

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 152 of 2009

Dated : July 13, 2010

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. P.S. Datta, Judicial Member**

In the matter of:

Kerala State Electricity Board
Vydyuthi Bhavanam, Pttom
Thiruvananthapuram-695004

.....Appellant(s)

Vs

1. Cochin Port Trust
Cochin, Kerala State-682009

2. Kerala State Electricity Regulatory Commission
KPFC Building
Vellayambalam
Thiruvananthapuram
Kerala State-695010

....Respondents

Counsel for Appellant(s) : Mr. M.T. George
Ms Smitharani

Counsel for Respondent(s) : Mr. Ritin Rai
Mr. Aashish Kaul
Mr. Siddhartha Jha for Res.1

Mr. Ramesh Balu for Resp.2
Mr. Jaishankar Nambiar for Res.2

No. of corrections

Appeal No.152 of 2009

Judgment

Per Hon'ble Shri Rakesh Nath, Technical Member.

This Appeal has been filed by the Kerala State Electricity Board against the order dated 15..07.2009 passed by the Kerala State Electricity Regulatory Commission, the Respondent 2 herein, whereby it held that Kerala State Electricity Board is not authorized or entitled to collect Service Connection Charges from Cochin Port Trust (Respondent 1), a licensee for Cochin Port Trust area. The Commission had directed the Board to refund to Cochin Port Trust the amount collected from it as Service Connection Charges.

2. Kerala State Electricity Board (Appellant) is vertically integrated entity responsible for generation, transmission and distribution in the state of Kerala. Cochin Port Trust Ltd. (Respondent 1) is a deemed licensee under Section 14 of the Electricity Act, 2003 for distribution of electricity in Cochin Port Trust area at Wellington Island in Kochi. Electricity is supplied by the Port Trust (R1) for its own use and for distribution to consumers within the geographical area of Wellington Island. Cochin Port Trust purchases power from the Appellant Board for meeting electricity requirements in its licensed area as per the terms of their agreement.

No. of corrections

Appeal No.152 of 2009

Background:

3. Cochin Port Trust (R 1) entered into specific power purchase agreement with Kerala State Electricity Board ((Appellant) for the purpose of obtaining power for distribution to consumers in its licensed area. Initially the Appellant Board was supplying power to the Port Trust (R1) through 11 kV feeder from its 66/11 KV Perumanoor Substation with contract demand of 3.5 MVA. Between 1988 and 1993, the Port Trust (R1) sought enhancement of load from 3.5 MVA to 6.5 MVA which was provided by the Board. The cost of enhancement of capacity of feeder cable to Port Trust area was borne by the Respondent 1.

4. In 1993, Cochin Port Trust (R1) requested the Appellant Electricity Board for enhancement of load from 6.5 MVA to 13 MVA. During the same period, Cochin Navel Base, another licensee also demanded additional 2 MVA power allocation. In order to meet the increased power requirements it was decided by the Board in consultation with the licensees to establish 110 kV Kataribagh substation to supply power to Respondent 1 through a 110 kV feeder. There was an understanding amongst the Board, Port Trust and Naval Base that the total cost of Kataribagh substation would be shared among the three based on their respective additional load. Cochin Port Trust, however, did not pursue its request for additional load till the year 2003.

5. In April 2003. Cochin Port Trust (R1) submitted an application for power allocation of 8.5 MVA at 110 KV. However, in November, 2003, Cochin Port Trust reduced their demand to 6.5 MVA from the said 110 kV sub-station. Thus there was no change in contract demand of Cochin Port Trust except that the supply was to be given at 110 kV instead of 11 kV. For availing power at 110 kV, the Port Trust had to construct a 110 kV sub-station in its area and lay a 110 kV cable connecting its 110 kV Sub-station to the Appellant Board's Kataribagh Substation.

6. The Appellant Board undertook the construction of 110 kV Kataribagh substation. After Kataribagh substation was commissioned the Port Trust (R1) started getting supply at 11kV from Kataribagh substation. Supply to Cochin Port Trust could not be upgraded to 110 kV as its own 110 kV sub-station to receive power at 110 kV was not ready.

7. In March 2005 the Port Trust (Respondent 1) on the demand of the Appellant Board remitted an amount of Rs 63.51 lakhs to meet the cost of expansion of bay at the Board's Kataribagh substation to enable extension of supply at 110 kV Cochin Port Trust.

8. Respondent1 also completed the construction of 110 kV substation in Port's premises and also laid 110 kV cable from Appellant Board's Kataribagh substation to its own 110 kV substation to avail supply at 110 kV .

9. Respondent 1 also remitted an amount of Rs 12,35,416 to the appellant Board towards security deposit for power allocation . Accordingly, power allocation was granted by the Appellant Board to Respondent1.

10. In September 2008 the Appellant Board intimated the following conditions to Respondent 1 for extending supply at 110 kV.

- i) To remit Rs. 2, 24,57,964/- as security deposit.
- ii) To remit Rs.201.5 lakhs towards 1/3rd cost of construction of Kataribagh substation
- iii). To remit Rs. 26,32,500/- towards Service Connection Charges.
- iv) Execute an agreement with Kerala State electricity Board.

11. Cochin Port Trust (R1) remitted the security deposit and also paid Service Connection Charges under protest in September 2008 and October,2008 respectively before energization of supply at 110 kV . The agreement for supply of power at 110 kV with contract demand of 6.5 MVA was also signed on 17.11.2008. Regarding sharing of 1/3rd cost of Kataribagh Sub-Station, Cochin Port Trust informed the Board that the said amount shall be remitted after getting the approval from Kerala State Electricity Regulatory Commission.

12. Cochin Port Trust (R1) has drawn electricity from the Appellant Board at 11 kV with contract demand of 6.5 MVA till 26.11.2008. Thereafter, on energization of 110 kV substation at Cochin Port premises, Respondent 1 has started drawing power at 110 kV with the same contract demand of 6.5 MVA.

13. Cochin Port Trust filed petition No. 74 of 2009 with Kerala State Electricity Regulatory Commission against Service Connection Charges of Rs. 26.32 lakhs collected by the Kerala State Electricity Board (Appellant).

14. The Commission in its order dated 15.7.2009 decided that the claim of Service Connection Charges from Cochin Port Trust was not correct and directed the Board to refund the amount to the Port Trust. Aggrieved by the order, Kerala State Electricity Board has filed this Appeal against the Commission's order dated 15.07.2009.(impugned order)

Submissions of Kerala State Electricity Board (Appellant):

15. Learned counsel for the Appellant Board has submitted the following:

- i) Service connection charge was introduced by the Board w.e.f. 1.10.1998 to enable the Board to recover a portion of the cost incurred by the Board in its backend system for giving its service connection. The Board had to invest huge amount to strengthen its generation, transmission and distribution networks to meet the

enhanced electricity demand. Hence a consumer/licensee when applying for power connection has to bear a part of the cost incurred by the Board for developing/increasing capacity of transmission and distribution system.

- ii) Kerala State Electricity Regulatory Commission on 23.3.2005 notified the Kerala Electricity Supply Code, 2005. The Code did not provide for Service Connection Charges. However, the Commission by a letter dated 10.8.2005 had clarified that the Appellant Board is entitled to continue to realize the Service Connection Charges for pending connections under normal development category in accordance with the terms and conditions of supply which were in force at the time of submitting applications.
- iii) The appellant Board had collected the Service Connection Charges from Cochin Port Trust (R1) in accordance with terms that were prevailing prior to enforcement of Supply Code 2005 as estimates for extending supply to Respondent 1 at 110 kV were made prior to year 2005 before the enforcement of supply code, 2005.
- iv) The Service Connection Charges claimed by the Board were expenses incurred by the Board in providing electricity to the licensee.

- v) During the proceedings of the petition before the Commission (R2), Cochin Port Trust had filed a counter reply dated 2.07.2009 to the reply filed by the Electricity Board. The Commission vide its letter dated 7.7.2009 to the Electricity Board forwarded the same seeking Board's comments on or before 20.7.2009. The Board filed its reply to the Commission on 20.7.2009. However, before that the Commission passed the impugned order on 15.7.2009 ignoring its directions for filing comments by the Board on or before 20.7.2009 and without hearing them, violating the principles of natural justice

Submissions of Cochin Port Trust (Respondent 1):

16. The learned counsel for the Respondent No. 1 has argued that there is no legal basis on which the demand for Service Connection Charges was made by Kerala State Electricity Board. The demand of any amount by the Board from a licensee should be traceable to a provision either in a contract or a statute. There is no provision of Service Connection Charges either under Electricity Act, 2003 or in any provision of power supply agreement dated 17.11.2008 signed with the Appellant Board or any order or Regulation of the Commission.

17. The Appellant Board's contention that the demand for Service Connection Charges is on account of additional cost incurred by them in connection with supply of power at 110 kV (as against 11 kV earlier) and also to recover portion of the cost incurred by them in its backend system for giving the service connection is untenable.

18. The learn Counsel for Respondent 2 further argued that the Appellant Board cannot recover cost of maintaining a backend system separately from a consumer or a licensee. Such recoveries of capital outlay are normally affected through the tariff approval by the Commission (R2). The expenditure is to be reflected in the Anticipated Revenue Requirement and Expected Revenue Charges (ARR & ERC) which is placed for approval by the Commission. On approval of the said ARR and ERC, the capital outlay is taken into consideration while fixing the demand charges under the Tariff. The demand charges collected by the Appellant Board already took into account the capital outlay expended by the Appellant Board in connection with the supply to Cochin Port Trust (R1).

19. According to Respondent 1, in the instant case there was no additional expenditure incurred by Kerala State Electricity Board in extending supply at 110 kV to the Port Trust. The supply of power at 11 KV was being effected from the same Sub-station at Kataribagh before the up-gradation of supply

voltage and on up-gradation to 110 KV, there was no enhancement of load which remained unchanged at 6.5 MVA.

20. Cochin Port Trust (R1) met the cost of bay expansion works at Katribagh substation for extending supply at 110 kV. The entire cost of cabling and yard equipment, for supply of power from Kataribagh substation to the 110 KV sub-station of Cochin Port Trust were also met by the Port Trust (R1).

21. Further the Respondent 1 has argued that the supply code, 2005 by the Commission does not authorize the Appellant Board to collect Service Connection Charges.

Submissions of Kerala State Electricity Regulatory Commission (R2)

22. The learned counsel for the Commission (R2) has submitted that the supply code 2005 does not provide for collection of Service Connection Charges by the Appellant Board. The clarification that the Commission vide its letter dated 10.8.2005 had given to the Appellant Board regarding realization of Service Connection Charges for pending connections under normal development category was meant to be applied only to consumers and not to licensees. In the same letter the Board was given approval to clear the pending connections by utilizing Board's own funds and cover the amount

in the Annual Revenue Requirement and Expected Revenue charges. This clearly meant that such costs are to be recovered from tariff.

23. According to the Commission, after the enactment of the Electricity Act, 2003, Kerala Electricity Board can recover expenses only as authorized by the State Commission. The Board also cannot recover any charges which are not approved by the provisions of the Electricity Act, 2003.

24. The Commission has further submitted that all costs involved in supplying power by the Appellant to Respondent. No. 1 are to be recovered through tariff. The argument of the Appellant that the Service Connection Charges are levied to recover the cost of generation and transmission to meet the extra demand is not tenable as there is no increase in contract demand of Cochin Port Trust.

25. Regarding the contention of the Appellant that they were not given opportunities to submit their comments on the counter of Cochin Port Trust dated 2.7.2009 before the Commission, the learned counsel for the Commission (R2) submitted that the Electricity Board had participated in the hearing on 24.6.2009 and they got sufficient opportunity to counter the 'reply statement' of the Cochin Port Trust (R-1).

Analysis

26. The following issues emerge from the above submissions by the Appellant and the Respondents:

- a) Whether the Commission has passed the impugned order without giving adequate opportunity to the Kerala State Electricity Board to comment on the reply filed by the Port Trust against the principles of natural justice?
- b) Whether the Appellant Board is entitled to realize the Service Connection Charges from Cochin Port Trust on the ground that the Board was permitted by the Commission on 10.8.2005 to realize charges for pending connections in accordance with the terms and conditions of supply which were in force at the time of submitting applications?
- c) Whether the Appellant Electricity Board can recover Service Connection Charges from a distribution licensee viz. Cochin Port Trust for up-grading of power supply at 110 kV from 11 kV to recover part of cost of augmentation of generation, transmission and distribution system?

27. We have analyzed the above issues in the subsequent paras.

28. The Board had submitted its reply to the Petition No. 74 of 2009 filed by Cochin Port Trust before the Commission vide its letter dated 24.6.2009. It has been stated by the commission that the hearing of the petition was earlier posed by the Commission on 30.5.2009 but was postponed and held on 24.6.2009. thus it appears that the reply of the Board was filed on the date of final hearing only. Subsequent o the hearing, Cochin Port Trust submitted its rejoinder dated 2.7.2009 to the Commission styling it as `Reply Statement`

29. It is correct that the Commission vide letter dated 7.7.2009 had sought comments of the Board on the counter dated 2.7.2009 of Cochin Port Trust to be submitted on or before 20.7.2009.. The comments of he Board were submitted on 20.7.2009 within the time allowed by the Commission. However, the impugned order was passed before the last date of submission of comments by the Board.

30. The Commission in its affidavit has submitted that the Appellant Board had argued their case in the hearing on 24..6.2009. and got sufficient opportunity to present their case and counter the arguments of Cochin Port Trust. The Commission also considered all the points put forward by the Board.

31. Normally the reply or counter and rejoinder thereto by the Respondent and the Petitioner respectively are required to be submitted before the final

hearing before the commission and the hearing is held after completion of the Port trust appears to have been submitted only on the date of final hearing i.e. 24.06.2009. Looking into the circumstances of the case, we do not feel that the commission has passed the order against the principles of natural justice without giving adequate opportunity to the Board. The law of pleading does not recognize any second "reply statement" of a Respondent. What the Cochin Port Trust filed on 2.7.2009 is a rejoinder to the reply of the Board. With the filing of the rejoinder the pleadings are complete, and the Commission's asking for comments from the Board on the rejoinder has behind it no legal compulsion and is accordingly of no consequence whatsoever. In any case, this Tribunal has considered all the submissions and documents furnished by the Appellant Board including the comments dated 20.7.2009 submitted by the Board to the Commission.

32. The Commission in exercise of the powers conferred under Section 50 and 181 of the Electricity Act, 2003 had notified the Kerala Electricity Supply Code, 2005 on 23.2.2005. The Code did not provide for Service Connection Charges. Kerala State Electricity Board's terms and conditions of supply are based on the Supply Code that came into force with effect from 24.8.2005.

33. The learned Counsel for the Appellant has argued that the Commission vide letter dated 10.8.2005 had allowed it to collect Service Connection

Charges for pending connection. As the estimates of the work for upgrading supply of Respondent 1 was sanctioned before the Board's terms and conditions of supply based on supply code came into force on 24.8.2005, the Service Connection Charges were applicable to Respondent 1 also.

34. This argument of Appellant is not tenable as, firstly, the supply code is applicable to consumers and not applicable to Respondent 1 who is a licensee and not a consumer. Further, the Commission has also confirmed that the exemption given by them vide letter dated 10.8.2005. was not applicable to supply to a licensee. Extension of supply to the Port Trust at 110 kV is not against a pending connection but it is only up-gradation of supply from 11 kV to 110 kV.

35. The contention of the Appellant for recovering Service Connection Charges from the Respondent 1 is that it is the reasonable expenditure incurred to supply power to Respondent 1. However, any Service Connection Charge to be recovered by the Appellant from Respondent 1 has to be in accordance with the provision of Electricity Act as per their agreement.

36. There is also no provision for Service Connection charges in the Agreement dated 17.11.2008 for supply of power at 110 kV signed between the Appellant and the Respondent 1. Further as per the supply code, 2005

the Service Connection Charges are not applicable even for consumes. Thus, there is no justification for levying the same on a licensee for upgradation of supply implemented in the year 2008.

37. There is also no enhancement in quantum of contract demand which remained at 6.5 MVA. Only the voltage level for supply has been upgraded from 11kV to 110 kV from Kataribagh sub-station. The supply from the same sub-station was earlier being given at 11 kV.

38. Respondent 1 has already borne the cost of dedicated transmission system required for extending supply at 110 kV namely cost of 110 kV expansion bay at Kataribagh and 110 kV cable connecting Kataribagh to Port Trust's 110 kV sub-station

39. The cost of back up system and cost of generation has to be recovered in the tariff for supply of power by the Appellant Board to Respondent 1. In this case, the Commission has rightly held that as the contract demand has remained the same, the sub-station from where the supply has been extended also remain the same, the Respondent 1 has paid the cost for additional investment at the sub-station, there is no new upfront cost involved. Thus in our opinion, the claim of the Appellant for Service Connection Charges could not be established.

40. The Commission has also not allowed to recovery of 1/3rd cost of Kataribagh sub-station the ground that the respondent could not produce any documentary. However, this relief was not sought in the prayer made in the Petition before the Commission. This issue has also not been raised in the ground of Appeal and the relief sought in this Appeal. However, the Appellant has submitted documents before the Tribunal showing that there was an understanding between the Board and Cochin Port Trust in sharing the cost of Kataribagh Sub-station. These documents were not placed before the Commission. The Respondent 1 has stated that the understanding was reached when there was a proposal for enhancing quantum of power. According to Respondent 1, since he contracted demand was not increased there was no question of sharing 1/3rd cost of Kataribagh sub-station. We are not going into the merit of the issue as some documents which were not placed before the Commission have not been submitted before the Tribunal. The appellant has liberty to approach the Commission regarding their claim for sharing the cost of Kataribagh Sub-station.

Conclusion:

41. In view of above we uphold the impugned order of the commission that the Appellant is not entitled to realize the Service Connection Charges from Respondent 1.

42. The Appeal is dismissed. No costs.

(Justice P.S. Datta)
Judicial member

(Rakesh Nath)
Technical Member

REPORTABLE/NON-REPORTABLE

Dated 13th July, 2010

