition in the matter of tariff applicable to the appellant and upon the fresh petitions, the Commission passed an Order in relation to the appellant effective from 1.12.2007 against which the appellant approached this Tribunal in appeal No.140 of 2010 but the appeal was dismissed by this Tribunal on 28.1.2011. Meanwhile, the Commission issued order on 15.11.2010 upon the Aggregate Revenue Requirement and Expected Revenue Charge for the year 2010-11 in respect of the appellant and the Commission observed that the appellant was holding a surplus of Rs.55.43lakh over and above the reasonable

surplus allowed for the financial years from 2005-06 to 2008-09 and 2010-11.

- q) The contention of the appellant that the consumer mix of the appellant is predominantly domestic is contrary to the facts because the percentage of consumption by industries amounts to 72.15% of the total consumption.
- r) The apprehension of the appellant that the revision of the Bulk Supply Tariff would not be 25% but 52% is baseless because the actual revision has been only at 15% at energy charges.
- s) The appellant did not file true-up petition for the period from 2002-03 to 2004-05.
- t) The Commission has not permitted 5% rebate in the revised Bulk Supply Tariff in respect of the appellant and this revised Bulk Supply Tariff is not applicable in respect of the Financial Year 2009-10.
- u) The average rate of realization from retail sale of power in respect of the appellant is Rs.3.95 due to better consumer mix, while the average realization of the Board is Rs.3.69 only.
- v) The average cost of supply by the Board is Rs.4, while the average power purchase cost of the appellant is Rs.3.03 only.
- w) The appellant overlooked the fact that the Commission revised the Bulk Supply Tariff taking into consideration the surplus held by the appellant over the years and not considering the Financial Year 2010-11 alone.

13. In appeal No.107 of 2011, the Board contends as follows:-

- a) The terms and conditions specified in the license granted to the appellant by the Commission is for the business of distribution of electricity,
- b) It is the responsibility of the KEPIP who is holding the license for distribution of electricity to transfer the asset to the appellant as per the Joint-Venture Agreement with the approval of the Commission under section 17 (3) of the Electricity Act, 2003.
- c) Clause 9.1.2 of the JVA provides for facilitation of notification of appropriate transfer scheme by the Govt. of Kerala / KERC for transfer of business and assets of the KEPIP pertaining to the retail distribution from KINFRA / KEPIP to the proposed JVC.
- d) The Commission has not given any direction to the Board to enter into Power Purchase Agreement as alleged by the appellant. The Commission has only ordered that the bulk supply rate to be included in the Power Purchase Agreement to be executed by the present appellant and the Board shall be the rates now in force.
- e) The Board has expressed its willingness to permit the assignment of the Power Purchase Agreement with KEPIP in favour of the appellant at Kakkanad where KEPIP and the Board entered into agreement, but the Board is not willing to provide power to cater to the additional requirement as desired by the appellant because the Board is not having any surplus power to cater to the additional requirement of the appellant.

- f) It is not that the Board has been supplying power in bulk to the appellant to enable the appellant to undertake the distribution & retail supply of electricity in its area of supply. The Board is still supplying electricity to KEPIP as per the Agreement.
- g) The Commission in the matter of fixation of tariff has followed the principle accepted by this Tribunal in appeal No.121 of 2007 (Uttar Pradesh Power Corporation Ltd. Vs. Noida Power Company Ltd. & Others) where the Tribunal upheld the methodology considering the realization from sale of power in the licensed area at the reasonable expenses including return on investment of the licensee for the purpose of determining the Bulk Supply Tariff to small licensee. If the appellant feels the revision of the tariff for procurement of power from the Board is unaffordable considering the lower retail tariff of the licensees, they can approach the Commission for revision of the retail tariff.
- h) As per the joint venture agreement all the assets shall have to be taken over together with the surplus but if the same has not been done so far it is the failure of the transferee.
- i) The appellant is conveniently silent about the transfer of surplus which the Commission itself has found available with the KEPIP, even when KEPIP/KINFRA is a part and parcel of the JVC.
- j) It is evident that the entire business of the former licensee's business related to the retail distribution of power to consumers by KEPIP has been transferred,

which clearly establishes the fact that the full accounts along with the assets have been transferred and the joint venture company, M/s. KPUPL is at present holding the entire assets and the liabilities and profits.

14. In appeal No.127 of 2011 the Board filed a counter affidavit contending as follows:

- a.) The trued up figures for the period 2008-2009 is in no way connected to the revision of BST with effect from 1.12.2010 and further the appellant has not challenged the trued up figures.
- b.) The Commission did not arbitrarily chose to increase the Bulk Supply Tariff of the appellant Without considering the actual cost of the distribution of the electricity incurred by the appellant.
- c.) The argument that the increase in the Bulk Supply Tariff will necessitate the increase in retail tariff is not correct.
- d.) The energy charge of the appellant was Rs. 2.75 per unit until it was revised to Rs. 3.16 per unit with effect from 1.12.2010.
- e.) The average cost of supply of the Board as per the annual accounts of the Board which was audited and approved by Comptroller and Auditor General of India was Rs. 3.90 in 2007-08, Rs.4.74 in 2008-09 and Rs.4.56 in 2009-10.
- f.) The contention of the appellant that it was running a loss of Rs.78.30 lakh in 2011-12 is not true because the Aggregate Revenue Requirement and Expected Revenue Charge for

the year 2011-12 which has been approved by the Commission shows surplus of Rs. 10.58 lakh.

- g.) Surplus was not based on the efficiency of the appellant but was solely due to the better consumer mix of the licensee.
- h.) The appellant is not bearing any interest on finance charges since the entire expenditure on infrastructure for power distribution in respect of the appellant is met by the Government of India as observed by the Commission
- i.) The Commission found that the appellant has a total surplus of Rs 689.99 lakh in just four years. The above surplus which is over and above the reasonable return to be maintained by the appellant is exclusive of the truing up for the year 2009-2010, which again shows a surplus of Rs 278.79 lakh, resulting into a total surplus of Rs 968.78 lakh over the period of Financial Year 2006-2007 to Financial Year 2010-2011. The surplus so held by the appellant has to be passed over to the suppliers and its consumers i.e. KSEB in this case.
- j.) The average cost of power purchase by the appellant is Rs. 3.35, while the average realization of the appellant is Rs.4.04.

15. In respect of the appeal No. 151 of 2011 the Board did not file any separate counter-affidavit but it is to be noted that the Board has filed, apart from filing separate counter-affidavit in the other three appeals, a written note of arguments common to all the four appeals and the learned advocate for the Board, Mr. George M.T. has made the following submissions in conformity with the written note of arguments:-

- a) The licensees have unnecessarily made hue and cry against Bulk Supply Tariff hike which was only marginal having regard to the fact that over the years from FY 2007-08, almost all the licensees have consistently developed surplus fund which is mainly attributable to low power purchase cost payable by them to the Board while having realization at a greater amount from their consumers. The appellants ignored the fact that while the Bulk Supply Tariff has remained the same over the last three to four Financial Years, the Board had to pay periodically and from time to time higher purchase cost payable to central generating stations and others as a result of which over the years as aforesaid rate of realization per unit has been lesser and lesser for the Board which, in fact, is also a distribution licensee apart from carrying on business of generation and transmission and which in fact caters to 98% of the total consumers of the State, and while the licensees are having the opportunity of consumer mix, the Board has been consistently having adverse consumer mix.
- b) There are eight distribution licensees in the State of Kerala who have been purchasing power from the Board but while four of them namely TECHNOPARK, RUBBER PARK, THRISUR CORP and MES have accepted the Bulk Supply Tariff hike, the remaining four who really could not have any grudge worth considering against the marginal hike are found to have surplus over the years. It is not rational to highlight deficit in a particular Financial

Year. The Commission analysed the financial position of each of the licensees on the basis of Aggregate Revenue Requirement and Expected Revenue Charge and also the true-up petitions filed by some of them and came to the conclusion that the licensees would not have in their respective distribution business any adverse financial impact which can ultimately touch upon the consumers of each licensee in a substantial manner.

- c) The Commission fairly observed that since 1.12.2007, there has not been increase of Bulk Supply Tariff of the Board vis-a-vis the licensees' purchasing power from the Board.
- d) The Commission observed that the Bulk Supply Tariff hike is only provisional and in case any licensee notices serious adverse impact, they are free to approach the Commission with all the relevant data for review of the position. But, none of the licensees approached the Commission, so far, and importantly, the Bulk Supply Tariff hike was made effective only after the examination of Aggregate Revenue Requirement and Expected Revenue Charge of each of the licensees for Financial Year 2010-11 purchasing power from the Board.
- e) In order to meet the requirement of 98% of the consumers, who were catered by the Board, the Board has to purchase power from traders and Central Generating Stations even at Rs.10/- per unit and the total generation capacity of the Board is not sufficient to meet the total demands of the Board in its capacity as a

distribution licensee as also those of the licensees catered by it.

16. In view of the pleadings of the parties, the following points arise for consideration:-

- (i) Do the appellants have cause of action?
- (ii) Whether the increase in bulk supply tariff made by the Commission in relation to the appellants is legally justified?
- (iii) Was the financial position of the Kerala State Electricity Board such as did really warrant for enhancement in the bulk supply tariff payable by the appellants by the Board?
- (iv) Has the increase in bulk supply tariff as made by the Commission in the impugned order made adverse financial impact upon the licensees so as to render their distribution business unviable?
- (v) Does the increase in bulk supply tariff payable by the licensees to the Board have prejudicial effect upon the consumers of the licensees in case the retail supply of tariff the consumers is increased?
- (vi) Does the methodology adopted in increasing the Bulk Supply Tariff call for outright rejection at the first hand?

17. All the issues are taken up together as they require a comprehensive treatment. There was an attempt to plead the competency or otherwise of the Commission to make the impugned order affecting purchaser of power in bulk from the Board but the law is very clear now that it is the Regulatory Commission which by virtue of Section 86 (1) (a) of the Electricity Act read with Sections 61, 62 and 64 thereof that alone has jurisdiction to determine tariff in respect of the licensees. The question whether the Commission was competent to revise the bulk supply tariff in a provisional manner is different from the question as to whether the Commission has jurisdiction to revise the bulk supply tariff. That the Commission has jurisdiction to revise the bulk supply tariff which, in fact, is a statutory function of determination of tariff is a trite law. We will only consider the question as to whether the revision made by the Commission in the impugned order does call for interference from this Tribunal in its appellate jurisdiction.

18. The position of the Kerala State Electricity Board which had been functioning even after the passing of the Electricity Act, 2003 as an integrated utility in conformity with the 1948 Act until unbundling had generation, transmission and distribution business. Like other licensees who have been carrying on distribution business, the appellant also carries on the business of distribution and unquestionably the Board caters to the need of 98% of the consumers of the State. The argument of the learned counsel for the appellants that the Board has been supplying power from the Hydro Electric Power and the cost of supply / purchase cost is

limited to the exclusive zone of hydro electric power generation cost is not based on fact. In course of hearing it has not been denied when it was argued by the learned advocate for the Board that the Board has to purchase power from different sources including Central Generating Station and traders even at a high rate per unit which is not chargeable on its own consumers or licensees. Therefore, in a cost plus regime the tariff of the Board in relation to the licensees purchasing power from the Board has to be on commercial principles and such commercial principles must not only take care of the commercial viability of the licensees but also that of the Board in order that while ensuring a balancing scale the Board's financial position is not weakened. The question that Bulk Supply Tariff is not included under Section 62 of the Act carries no force because under the Act, 2003, Section 2(70) 'supply' in relation to electricity means the sale of electricity to a consumer as also to a 'licensee' and the licensee under Section 2(39) means one who has been granted license under Section 14. The definition of the word 'consumer' is so comprehensive that it includes any person who is supplied with electricity for his own use by a licensee or by the Govt. or by any other person engaged in the business of supplying electricity to the members of the public under this Act or any other law for the time being in force and includes any person whose premises for the time being is connected for the purpose of receiving electricity. Although supply of electricity in bulk by a licensee to another licensee has not been specifically mentioned by the implication of the statute supply means supply to a distribution licensee or to a consumer and it encompasses the sale of electricity by a licensee to another licensee. In a batch of appeals being appeal No.24 of 2007, 33 of 2007 and 101 of 2007 which was decided on

28.1.2008, the determination of Bulk Supply Tariff by the Commission payable by a licensee to MSEDCL was the issue and the determination of Bulk Supply Tariff by the Commission was upheld.

19. Certain facts are not in dispute. It was on 24.7.2009 that the Board had filed a tariff application before the Commission proposing therein a flat increase of 25% in the existing Bulk Supply Tariff applicable to the bulk consumers on the ground that power purchase cost of the Board had been on increase consistently over the years that had the effect of reducing the annual realization out of sale per unit, while the tariff applicable to the licensees remained constant. The Board furnished plethora of data and figures in support of justification of such proposed increase at 25%. The Commission did not make any order. In its prudence and wisdom, it deferred the proposal with the observation that the proposal would come up for examination only after final examination of Aggregate Revenue Requirement and Expected Revenue Charge of the licensees for the Financial Year 2010-11 are finalised. The Commission upon deliberation finalized the Aggregate Revenue Requirement and Expected Revenue Charge of the licensees and upon finding that most of the licensees have consistently been able to make surplus out of the distribution business, it concluded that increase at 15% in energy charges would be justifiable in favour of the Board because of the fact that the power purchase cost of the Board which has been on increase gradually did not match its realization. Here, the Board makes out the point that the surplus of the licensees is mostly due to two factors, namely a) no augmentation of the Bulk Supply Tariff in the case of licensees was

effected since 1.12.2007 and b) favourable consumer mix was available with the licensees which is absent in the case of the Board. It has been argued by the learned counsel for the Board, not without justification, that even though some of the appellants have been raising cavil that they have been coping with adverse consumer mix the facts do not justify such lamentations. We will come to this point when we will have occasion to deal with each of the licensee separately but it is suffice for the present to say that the alleged adverse consumer mix cannot be capitalized because of the fact that the facts would show that had there really been existence of adverse consumer mix most unfavourable to the licensees, the financial position of the licensees perhaps would have presented a different picture. It is, however, now settled that the Commission has jurisdiction to fix Bulk Supply Tariff applicable to a Distribution licensee.

20. A pertinent question has arisen as to whether revision of Bulk Supply Tariff applicable to a distribution licensee, deemed or otherwise, should precede any revision of retail supply tariff for such licensee or the retail supply tariff of the Board and whether the Bulk Supply Tariff should be made uniform in respect of all such licensees operating in their respective areas of supply and procuring power from the Board. It has been argued by the learned counsel for the appellants that without first revision of the retail supply tariff, the Bulk Supply Tariff should not be revised. This question is a question of prudence but not invariably is a question of law. If the circumstances justify that revision of Bulk Supply Tariff is necessary without prior revision of the Retail Supply Tariff, if the circumstances so warrant that a bulk supplier has been consistently prejudiced by payment of

gradual and increased power purchase cost and if the proposed revision of Bulk Supply Tariff does not touch upon financial viability of licensees adversely then perhaps the Commission in its quasi legislative jurisdiction would be entitled to make revision of the Bulk Supply Tariff. As per Section 86 (1) (a), the Commission has the power to decide tariff for generation, transmission, wheeling, wholesale, bulk or retail. In a batch of three appeals being appeal No.24 of 2007, appeal No.33 of 2007 and appeal No101 of 2007, this Tribunal was faced with the question as to whether revision of Bulk Supply Tariff in favour of MSEDCL that could affect the Mulapravara ECS was permissible without revising the tariff chargeable by the latter and the question was answered in the affirmative. In this case the Tribunal held that while determining the Bulk Supply Tariff, the Commission can include in addition to the cost of power, the costs such as demand charges, operational charges, financial and administrative cost of MSEDCL.

21. While revising the Bulk Supply Tariff, the principle of natural justice was followed. Initially, the Commission deferred the proposal till examination of Aggregate Revenue Requirement and Expected Revenue Charge of the licensees which was completed by October, 2010. The Commission also received true-up petitions from most of the licensees and true-up for the period from 2004-05 to 2008-09 had then been finalized. Then, publication of notice was issued. Hearing took place and the records of the appeals reveal that all the appellants participated in the deliberations and importantly a good number of licensees admitted to the fact that they were having surplus while carrying on the distribution business of electricity energy.

22. It appears further that the revision of the Bulk Supply Tariff was based on the principle of uniform retail supply tariff as recommended by National Tariff Policy in Para 8.4.2. Unquestionably, power purchase cost is a major item of expenses of the small licensees. The Commission found on examination that the appellants had the cream of commercial and industrial consumers which is not available to the Board and the surplus generated by the appellants was mainly on account of low power purchase cost which was at the expense of more than 98% of the total consumers of the state looked after by the Board. In this connection, the observation of the Commission is pertinent which is as follows:-

“16. Para 8.4.2 of the National Tariff Policy provides for uniform retail supply tariff in the State. In the Order dated 2-12-2009, the Commission also favourably considered the principle of uniform retail supply tariff in the State. Accordingly there has to be different BST for providing uniform RST primarily on the grounds that: a) consumer mix of licensees are different and hence the variation in the revenue earning potential b) the licensees are eligible to earn only reasonable profit. c) at present all power requirements of licensees are met from KSEB d) the Power purchase is the major expenses for licensees”.

23. The Commission has considered the argument of the KSEB that there has been an increase in the cost of power purchase since 2007 but there is no corresponding increase in BST since then. It is a fact that the power requirements of the licensees are met by the Board and the risk of procuring power is borne by the KSEB. It is also true that the licensees are free to procure any additional

requirements of power from the open market. Though the licensees have the option of shopping for power, they opt to receive power from the KSEB, insulating thereby themselves from all risks and hassles of procuring power from the market at rate which reasonably cannot be lesser than the rate of the Board as approved by the Commission in respect of each licensee from time to time. The total volume of electricity distributed by these licensees is less than 3% of the total electricity demand and less than 2% of the total consumers who are served by these licensees. For these licensees, electricity distribution is not their main activity and the actual cost of distribution of electricity cannot be exactly or accurately ascertained due to combined use of resources for the main business and electricity distribution. For most of them, it is only one of the support services extended to their customers under their main activity. Based on the accounts provided by the licensees, most of them have substantial revenue surplus. The surplus generated is mainly on account of low power purchase cost which is at the expense of more than 98% of the consumers of the State, served by KSEB. Accordingly, lower BST without aligning it with cost escalations are benefiting only the licensees. Hence, any surplus more than the reasonable level due to low BST should be ploughed back to KSEB which will ultimately benefit all the consumers in the State. The argument of the licensees

that increase in Bulk Supply Tariff will necessitate increase in retail tariff is not acceptable unless it can be established that any revision of BST will destroy their viable operations.

24. The Commission is of the view that most of the arguments put forwarded by the licensees run in a fashion as if they are mere consumers and nothing more. Such arguments are not available to licensees. The increase in BST should not affect the operations of licensees since the Commission is duty bound to fix the tariff of the licensees so that they generate reasonable surplus they are entitled to as per accepted norms.

25. It appears that the energy charge at 66kv and 110 kv has been Rs.2.75 and for 11 kv, it has been Rs.2.85 w.e.f. 1.12.2007. It is the finding of the Commission as per the orders passed on Aggregate Revenue Requirement that cost of power purchase has increased in the case of the Board from 28.80% in 2008-09 to 53.88%, and so far as the Financial Year 2010-11 is concerned, the cost of power purchase is Rs.3.46 per unit as against Rs.2.55 per unit which was prevalent in the Financial Year 2007-08 (w.e.f. 1.12.2007). Resultantly, there has been gradual increase in revenue gap of the Board as found out by the Commission and the gap in Financial Year

2010-11 was Rs.0.44 as against -0.27 during Financial Year 2007-08. In Financial Year 2008-09, there was no revenue gap but there was abnormal increase in gap of Rs.0.24 in Financial Year 2009-10 primarily because of increase in the average cost of supply. In Financial Year 2009-10, there was a considerable fall in average revenue including non-tariff income and in Financial Year 2010-11, there has been again fall, though a small one. It is noticeable that the Bulk Supply Tariff applicable to the licensees remained the same as it was on 1.12.2007. As on the day of passing this order, we are in the present Financial Year 2012-13. The order of the Commission was passed on 13.12.2010 and the appeals were preferred one after another by four out of eight licensees and the first appeal was preferred on 3.2.2011. Thus, on account of increase in cost of power purchase the average cost of supply of the Board increased substantially as a result whereof there has been widening of revenue gap. This sort of revenue gap is not noticeable in case of the licensees. It cannot be the case that while determining tariff for the bulk consumers no licensees have been granted subsidy. So far as the Financial Year 2010-11 is concerned, average cost of supply as per approved Aggregate Revenue Requirement in respect of all the licensees has been Rs.4 per kWh while the average power purchase cost of the licensees varies between Rs.3.03 to Rs.3.74 at

the highest. Energy charge remained at Rs.2.75 per kWh. It appears that subsidy varied between 8.25% and 24.25% amongst the licensees. Thus, Bulk Supply Tariff to each licensee was subsidized up to 24.25% against the approved average cost of supply. Although no legal obligation was cast on the Board to provide electricity at subsidized rate to other distribution licensees, it must not be forgotten that the Board had entered into Power Purchase Agreement with central generating stations, traders and other IPPs who urge for increase in input cost due to fuel cost variation which is ordinarily allowed by the Central Electricity Regulatory Commission in the fixed cost and energy charges and it cannot be contradicted that the entire cost is passed through to the Board. This compulsion and scenario is not to be faced by the licensees who procure power from the Board although there was no legal impediment for the licensees like the appellants to purchase power from the sources of their choice. A figure has been given by the Board for the year 2009-10 with regard to average per unit realization of the Board which stands at Rs.3.69. For example, for the appellant of appeal No.25 of 2011, the average per unit realization in respect of the year 2009-10 was Rs.3.95 but in the case of other licensees, the amount for the Financial Year 2010-11 ranged between Rs.3.87 and Rs.6.29 and the difference in percentage greatly varied from 7.05% to even

17.46%. Distribution margin allowed to the distribution licensees varies from Rs.0.30 per unit to Rs.2.81 per unit for the 2010-11. The argument of the appellants which is a common argument that the Board must not be concerned with the figure of surplus available in the hands of the licensees cannot be accepted for the reason that in case it is found that a particular entity either a generator or a bulk supplier on account of adverse consumer mix and other compelling circumstances has been running at a loss not purely attributed to it definitely the question would arise about the legitimacy for enhancement of Bulk Supply Tariff in the case of that particular licensee which, of course, does not arise here. Again, deficit of a particular licensee in a particular year but surplus in respect of the preceding years cannot be decisive. Therefore, it is clear that while for the licensees, Bulk Supply Tariff has remained static; the Board has been facing with the problem of ever increasing power purchase cost because of the circumstances beyond the control of the Board. This is the fundamental premise on which the proposal for enhancement of Bulk Supply Tariff can be conceded to.

26. In the case of the appellant in appeal No.25 of 2011, it appears that the distribution area of the appellant comprises plantation and factories and residences of the labourers and a few

commercial outlets totalling around 15,000 consumers in addition to the town of Munnar which is known to be a place of tourist destination. The claim of the appellant that it is having adverse consumer mix does not appear to be sound. The Commission has observed that the appellant in this appeal has been holding a surplus of Rs.55.43 lakh over and above the reasonable surplus allowed for the FYs 2005-06 to 2008-09 and 2010-11 and to plough back such excess surplus the Commission revised the Bulk Supply Tariff with effect from 1.12.2010. Having read the memorandum of appeal in details and the reply of the Board as also of the Commission, it appears that the distribution business of the appellant is not the main business, the main business being tea plantations for manufacture of tea. The argument for learned counsel for the appellant that the actual effect of increase of Bulk Supply Tariff would be 52% is not borne out by any evidence. The argument of the learned counsel for the appellant that the average cost incurred by the appellant for the supply of electricity is Rs.3.56 per unit and average per unit realization is Rs.3.54 is not based on records.

27. Two decisions of this Tribunal which have been referred to by the parties in support of their respective viewpoints are relevant as some of the points involved herein which were also raised therein

are now settled. The first decision was rendered on 28.1.2008 in a batch of three appeals, namely appeal no.24 of 2007, appeal no 33 of 2007, and appeal no.101 of 2007 in which the appellant was a distribution licensee, shortly called MPECS, a bulk purchaser from Maharashtra State Electricity Distribution Company Limited (MSEDCL). The other decision was rendered on 15.12.2010 by a Full Bench of this Tribunal in a batch of two appeals, being appeal no.121 of 2007 and appeal no 51 of 2010. In all these appeals the status of the bulk supplier, the competency of supply of electrical energy in bulk to other distribution licensees , the methodology of determining the BST, the jurisdiction of the Commission in determining the BST came up for consideration and discussed. In the batch of three appeals as aforesaid a dozen of issues were considered, but for the purpose of appeals we are considering the issue nos. B, C, and I are relevant. The issue no B was:

28. Is it correct for MERC to include MSEDCL's cost of supply for determination of BST payable by MPECS to MSEDCL? The answer was:

"48. The issue for our consideration is that whether the Commission is right or not in allowing costs over and above the Fully Allocated Cost of supply in determination of Bulk Supply tariff .The fundamental premise on which the Commission is required to determine BST is that the appellant is a bulk supply consumer of

MSEDCL and would pay the Fully Allocated Cost based Bulk Supply Tariff. We, therefore, agree with the contention of the Commission that the landed cost of power for MSEDCL is the base line on top of which all costs of MSEDCL would be built. There is no force in the contention of the appellant that it should be charged the landed cost of power from MSEDCL. The Commission is justified in allowing all costs such as demand charges, operation, financial, and administrative costs, etc. of MSEDCL for supplying power to the appellant. We, therefore, decide the issue against the appellant”.

The issue no C was: Is the appellant justified in alleging that the consumers are subsidizing MSEDCL consumers? The answer was:

“49. The appellant avails supply from MSEDCL at 33/11 kv level in bulk and in turn supplies to its own consumers. Under section 86 of the Electricity Act, 2003 the Commission is empowered to determine inter alia Bulk Supply Tariff. appellant is required to pay BST to MSEDCL as determined by the Commission. BST tariff for the appellant is comparatively lower than other Bulk Supply Tariff rates specified in the order dated October 20, 2006 payable by other bulk consumers of MSEDCL as contended by the Commission. In view of this we do not agree with the appellant’s contention that its consumers are subsidizing the consumers of MSECL”

The issue no I was : Is it proper for the Commission to determine Bulk Supply Tariff payable to MSEDCL without determining the ARR of MPECS?

The answer was: *“61. Annual Revenue Requirement of the appellant comprises of power purchase cost, operating and financial expenses etc. Therefore, it is essential that the Commission determines the power purchase cost of the licensee to determine its ARR. As the appellant is a bulk consumer of MSEDCL, it is necessary for the Commission to determine the Bulk Supply Tariff payable by the appellant to MSEDL in order to determine the power purchase expenses of the appellant . In view of this , we decide that it is necessary for the Commission to determine the BST of MSEDCL before determining the ARR of MPECS and we do not agree with the contention of MPECS in this view of the issue.”*

29. In the second batch of two appeals as above-mentioned two questions amongst others were raised, namely the status of the appellant Uttar Pradesh Power Corporation Limited(UPPCL), an entity created after unbundling the erstwhile the Uttar Pradesh State Electricity Board in its function of supplying electrical energy in bulk to the distribution licensees like Noida Power Corporation Limited which was one of the respondents in the appeals. In these appeals the UPPCL claimed its entitlement to charge double the rates against the distribution licensees. The Tribunal negated the plea while considering the question whether the Commission has jurisdiction to determine the rate of power supply by the appellant, a trader or a bulk supplier to the respondents distribution licensees. The Tribunal held that while supplying power the appellant was aggregating the requirements of the distribution companies and supply of such power is not in the capacity as a Trader in as much as the UPPCL is not a trader within the meaning of section 2(71) of the Act. Further, the Tribunal held: "Thus the bulk supply tariff of the supply to the Respondent distribution licensee has to be regulated and determined by the State Commission under section 86(1)(a)&(b) of the Electricity Act,2003. Revenue gap only for the FY 2011-12

can be met from the revenue surplus of Rs.622.43lakh arrived at the truing up process for the FYs ss2005-06 to 2009-10.”

30. The summarisation of the above two batches of appeals leads us to following points:-

- a) The Commission has jurisdiction to determine the Bulk Supply Tariff.
- b) It is permissible for the Commission to determine the Bulk Supply Tariff without determining the Aggregate Revenue Requirement of the distribution companies.
- c) The bulk supplier is not entitled to charge double the rates.
- d) Supply by the bulk supplier to the distribution licensees is not in the capacity of trading as defined in Section 2(171) of the Act.
- e) While determining Bulk Supply Tariff , the Commission would be justified in allowing all costs such as demand charges, operation charges, financial and administrative costs.

31. Upon examination of the materials on record, we find the following points:-

- a) There has not been yearly increase of Bulk Supply Tariff in respect of the distribution companies.

- b) It was on 1.12.2007, that the Bulk Supply Tariff was determined for the last time.
- c) It is amply borne out from the records that the power purchase cost of the Board has been on gradual increase over the years but the power purchase cost of the distribution licensees from the Board has remained constant over the years.
- d) It is not that without examining the economic viability of the distribution companies, the Board has unilaterally enhanced the Bulk Supply Tariff against the appellants because though the Board made an application on 24.7.2009 praying for increase of the Bulk Supply Tariff, the Commission deferred the proposal till it could be able to examine the Aggregate Revenue Requirement of the distribution licensees and only after examination and finalization of the Aggregate Revenue Requirement of the distribution licensees for the year 2010-11 that the Board took up the matter of the revision of the Bulk Supply Tariff on the prayer of the Board.
- e) The Board came to the conclusion in favour of the revision of the Bulk Supply Tariff by increase after complying with the principle of natural justice because it appears from the records that public hearing was given and a good number of

representatives and participants representing the appellants and others participated in the deliberations.

- f) Both the facts and figures as also the submission of the participants in the deliberations revealed that the distribution companies have been making surplus over the years.
- g) The Board came to the conclusion that the surplus could be attributed to the lower power purchase cost available to the distribution licensees as against the Board.
- h) It could not be established that the revised Bulk Supply Tariff has the effect of subsidizing the consumers of the Board by the consumers of the distribution licensees.
- i) It appears that the Board caters to 98% of the total consumers of the State while the distribution licensees operate in small areas and caters to the need of the rest of the consumers of the State.
- j) It is clearly borne out by the record of the Commission that it is the distribution licensees who were having the cream of the commercial and industrial consumers while the Board is having consumers of heterogeneous nature.
- k) It has not been established at all that the revised Bulk Supply Tariff at all does have any effect of financial loss of the distribution licensees when the rate at which the licensees are

supplying electrical energy to their respective consumers is considered.

- l) The average rate of realization of the Board is found to be much lower than the average rate of realization of the distribution licensees.
- m) The distribution licensees do not have to purchase power from any other source at higher cost.
- n) Uniform increase of the Bulk Supply Tariff at 15% in energy charges has not prejudiced any of the distribution licensees.

32. The arguments of the Learned Counsel for the appellant in appeal No.25 of 2011 are the very same arguments in appeal No.27 of 2011 because it is the same learned counsel who appeared for both the appellants. It is argued that the Act, 2003 does not have any provision for any provisional tariff because Section 64 of the Act mandates that the Commission shall issue a Tariff Order accepting the application with such modifications or such conditions as may be specified and Regulation No.4(2) of the Kerala State Electricity Regulatory Commission (Tariff) Regulations 2003 provides that no part or any part of tariff shall be amended more than once in any Financial Year. Therefore, it is argued that the impugned order being a provisional order is without jurisdiction. The argument is not

acceptable firstly because the word 'provisional' appears to have been loosely used by the Commission in the impugned order. The context in which the observation had been made by the Commission is traceable to the fact that except the appellant in appeal No.25 of 2011, the other three appellants filed review applications praying for review of the impugned order dated 13.12.2010. While disposing of the review application by way of dismissal by an order dated 24.3.2011, the Commission observed as follows:-

“21. The Commission would place on record that the present revision of BST is temporary. The true-up petitions of the licensees are still not finalised and are revised several times. The small licensees are seen to be very reluctant and irregular in submitting their Aggregate Revenue Requirement and Expected Revenue Charge in time. The provisional accounts are not trued-up with the actual promptly. As such, the actual financial position of such licensees is not available before the Commission. In any case, if the distribution business, properly segregated, documented and accounted, is found to be generating deficits, the Commission will initiate appropriate remedial action in future. The Commission is also in the process of initiating a consultancy for properly assessing the rate base, cost sharing and depreciation allowance for the licensees. The Commission is in the process of comprehensive examination on the policy to be adopted for fixing the BST/RST for the licensees procuring bulk power from KSEB, which is related to the issue of competitive procurement of power and policy on uniform or differential Retail Supply Tariff. Till such time there may be uncertainties which will be addressed in the due course”.

33. It appears that the enhancement of Bulk Supply Tariff at 15% at energy charges has been made with a view to mitigating the immediate financial predicament of the Board pending finalization of the tariff in respect of the licensees. The Bulk Supply Tariff was made applicable from 1.12.2010 and the order was passed in the Financial Year 2010-11. The last revision was made on 1.12.2007 which related to the Financial Year 2007-08. There has not been any increase in Bulk Supply Tariff during the Financial Year 2008-09, 2009-10 and 2010-11 except perhaps routine increase of fuel surcharge. The Financial Year in respect of which the impugned order was passed expired and on the day when these appeals are being disposed of the Financial Year 2012-13 has already commenced in respect of which the licensees as also the KSEB have filed their ARRs & ERCs. There has not been any increase in Bulk Supply Tariff during the Financial Year 2011-12 and it has not been submitted that any proposal for further increase or revision is afoot in the Financial Year 2012-13. In fact, there has also not been any further increase or amendment of Bulk Supply Tariff in the very Financial Year 2010-11 during which the impugned order was passed. Therefore, in the present scenario, it is perfectly logical and reasonable for the Commission to review the financial position of all the licensees upon finalization of their true-up petitions viz.-a-viz. the

financial position of the Board so as to arrive at a finding on determination of Bulk Supply Tariff that should be made applicable to the licensees.

34. It is argued by the Learned Counsel for the appellant in the above two appeals that while Section 64 (3) of the Act mandates the Commission to issue Tariff Order within 120 days from the date of the receipt of the application, the Commission passed the order on 13.12.2010 when the application was received on 24.7.2009. The argument appears to be out of context because the Aggregate Revenue Requirement and Expected Revenue Charge petition was filed by the Board on 24.7.2009 and in that petition the Board proposed for 24.5% increase in the Bulk Supply Tariff applicable to the licensees. The Commission observed that it would not accede to the prayer of the Board until examination of the Aggregate Revenue Requirement and Expected Revenue Charge of the licensees for the Financial Year 2010-11 and only after this was done and only when most of the licensees filed truing-up petitions that the Board issued notice to all concerned persons and parties, and after due hearing afforded to the parties and their representatives that the order was passed. In this conspectus, the decision in A.K.Roy & Another Vs.

State of Punjab & Others reported in AIR 1986 SC 2160 does not appear to be applicable.

35. It is argued by the Learned Counsel for the appellant in the above two appeals that the decision in Bangalore Electricity Supply Company Ltd. & Ors. Vs. Karnataka Electricity Regulatory Commission reported in 2009 ELR (APTEL) 1012 has not been followed. In this decision, it has been held that the determination of tariff for each distribution licensee is based on cost and expenses, power availability for the particular distribution licensee, consumer base and consumer mix of the distribution licensee, their efficiency of operation, distribution losses etc. It has been further held that in order to encourage efficient operation it is only necessary that the different licensees have competition amongst themselves to carry out their operations in a more efficient manner. In this decision, the Tribunal held that the Commission may determine differential tariff according to geographical location of the consumers and as such different licensees may have different tariff for their respective area of operations. We do not think that though there has been made 15% increase in Bulk Supply Tariff, the principle laid down in the Bangalore case have been completely overlooked. The analysis made in the preceding paragraphs, the Commission's order and the

relevant figures show that the criteria have been taken care of. It must not be lost sight of the fact that the Board caters to the need of 98% of the consumers while the rest are being looked after by the distribution licensees who operate in their small areas where none of the distribution licensees has any adverse consumer mix. So far as the appellant in appeal No.25 of 2011 is concerned, 75% of the electrical energy it uses for its own use and the core business of this appellant is tea factory at Munnar. It cannot be said that its consumer mix is adverse. There could be differential tariffs for different licensees but it does not mean that there has to be differential tariff invariably in every case in respect of different licensees operating in their respective areas of operations. The National Tariff Policy gives a guideline that there should be a uniform Retail Supply Tariff. The uniform Bulk Supply Tariff cannot be attacked where such uniform Bulk Supply Tariff appears to be reasonable and justified in order to obviate unjust differentiation. The National Tariff Policy does not lay down that different distribution licensees must have differential tariff applicable to them when they procure power from one common source for supply to their end consumers even when consumer mix and other parameters are found to be harmonious.

36. After its inception, the Commission issued five orders on Aggregate Revenue Requirement and Expected Revenue Charge of the Board for the Financial Years' 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08. In the Aggregate Revenue Requirement and Expected Revenue Charge for the Financial Year 2003-04, the Commission permitted a revenue gap of Rs.556.46 crore. In the Aggregate Revenue Requirement and Expected Revenue Charge for the Financial Year 2004-05, the gap was reduced to Rs.296.46 crore. In the both the Aggregate Revenue Requirement and Expected Revenue Charge as aforesaid the Commission made some recommendations for exemption from paying electricity duty and release of subsidy. In the Aggregate Revenue Requirement and Expected Revenue Charge for Financial Year 2005-06, the Commission left a gap of Rs.51.31 crore, while in the Aggregate Revenue Requirement and Expected Revenue Charge for the Financial Year 2006-07, Commission provided a surplus of Rs.184.63 crore. The background for revision of Bulk Supply Tariff as made by the Commission in its order dated 13.12.2010 can be seen from the Commission's own words expressed in order dtd. 2.12.2009 passed on the petition of the Board dated. 24. 7.2009.

KSEB in its petition has proposed many changes in the existing tariff for rationalization & re- categorisation. For the convenience of

disposal of the petition, the Commission segregates the proposal as shown below:

Section 1: Tariff revision proposal

Section 2: Rationalization of Time of Day tariff

Section 3: Tariff Re-categorization

30. KSEB also proposed to increase Bulk Supply Tariff (BST) applicable to licensees. The Commission in its Order dated 26-11-2007, effective from 1-12-2007 have revised the Bulk Supply Tariff (BST) applicable to the licensees. However, as per the order of Hon. High Court of Kerala, the tariff applicable to M/s KDHPCL was quashed. In the present proposal, the KSEB has proposed to increase the tariff for all licensees by 25%, stating the reason that licensees are making excess profit and the retail supply tariff revision would also fetch additional revenue to licensees. After the public hearing, the Commission convened a meeting of licensees along with KSEB on 30-9-2009 for discussing the proposal. All the licensees objected to the proposal of KSEB. According to the licensees, the increase in power purchase cost will be more than proportionate to the increase in revenue. Further they pointed out that the power purchase cost will be much higher than the retail tariff in the case of industrial consumers. Some licensees have suggested that they are ready to remit to KSEB the excess revenue collected in the event of revision of retail tariff. In reply, KSEB pointed out that many licensees are earning much higher return, which is a reason for increasing the Bulk Supply Tariff. The Commission has considered the arguments of both sides. There is merit in the argument of KSEB that some licensees are earning extra profit. At the same time, the increase proposed by KSEB is unsustainable for licensees without proportionate revision in retail tariff. The Commission understands that the uniform retail supply tariff (RST) for most of the licensees and uniform Bulk Supply Tariff (BST) at voltage level, along with difference in consumer mix and load profile, are the reason for divergent profit levels for the licensees. As per the provisions of the Act, the licensees should earn regulated profit commensurate with their performance thereby ensuring financial viability. National Electricity Policy and Tariff Policy states that State Governments may assign the generating stations in accordance with the load profile of distribution companies so as to have uniform retail tariffs. Para 8.4.2 of Tariff policy states as follows:

“The National Electricity Policy states that existing PPAs with the generating companies would need to be suitably assigned to the

successor distribution companies. The State Governments may make such assignments taking care of different load profiles of the distribution companies so that retail tariffs are uniform in the State for different categories of consumers. Thereafter the retail tariffs would reflect the relative efficiency of distribution companies in procuring power at competitive costs, controlling theft and reducing other distribution losses.”

31. *The above provision clearly suggests that uniform retail tariff is to be preferred within a State. Para 5.3(a) of the Tariff Policy further provides that:*

“The State Commission may consider ‘distribution margin’ as basis for allowing returns in distribution business at an appropriate time. The Forum of Regulators should evolve a comprehensive approach on ‘distribution margin’ within one year. The considerations while preparing such an approach would, inter-alia, include issues such as reduction in Aggregate Technical and Commercial losses, improving the standards of performance and reduction in cost of supply”.

“32. The distribution margin approach inter alia provides for regulation of distribution costs except power purchase cost, which needs to be addressed separately considering the loss level and consumer mix in each distribution area. The Commission is of the view that uniform retail supply tariff would be a preferable option within the State. In such a situation, licensees having better consumer mix could earn higher profit and vice versa. An increase in Bulk Supply Tariff is warranted if any licensee earns higher profits, at the same time the concerns of the licensees on financial viability should also be considered by the Commission. Hence, the Commission hereby orders that all the licensees shall file the ARR & ERC for 2010-11 in the month of December as provided in KSERC (Tariff) Regulations, 2003. The Commission would consider the ARR & ERC to determine the BST applicable to each licensee after following the due procedure. The proposal of KSEB on BST is deferred till then.”

37. The most common argument which we have referred to earlier as advanced by the learned Advocates for the appellants is that without re-determining the Retail Supply Tariff payable to the

appellants by their own consumers, the Commission increased the Bulk Supply Tariff by 15% in energy charges. By the time when the Commission passed the impugned order, it had examined the approved Aggregate Revenue Requirement and Expected Revenue Charge of the appellants for Financial Year 2010-11 and had an overview of the financial viability of them. It is not the case of the appellants that any of them has ever approached the Commission for enhancement of the Retail Supply Tariff. The reason is not far to seek. Unlike the Board the composition of the consumers in respect of the four appellants is totally different in this that in the case of the appellants in appeal No.25 of 2011, it is the appellant that consumes the lion's share of its total energy availability by self-consumption. In the case of the appellant of the appeal No.107 of 2011, it is a transferee business, a joint-venture company and is not having any adverse consumer mix. In respect of the appellant in appeal No.127 of 2011, it is a special economic zone and the expenditure on infrastructure for power distribution is met by the Govt. of India. Thus, this appellant has not to pay any expenditure on interest payment. It is having a comfortable surplus and while the average cost of power purchase for this appellant is Rs.3.35 the average realization of the appellant is Rs.4.04. It is clearly brought out on record that about 88% of the total sales of energy is made by this

appellant to the HT industrial consumers while the rest is sold to LT industrial consumers. In the case of the appellant in appeal No.151 of 2011, its total consumption in the Financial Year 2009-10 is so far the lowest amongst all the appellants, it being 29.71 M.u. And, it has also no adverse consumer mix. It is not established at all that the consumers under the Board in respect of the different categories including the LT, HT and EHT have lesser retail tariff than the consumers of these categories paying tariff to the appellants. It also is not established that per unit realization in case of the Board is much more than the per unit realization in the case of the appellants. It is also not established that power purchase cost of the Board is less than the power purchase cost of the appellants from the Board. Fourthly, it is not established that the financial viability of the Board is stronger than that of the appellants. In the circumstances it could not be established that the consumers of the licensees have subsidized the consumers of the KSEB.

38. It has to be borne in mind that right in the financial year 2007-08, when the Board filed tariff application it made a submission in respect of the bulk licensees as follows:-

20. "Bulk Supply It is submitted that the Board had been providing energy at grid tariff to the licensees

who supply energy to consumers within their territorial jurisdiction. As per the grid tariff notification and the tariff notifications issued thereafter a licensee is eligible for grid tariff, if and only if, they supply more than 50% of the energy availed by them to the ordinary consumer consisting of domestic, agriculture, industry, etc. Categories. In other words, the consumption of the licensee shall not be more than 50% of the total energy availed by them. Subsequently, consumers like Technopark, KINFRA Industrial Park, Cochin Port Trust, Cochin Shipyard, Special Economic Zone, etc. were also given the status of licensee for providing electricity to the industrial units working in those parks and zones. In fact they are not supplying energy to any agricultural consumers or domestic consumers or similar other down trodden segments of society. The category of consumers under them is only industrial and commercial consumers. Therefore grid tariff specially determined for such licensees in order to cater to the needs supplying energy to the common man at concessional as determined by the Government shall not be made applicable to the industrial parks, technoparks, special economic zones etc. These technoparks and industrial parks supply energy to their consumers at LT level for which they charge at their own rates. In view of the above facts, they can only be classified as bulk consumers and they shall be charged at HT or EHT rates in accordance with the level at which they avail energy.”

39. This we find from the judgment of this Tribunal in appeal No. 140 of 2010 where the appellant in appeal No. 25 of 2011 was the appellant. Now we find from the judgment of this appeal that when tariff payable by the appellant in appeal No. 25 of 2011 as also others was revised last with effect from. 01.12.2007, the appellant in

appeal No. 25 of 2011 made an application before the Commission praying for revision of retail tariff in respect of the consumers of this appellant and it was allowed by revision with effect from 31.12.2007. In respect of this appellant, its revenue surplus was found to be, as per approval of the Commission Rs. 6.23 lakh. The appellant in appeal No. 151 of 2011, was having deficit although the average power purchase cost was much lesser than the power purchase cost of the KSEB. This utility itself projected its power purchase cost at Rs. 3.73/kwh. The Commission did not find any wrong in the submission of the Board that this appellant's average realization for 2010-11 was Rs. 6 per unit. As contrasted, the financial position of the KSEB, its revenue gap in Financial Year 2010-11 was found to be Rs. 457.47 crore with net total income of Rs. 5474.38 crore. In respect of the appellant in appeal No. 127 of 2011 it appears that as per Aggregate Revenue Requirement and Expected Revenue Charge for the Financial Year 2010-11 its surplus as approved by the Commission is Rs. 155.13 lakh and power purchase cost as was approved was Rs. 1563.86 lakh. In respect of the appellant in appeal No. 107 of 2011 its surplus as was approved by the Commission was Rs. 92.39 lakh and its ROE was Rs. 139.65 lakh and power purchase cost was Rs. 2324.3 lakh

40. Thus, we find that there is no absolute illegality in the order complained of. Given the facts that the impugned order was passed during Financial Year 2010-11, that the Financial Year 2011-12 has expired and that we are in the Financial Year 2012-13 there is no proper justification to interfere with the order.

41. In the circumstance, we shall direct the State Commission to re-examine the bulk supply tariff in respect of the appellants and others who have not come up in these appeals after examination and finalization of truing up their financials after Financial Year 2010-11. The appellants shall submit their true up petitions with all materials and data before the Commission so as to enable the Commission to revisit the issue and pass appropriate orders as may be found necessary. Subject to these observations, we dismiss the appeals but without cost.

(V.J. TALWAR)
TECHNICAL MEMBER

(P.S. DATTA)
JUDICIAL MEMBER

Reportable/not reportable

pr