Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 94 of 2008

Dated : 12th November, 2009

Coram : Hon'ble Ms. Justice Manju Goel, Judicial Member
Hon'ble Mr. H.L. Bajaj, Technical Member

IN THE MATTERS OF :-

Kerala State Electricity Board
Vydyuthi Bhavanam
Thiruvananthapuram – 695 004 … Appellant(s)

Versus

Kerala State Electricity Regulatory Commission
KPFC Bhavanam, CV Raman Pillai Road,
Vellayambalam,
Thiruvananthapuram – 695 010 …..Respondent(s)

Counsel for the Appellant(s) : Mr. M. G. Ramachandran,
Ms. Swapna Seshadri
Mr. M. T. George,
Ms. Smitha Rani
Mr. Shiva Prasad P. V.

Counsel for the Respondent(s) : Mr. Sudhir Gupta,
Mr. Syed Shahid Husain Rizvi,
Ms. Hina Rizvi

Mr. Akhil Sibal, Ms. Ananya
Kar, Mr. Tarun Satija,

Mr. Vaibhav Mishra
Ms. Bina Madhavan.
Mr. Manish Kumar
Mr. Shwetank Sailokwal
Mr. Salem Imamdar,
Mr. Hemant Seth
Mr. Amarjit S. Bedi,
Mr. Dinesh Kumar

J U D G M E N T

Justice Manju Goel, Judicial Member

The appeal is directed against the order of the Kerala Electricity Regulatory Commission (Commission for short) in its order dated 24.11.07 in TP No. 20 of 2006 and 22 of 2006 filed by the appellant as distribution licensee.

02) The Commission in its tariff order for the appellant for 2003-04 approved a total revenue requirement of Rs.3,647.83 Crores with Rs.240.37 Crores as non-tariff income and Rs.3,141.37 Crores as revenue from tariff leaving a revenue gap of Rs.556.46 Crores and recommended to the Government that a subsidy to the extent of Rs.556.46 Crores be given to the appellant. The appellant filed truing up petition showing a gross ARR of Rs.4,068/- Crores and Rs.3,060.74 Crores as revenue from sale of power and other income leaving a revenue gap of Rs.1,007.44 Crores. The Government released subsidy of Rs.361.00 Crores and adjusted the guaranteed

subsidy & electricity duty to the tune of Rs.195.46 Crores totaling Rs.556.46 Crores. The appellant prayed for truing up the financials to accept the revenue gap of Rs.450.97 Crores.

03) In the ARR & ERC order of 2004-05 the Commission fixed revenue gap of Rs.296.46 Crores with ARR fixed as Rs.3,492 Crores and revenue from electricity charges at Rs.3,196 Crores. The Commission proposed subsidy of Rs.96 Crores in addition to adjustment of Rs.166 Crores of duty collected under Section 4 of the Kerala Electricity Duty Act and exemption of Rs.34 Crores of electricity duty payable by the appellant under section 3(i) of the KED Act so as to avoid a tariff revision. The appellant in truing up petition No.22 mentioned actual gap to the tune of Rs.342.77 Crores as against the initial estimation of Rs.296.46 Crores.

04) The Commission examined the truing up petitions being No. TP 20 of 2006 & TP 22 of 2006 and disposed them of by the common order impugned in this appeal.

05) The Commission found that T&D loss level achieved by the appellant was 27.4% in 2003-04 as against committed T&D loss of 26.5% and approved loss of 26.6%.

06) The audited accounts of the appellant showed actual energy input as 12281 MU. Hence the sale should have been 9018 MU. The Commission found that actual sale was 8900 MU. The Commission concluded that the difference, viz. 118 MU, should have been sold and revenue to that extent earned.

07) For 2004-05, the Commission had mentioned in the tariff order of 2003-04 itself that TD loss should be reduced by 3%. Thus T&D loss for 2004-05 should have been 24.4%. As per audited accounts the T&D loss for 2004-05 was 24.95%. The excess sales for 2004-05 for achieving approved loss would be 63 MU. The Commission considered the performance parameters of T&D loss at the approved level.

08) The generation and power purchase was considered at actual. For 2003-04, as against the approved power purchase cost of Rs.1775.13 Crores, the actual was found to have been 1887.11 Crores and was trued up as such. Similarly generation cost was trued up at Rs.143.70 Crores as actual against the approved cost in ARR at Rs.153.32 Crores. Similarly from the year 2004-05 power purchase cost & power generation cost were trued up at Rs.1,463.03 Crores and Rs.81.13 Crores, which were substantially lower than the approved cost.

09) Towards R&M expenses of 2003-04 the approved figure was Rs.66.70 Crores. But the appellant actually incurred Rs.63.79 Crores. The Commission considered the target as overachieved and trued up the R&M expenses at Rs.66.70 Crores. For 2004-05, the Commission had directed that the licensee shall maintain the R&M expenses at the same level as for the year 2003-04. Although the appellant actually incurred Rs.74.49 Crores as R&M, the Commission trued up the expenses to only Rs.66.70 Crores.

10) A&G expenses of the appellant for 2003-04 was approved at Rs.55.88 Crores but the actual was Rs.84.74 Crores. This included electricity duty under Section 3 of the Kerala Electricity Duty Act, 1963 which could not be passed on to the consumer. The Commission accordingly disallowed the expenses towards electricity duty as expenses which could be passed through in tariff. The remaining A&G expense was Rs.33.21 Crores, which was less than Rs.34.01 Crores approved in the ARR of 2003-04. The Commission allowed the approved expenditure of Rs.34.01 Crores granting the excess as incentive for performance. However in 2004-05 the actual expense was Rs.40.03 Crores but only Rs.34.30 Crores was allowed as that was the approved figure.

11) Employee expenses were higher than what was approved in both the years and was explained by the appellant to have been incurred on account of payment of DA arrears and terminal

benefits. The Commission trued up the employees expenses for 2003-04 at the actually incurred amount of Rs.788.31 Crores. However, for 2004-05, the Commission allowed only Rs.753.47 Crores as against the claim of actual expense of Rs.789.64 Crores, leaving a gap of Rs.31.17 Crores.

12) The Commission disallowed the carrying cost for the portion of subsidy adjustable against duty as there was no actual transfer of money from the appellant to the Govt. on this account. Other debits approved by the Commission for 2003-04 was Rs.17.41 Crores whereas the audited accounts showed a figure of Rs.22.72 Crores. For 2004-05 other debits approved was Rs.23.69 Crores as against the actual of Rs.36.50 Crores. The Commission stuck to the approved amounts and rejected the balance. The Commission allowed a total revenue gap for 2003-04 & 2004-05 at Rs.360.06 Crores to be carried in the ARR of 2007-08. The licensee which has challenged the Commission's decisions on the issue of T&D loss, the R&M expenses, A&G expenses, employment cost, electricity duty and other expenses has raised the following questions of law:

> "A. *Can the State Commission ignore the audited accounts of the KSEB placed before it duly certified by the Comptroller and Auditor General of India and not allow the actual expenses of KSEB as per audited accounts without any disallowance on*

account of unprudency on the part of KSEB being there?

B. *Can the State Commission adjust the electricity duty payable by KSEB to the Government against the revenue gap of KSEB when such electricity duty is not part of the revenues of KSEB?*

C. *During the course of truing up, can the State Commission refuse to allow to KSEB expenses that KSEB has necessarily incurred without there being any imprudence or mismanagement on the part of KSEB?"*

13) The appellant contends that the computation of T&D loss is incorrect in as much as the Commission has computed sales more than actuals on the assumption that the entire energy purchased was sold subject to the approved T&D loss. It is further submitted that for the year 2003-04 the Commission had not fixed any specific loss reduction target but has assumed that the T&D loss approved was 26.6%. The appellant refers to an earlier judgment of this Tribunal in Karnataka Power Transmission Corporation Ltd. Vs. Karnataka Electricity Regulatory Commission & Ors. Dated 04.12.07, appeal No.100 of 2007, in which this Tribunal, inter alia, held that the Commission cannot be allowed to assess the revenue

of the licensee on an imaginary sale of power and that the licensee has to bear the burden of extra purchase of power but that revenue of the licensee cannot be assessed on the basis of assumed sale of extra power purchased. The appellant contends that so far as R&M expenses is concerned the Commission should have accepted the account certified by Comptroller & Auditor General of India and should not have restricted the R&M expenditure for the 2004-05 to the extent of R&M expenditure in the year 2003-04. It is contended that the appellant had incurred substantial expenditure in maintaining and monitoring of assets and further added new generating capacity, sub-stations etc. which led to the rise in the R&M expenses. The appellant referred to the judgment of this Tribunal in the case of Bangalore Electricity Supply Co. Ltd. Vs. Karnataka Electricity Regulatory Commission 2008 ELR (APTEL 164) in which this Tribunal had advised that the projections of R&M expenses should be left to the wisdom of the utility/licensee. On Administrative and General expenses (A&G) the appellant contends that the major part of disallowance related to the Kerala Electricity Duty and the expenditure incurred on that behalf should be granted as a pass through. Coming to the employees salary the appellant contends that the rise in the salary of employee was caused by the hike in the DA in the year 2003-04 but the Commission had reduced the salary and DA component which is against the principles laid down by the Supreme Court in *West Bengal Electricity Regulatory Commission Vs. Calcutta Electricity Co.*

(2002) SCC 715. About other expenses disallowed, it is contended that the Commission on prudent accounting principles had written off bad and doubtful debts and other miscellaneous losses as per the observations of the Comptroller & Auditor General of India and that this should have been accepted. The revenue gap estimated by the State Commission is Rs.920.07 Crores as against the revenue gap of Rs.1007.43 Crores for 2003-04 and Rs.218.48 Crores as against Rs.342.77 Crores for the year 2004-05 as per audited accounts and this should have been allowed. So far as electricity Duty is concerned the Commission's approach of adjusting the duty against the Government subsidy is also criticized by the appellant.

14) The Commission has filed a counter affidavit and has attempted to explain and justify the impugned order.

15) We will consider the replies of the respondent Commission as we go along with our analysis as it follows.

Decision with reasons:

16) Most petitions before this Tribunal challenge the ARR and ERC order of the appropriate Commissions in which the Commissions estimates, on various parameters, the revenue required by a licensee in order to distribute energy to the consumers in its area. The Commission in the process is required

to also estimate the amount of energy required by the consumers in the area in the given period, the transmission and distribution loss as well as the cost to be incurred in distributing the energy. At the end of the given period, say one year, the accounts are examined in order to determine the actuals. In the truing up process the actual expenditures are examined and the expenditures with various heads are trued up. So far as the effect of audit is concerned, it establishes the genuineness of accounts and expenditure incurred. The audit does not certify the wisdom of expenditure incurred. The Commission has to allow only as much expenditure as pass through as meets the targets set by it or is found to be prudent and necessary.

17) For example, if the Commission estimates that 'X' units would be purchased at price 'P' and the total cost of purchase of electricity would be 'X x P' but in effect the price being higher for reasons beyond the control of the licensee the total expenditure on purchase may be X x (P + ∂ P). In truing up the Commission has to allow the expenditure actually incurred for purchasing the quantity of electricity which was estimated in the beginning. However, if instead of purchasing 'X' units of electricity the distribution licensees purchases 'X' + ∂ x amount of electricity then the expenditure incurred would be ('X' + ∂ x) x 'P' . The utility is then made to explain why it had to buy more than the 'X' units of electricity. If the extra purchase is on account of transmission and

distribution losses over and above what was targeted then it will be within the discretion of the Commission to disallow the difference in the purchase cost caused by extra purchase. The audit does not go into the justifiability of the extra purchase. It merely examines only the correctness of the account and nothing more. In fact in the audit certificate it was stated

> "*we have conducted our audit in accordance with the applicable rules and auditing standards generally accepted in India. These standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material mis-statements.*"

18) Although in the appeal petition the appellant has pleaded that the commission should have gone by the audited accounts, at the time of arguments Mr. M. G. Ramachandran Advocate for the appellant did not subscribe to any such view. He accepts the Commission's discretion to seek explanations and to allow the justified expenditure and insist on meeting targets set in the beginning of the year. His case is that on the submissions made by the appellant the Commission should have accepted the expenditures incurred and should have allowed the entire revenue gap as pass through. It will be worthwhile to mention the observations of the Supreme Court made in *West Bengal Electricity*

Regulatory Commission Vs. CESC Ltd. (2002) (8) SCC 715 which is extracted below. The judgment relates to the Electricity Regulatory Commissions Act 1998 but deals with the question at hand.

> *"The 1998 Act mandates the Commission to take into consideration of the efficient management by the licensee of its Company, as also the interests of consumers while determining the tariff, therefore, if these two factors which go in favour the consumers are in conflict with the definition of expenditure 'properly incurred' in Schedule VI to the 1948 Act then it is for the Commission to reconcile this conflict and decide whether to accept the expenditure reflected in the accounts of the company or not. In this process the Commission in our opinion is not bound by the Auditors' report.*
>
> *Herein we notice that the objects of the 1948 Act are entirely different from the objects of the 1998 Act. The 1948 Act under Schedule IV does not contemplate taking into account the factors like good performance of the Company as also the consumers interest in its expenditure while considering a particular expenditure as 'properly incurred expenditure' While the 1998 Act specifically mandates that these factors also should be taken into account while considering whether a particular*

expenditure is 'properly incurred expenditure' or not, there it is not correct to say that each and every expenditure maintained under the provisions of sixth schedule ipso facto becomes binding on the Commission.

*The High Court further came to the conclusion that in view of the fact that there is no challenge to the accounts of the Company by the consumers, the said accounts of the Company should be accepted by the Commission. Here again we are not in complete agreement with the High Court. There may be any number of instances where an account may be genuine and may not be questioned, yet the same not reflect good performance of the Company or may not be in the interest of the consumers. Therefore there is an obligation on the Commission to examine the accounts of the Company, which maybe genuine and unchallenged on that count still in the light of the above requirements of Section 29(2)(g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the Company are not ipso facto binding on the Commission." (*Emphasis Added)"

19) The appeal relates only to the truing up order. Therefore we proceed to examine the appeal in the light of the above principles.

Another thing to be remembered here is that the projections made in the beginning of the year 2003-04 or in the beginning of 2004-05 have not been questioned. Accordingly, no plea about the propriety of the projections can be challenged in the appeal.

Transmission and distribution losses:

20) In the ARR and ERC petition, submitted by licensee for the 2003-04 the licensee committed that it would limit the T&D loss to 26.5%. The Commission fixed the total internal energy input as 12120 MU on the basis of data available as on December, 2003. The Commission arrived at this figure after making due adjustment for the normal growth for the remaining period and reduction in consumption in certain categories and T&D loss during 2003-04. The Commission however, said in the impugned order itself that estimate of T&D loss could not be arrived at due to lack of sales data and that it would undertake a review of sales at the end of the year. In the ARR and ERC exercise for 2004-05 the Commission had undertaken the review of sales based on data up to December 2003 and decided the sales for 2003-04 at 8900 MU and thereby approved the T&D loss at 26.6%. The audited account showed that the loss level was 27.4%. The actual energy input was 12281 MU. The Commission estimated that with T&D loss of 26.6% energy sales should have been 9018 MU. The difference in sales of 108 MU was found to be excess sales that should have been achieved by the licensee. The appellant contends that the Commission had in fact

not set any target for the year 2003-04 and the assumption of 26.5% was merely fictitious. Further how much of the T&D loss can be loaded on the appellant has also been questioned by the appellant. The appellant refers to an earlier judgment of this court in Karnataka Power Transmission Corporation Ltd. Vs. Karnataka Electricity Regulatory Commission and Others in appeal No. 100 of 2007, delivered on 04.12.07. The following part of that judgment dealing with T&D losses is relied upon by the appellant:

> *32. We need to balance the interest of the consumer and the licensee by ensuring that the licensee tries his best to achieve the said targets and is deterred to under achieve loss reduction. In the present case to sell 69 units KPTCL will be allowed purchase cost of 100 unit only as per the target of 31% set by the Commission and the licensee will have to pay for the power required over and above 100 units so that 69 units are sold to consumers. We decide that this deterrent of disallowing cost of electricity required over and above 100 units is sufficient and it will not be correct to assume an imaginary sale of electricity when the actual loss level is 35.5% and when the licensee has already been penalized by not allowing it the cost of power procurement over and above 100 units. This will ensure that the licensee functions efficiently. Interest of consumers is not prejudiced because licensee is being*

allowed only purchase cost of power as per the loss level target set by the Commission.

The question before us is how much of power can be deemed to have been sold and what amount should be taken as the revenue from the sale of power. The Commission cannot be allowed to assess the revenue of the licensee on the imaginary sale of power as indicated above. The licensee has borne the burden of extra purchase of power for meeting the T&D loss over and above the target. The revenue of the licensee can be assessed only on the basis of actual sale. We, accordingly, uphold the objection of the appellant on this aspect and allow the appeal in respect of issues A&B."

21) Our view is also stated in our judgment in appeal No. 9 of 2008. Appeal No. 9 of 2008 challenged the order of Karnataka Electricity Regulatory Commission which was passed pursuant to our judgment in appeal No. 100 of 2007. Our view was expressed in the following language:

> "*36. … While arriving at the quantum of power purchase to be allowed for revenue requirement, KERC should first reduce the disallowed T&D losses from the quantum of power purchase entered in the*

audited accounts of KPTCL. From the figure so arrived, the Commission has to reduce the allowed T&D losses which will give the quantum of power available for sale yielding revenue. …"

22) The power purchase cost is a reality. So are the actual sales. The appellant has actually not earned any revenue by sale of the units which it should have been able to sell with T&D target at 26.5%. In our view it is more reasonable to disallow the cost incurred for purchasing the additional units of energy on account of failure to meet the target for T&D loss reduction than to penalize the distribution licensee by adding assumed revenue from the sale of the additional units of power purchased.

23) The appellant itself had offered to contain the T&D loss at 26.5% and accordingly it will be appropriate to accept that as the target fixed by the Commission. For 2004-05 the target fixed was 3% below the loss level of 2003-04. The loss level achieved for 2003-04 was 27.4% and hence the target fixed was 24.5%. The same principle as above should be followed for failure to meet the T&D loss level target in 2004-05. The Commission should disallow the additional cost for purchase of additional power rather than adding on the revenue side the amount which could be earned by achieving the T&D loss target.

Repair and maintenance:

24) The Commission had approved R&M expenses at Rs.66.70 Crores for the year 2003-04. The appellant could keep the R&M expenses within the target and in fact incurred only Rs.63.79 Crores on R&M expenses for that year. The Commission allowed the appellant to retain the balance amount by way of incentive for over achieving the target. For 2004-05 the Commission directed the R&M expenses to be restricted to the same level as 2003-04. However the audit show that the actual expenditure incurred was Rs.74.49 Crores. The Commission says in the impugned order that the licensee could not justify in a quantifiable manner the increase in R&M expenses more than the approved level and could not provide any material before the Commission on the efforts made to limit the R&M expenses within the target. The appellant on the other hand says that the appellant had duly justified the R&M expenses incurred. It is contended by the appellant that the Commission has failed to appreciate that the appellant had incurred substantial expenditure in maintaining and monitoring the old assets and further adding new generating capacity lines etc. and all these factors led to rise in R&M expenses year after year. The Commission contends that the explanation is most inadequate in as much as sufficient details and justification for the expenses has not been supplied. In the truing up petition the appellant had the following to say:

"7. <u>Repairs and Maintenance (R&M) Expenses</u>

7.1 The table below shows the expenses on Repairs and Maintenance in respect of each class of asset mentioned in the ARR and the actual as per the Provisional Accounts for the year 2004-05. In the ARR for 2004-05, the Board had projected a requirement of Rs.85.25 crores, but the Hon'ble Commission approved Rs.66.70 crores only at the same level approved by the Commission for the previous year (2003-04). However, the actual expenses in 2004-05 as per Accounts is Rs.74.49 crores as detailed below.

Table – 10 – Repairs and maintenance cost (Rs. in crores)

Sl. No.	Particulars	2004-05				
				Accounts		
		ARR	Approved by SERC	Consumption of stores, fuel etc.	Other Expenses	Total
1	Plant & Machinery	20.02		8.78	9.68	18.46
2	Buildings	1.60		0.08	1.33	1.41
3	Other Civil works	3.26		0.09	2.10	2.19
4	Hydraulic works	0.93		0.02	0.79	0.81
5	Lines, Cable networks	56.77		25.75	22.36	48.11
6	Vehicles	2.48		0.09	3.08	3.17
7	Furniture & fixtures	0.03		0.00	0.05	0.05
8	Office equipment	0.16		0.01	0.28	0.29
	Total	85.25	66.70	34.82	39.67	74.49

7.2 With a view to contain the expenditure, it was decided to curb the expenditure wherever required and consequently the Board has been able to reduce the expenditure from the projected amount of Rs.85.25 crores to Rs.74.49 cores, though it has exceeded the limit

approved by the Commission. It may be noted that Rs.39.67 crores out of Rs.74.49 crores was spent on stores and other materials required for the R&M work.

7.3 The following table gives the R&M expenses as percentage of opening balance of the respective asset classes.

Table-11 R&M Expenses as %ge of Opening Balance of Gross Fixed Assets

Particulars	2003-04 %	2004-05 Gross Block (Rs. Cr)	2004-05 R&M Expense (Rs. Cr)	2004-05 %
Land & Rights	0.00	182.84	0.00	0.00
Buildings	0.37	372.58	1.41	0.38
Hydraulic Works	0.11	703.69	0.81	0.12
Other Civil Works	1.49	148.11	2.19	1.48
Plant and Machinery	0.70	2710.53	18.46	0.68
Lines, Cable Network , etc.	2.02	2404.95	48.11	2.00
Vehicles	21.78	11.26	3.17	28.15
Furniture and Fixtures	0.31	10.63	0.05	0.47
Office Equipments	2.27	13.97	0.29	2.08
Total	1.18	6558.56	74.49	1.14

25) It is contended by the respondent Commission that the appellant could not substantiate in any manner the increase in expenditure for R&M beyond its reasonable control for the year 2004-05. It is contended that the appellant could not produce any material before the commission on efforts made to limit the R&M expenses within the approved limit and also could not substantiate why higher expenses were made. The impugned order also says that the licensee could not justify in any quantifiable manner the increase in R&M expenses more than the approved level. It was

contended on behalf of the Commission by Mr. Akhil Sibal that the Commission required to the appellant to produce the relevant data to justify the failure to limit the R&M expenses within Rs.66.70 Crores but the licensee did not respond to the same. The truing up petition, as mentioned above, merely states what amount of expenditure was actually incurred on R&M. Although it says that the R&M expenses was much less than what was projected by the appellant itself, there are no facts and figures given in support of such claim. Nothing is mentioned as to how instead of Rs.85.25 Crores the R&M was limited to Rs.74.49 Crores. In any case there is no explanation why the expenses could not be limited to the approved amount. The Commission says that the respondent was called upon to give a break up as to how the approved amount of Rs.66.70 Crores was proposed to be spent and the appellant failed to respond to that notice and therefore, failed to provide any basis to the Commission to examine whether the expenses incurred for R&M amounting to Rs.74.49 Crores could be justified and allowed to be pass through in tariff.

26) Shri Sibal wants to put the onus on the appellant to justify the R&M expenditure claimed in excess of the amount approved in the ARR order. Mr. Ramachandran on the other hand says that the appellant was never put to notice during the truing up proceedings that any information, more than what was already submitted was required by the Commission. The present litigation is not of

adversarial nature. Nor were the truing up proceedings. It appears to us that the dialogue between the Commission and the appellant during the truing up proceedings was not sufficient and the Commission confirmed the already sanctioned amount rather than probing into what should the expenses have been. We are of the opinion that the appellant and the Commission need to make further effort in determining the R&M expenses which should be passed through tariff.

Administrative and General Expenses:

27) The appellant contends that the Commission erred in limiting the A&G expenses for 2004-05 to the same extent as in 2003-04 and thereby disallowing Rs.5.73 Crores to the appellant. It can be stated at the outset that the Commission's decision to limit the A&G expenses to the same level as 2003-04 was not challenged. Therefore, in the present appeal against the truing up order the appellant can only raise some objections to the truing up exercise. Two major components of A&G expenses are to be examined in this appeal. The first component is the electricity duty payable by the appellant and the second is the expenses other than electricity duty which is Rs.34.01 Crores. There were two kinds of electricity duty payable under the Kerala Electricity Duty Act 1963 (KED Act for short). Section 3 of that Act requires the licensee to pay the electricity duty calculated at 6 paisa per unit of energy sold at a price more than 12 paisa per unit. Section 4 of the Act levies

electricity duty on the consumer which is distinct from duty payable by the licensee under section 3. Section 3 has a proviso to the following effect:

> "*the duty under this section on sales of energy should be born by the licensee and shall not be passed on to the consumers.*"

28) The Commission has expressed helplessness to help the appellant in view of this categorical direction in the Act. The duty payable under section 3(i) was Rs.54.98 Crores and the duty payable under section 4 was Rs.167.08 Crores. The Commission recommended to the Government for adjustment of duty for 2004-05. However, to the extent of the duty payable under section 3, the burden had to be born by the appellant and Rs.167.08 Crores only which had been collected by the appellant from the consumers could be retained by way of adjustment against subsidy payable. A letter from the Government of Kerala to the Commission about waiving of electricity duty has been placed on the record. This letter dated 05.11.05 deals only with the duty leviable under section 4 of the KED Act. The letter in effect says that it is necessary for the Government to actually release the subsidy from the expenditure head of account and then show the revenue received from the electricity duty and that this kind off setting will be done by Accountant General. The letter neither demands the electricity duty

payable under section 3 of the KED Act nor exempts the appellant from paying such duty. The Commission can make no concession in respect of duty payable under section 3 which is imposed statutorily on the appellant. Nor can the Commission allow the duty payable as pass through in tariff. In this regard we are constrained to agree with the view of the Commission.

29) Mr. Ramachandran submits that in a cost plus method of tariff fixation, we cannot burden the distribution licensee with any expenditure lawfully incurred. According to him electricity duty payable under section 3 of the KED Act should be part of the general expenses as has been done in the past. Mr. Sibal submits that if it is so done, the burden of the duty will eventually fall on the consumer and would not be permissible as per the proviso quoted above. We entirely agree with Mr. Sibal's contentions. The provision of the legislation cannot be frustrated by such manipulation. Even if in some year/years the duty in question has been included in the A&G expenses, the same cannot be adopted as a practice. There can be no estoppel against statute. Hence the Commission's view in this regard needs to be upheld.

30) So far as other expenses are concerned the A&G expenses for 2003-04 was Rs.33.21 Crores which was below the approved level of Rs.34.01 Crores and the Commission allowed the appellant to retain the balance amount by way of incentive. For 2004-05 the

Commission approved the A&G expense of Rs.68.68 Crores including the electricity duty. Expenses, other than electricity duty, approved were Rs.34.30 Crores. The Commission in the impugned order declined to allow any amount over and above Rs.34.30 Crores. In the counter affidavit the Commission says that A&G expenses were controllable items such as telephone charges, printing, stationary, conveyance, vehicle hire etc. and that if sincere efforts were made such expenses could be brought down. The Commission says that the licensee's A&G expenses can be curtailed below the approved level and the amount saved was allowed as incentive and that for the year 2004-05 the same principle has been followed. It is further submitted that the appellant could not provide any material to justify the increased expenses over and above approved level for the year 2004-05 and did not show what efforts were made to curtail the expenditure. The appellant contends that A&G expenses were higher that the Commission failed to appreciate that with increase in the demand charge and addition of five lakh consumers in 2004-05 the A&G expenses have arisen. The Commission on the other hand contends that the appellant did not produce any facts and figures to correlate the addition of consumers to the additional expenses and more particularly whether the addition of new consumers were beyond contemplation when the ARR was formulated.

31) We feel that in respect of A&G expenses also, the Commission and appellant should make more effort in identifying the true amount in the same manner as advised in respect of R&M expenses.

Employee expenses:

32) For 2003-04 the expenses towards employees was Rs.788.31 Crores which is higher by Rs.94.67 Crores than the projected cost of Rs.693.64 Crores. The licensee claimed that the increase was on account of release of five installments of DA in one go as well as increase in the quantum of terminal benefits. The Commission calculated that increase in DA could be to the extent of Rs.63.20 Crores and therefore, the employees cost except terminal benefits would amount to Rs.388.04 Crores after truing up. The actual terminal benefits were Rs.403.20 Crores as against approved expense of Rs.368.80 Crores. The Commission allowed the terminal benefit as a special case since the ARR ERC order for 2003-04 were finalized only in the month of December, 2003 and the appellant had very little scope to undertake cost reduction in terminal benefits. The Commission limited the employee expenses to the extent of Rs.788.31 Crores.

33) For 2004-05 the Commission has allowed an expense of Rs.753.47 Crores as against actual expense incurred of Rs.789.64 Crores. The Commission contends that it has allowed the additional

expense on account of increase in salary and DA as calculated by the Commission namely Rs.348.02 Crores as well as approved expenditure of Rs.361 Crores of terminal benefit which was higher than the expenses actually incurred on that account, viz. Rs.342.98 Crores. The appellant contends that actual increase in salary and DA in 2004-05 by 3.7% over the salary of 2003-04 but the State Commission had actually reduced the salary and DA component of 2004-05 compared to the amount allowed in 2003-04. In 2003-04 the Commission allowed an amount of Rs.788.31 Crores whereas in 2004-05 the amount allowed was Rs.753.47 Crores only.

34) The appellant gave a comparable table of the ARR demanded by it, approved by the Commission, and actuals as per the audited accounts. The same is as under :

Table – 8 – Employee Cost – 2004-05 *(Rs. in crores)*

Sl. No.	Particulars	2003-04	2004-05		
			ARR	SERC	Accounts
1	Salaries	212.94			232.51
3	DA	151.75	315.98	313.00	169.95
2	Overtime	0.12	0.14	0.13	0.07
4	Other Allowance	16.47	22.19	21.34	16.65
5	Bonus	2.51			2.55
6	Sub total of 1 to 5	383.79	338.31	334.47	421.73
7	Medical expenses reimbursement	1.90			1.80
8	Earned Leave encashment	0.00	23.00	23.00	22.78

9	*Payment under Workmen's compensation*	*0.32*			*0.35*
10	*Sub-total 7 to 9*	*2.22*	*23.00*	*23.00*	*24.93*
11	*Staff Welfare expenses*	*0.10*			*0.06*
12	*Terminal benefits (including terminal Surrender)*	*402.20*	*375.33*	*361.00*	*342.92*
13	*Sub-total of 11 to 12*	*402.30*	*375.33*	*361.00*	*342.98*
14	*Grand total*	*788.31*	*736.64*	*718.47*	*789.64*

35) The major issue is with regard to the expenses on salaries and DA. The salaries and DA, as per accounts works out to 402.46 Crores as against the trued up amount of 348.02 Crores. The Commission had warned against the high employee cost in its ARR order. In the true up order also the Commission has noted the grievance of the public that the employees cost of the appellant was rather high. The Commission has expressed its concern about non-fulfillment of the undertaking given by the appellant in making efforts to reduce the staff cost through measures such as improving productivity, reducing overtime charges, abolition of redundant posts of staff and officers etc. The Commission has also noted that the terminal benefit has over stepped the employee cost and therefore, the licensee has to take genuine long term steps to arrest the increase in employee cost. In the true up petition the appellant stated that the payment on account of DA and rise in salary are not controllable factors. It states further that there has been no large scale increase in employee strength despite increase in service connection network. It has further stated that vacancies

as per existing sanctioned strength are filled up only on need based manner to maintain the quality of service and to the bare minimum. The appellant further submitted that for 2003-04 the employee cost was 788.31 Crores and therefore in 2004-05 there has been only a marginal increase to 789.64 Crores and therefore, should have been allowed. On behalf of the Commission it is submitted by Mr. Sibal that it was for the appellant to explain how the cost towards DA and salary was higher than what was approved and it is not for the Commission to prove that the difference is unjustifiable. Mr. Sibal also fairly submits that the Commission should not adopt an adversarial or combative attitude. We are of the opinion that there cannot be any application of the theory of onus in the tariff proceedings or in the truing up proceedings as we do in the civil or criminal proceedings. Apart from the salary and DA other expenditure of other items, as can be seen in table 8, are within the anticipated range. Hence we think that the Commission should give the appellant another chance to explain the employees' expenses.

Bad debts:

36) The appellant has certain written off bad debts which have not been allowed by the Commission which has led to a difference between the amount claimed towards other expenses and the amount approved on that account. Here again the Commission has taken the stand that the data supplied was not sufficient. On this

issue also we direct a fresh attempt as we have done on issues relating to O&M expenses, A&G expenses and employees cost.

37) Accordingly, we allow the appeal in part and remand the truing-up of the financials of the appellant for the year 2004-05 in respect of effect of under achievement of transmission and distribution loss in the light of our observations in paragraphs 21, 22 & 23 and re-determine the R&M expenses, the A&G expenses other than Electricity duty, employees expenses as also bad debts for 2004-05 after affording the appellant another opportunity of hearing. The appeal on other issues is dismissed.

38) Pronounced in open court on this ***12th day of November, 2009***.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member

Reportable✓ / Non-reportable