

KERALA STATE ELECTRICITY REGULATORY COMMISSION THIRUVANANTHAPURAM

RP No.1/2020

Present : **Shri. Preman Dinaraj, Chairman**
Shri. S. Venugopal, Member

In the matter of : Review Petition against the Order dated 8-11-2019 in OA 10/2019 on the ARR&ERC of M/s Rubber Park India (P) Limited for the period 2018-19 to 2021-22.

Petitioner : M/s. Rubber Park India Private Limited,
Valayanchirangara, Ernakulam

Respondent : M/s KSEB Ltd, Thiruvananthapuram

Order dated 24/04/2020

1. M/s Rubber Park India (P) Ltd (*hereinafter referred to as M/s RPL or the licensee*) as per Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003, filed a Review Petition dated 3-1-2020, for the Review of the Commission's Order in OA No. 10/2019 dated 8-11-2019 on their ARR&ERC for the control period (Control Period) 2018-19 to 2020-21. Since there was delay in filing the petition, the Commission notified this defect to the petitioner vide letter dated 9-1-2020. The petitioner vide letter dated 16-1-2020 filed a petition for condonation of delay. The Commission considered the same and after condoning the delay, admitted the Review Petition as RP No.1 of 2020. Thereafter, the Commission issued notices to the parties for the public hearing which was held at the Commission's Office on 4-3-2020.
2. The Commission has approved the licensee's ARR&ERC for the Control Period as per the provisions of the KSERC (Terms and conditions for determination of Tariff) Regulations, 2018 (*hereinafter referred to as the Regulations or Tariff Regulations 2018*), vide its Order dated 8-11-2019 in OA 10/2019. In the Review Petition, the licensee submitted that the Commission in the above Order had not considered some of the expenses projected by the licensee and in some cases there were factual errors while assessing and approving certain expenses. According to the licensee, these errors are in the nature of "*error apparent on the face of record*" and therefore within the jurisdiction of the

review petition. The review was sought on the Return on Equity, Interest on Normative Loan and Depreciation approved in the Order. The specific claims of the licensee in the review petition are given below:

a. Return on Equity :

3. The licensee submitted that the Commission for the purpose of RoE for ARR&ERC for the control period 2018-19 to 2021-22 had taken the equity share capital as on the 31-3-2017 and equity component on a normative basis for the asset addition proposed during the control period. By doing so, the Commission has not considered the equity component of the assets capitalized during the year 2017-18 while approving the impugned ARR&ERC order. According to the licensee, as per Regulation 28 of the Tariff Regulations 2018, the RoE is to be allowed on the amount of equity capital approved by the Commission for the asset put into use at the commencement of the financial year and 50% of the equity share capital of the approved capital cost for the investment put into use during the financial year. According to the licensee, the RoE should have been allowed for the assets put into use as on 31-3-2018.
4. The licensee further stated that, in 2017-18 and 2018-19, it had capitalized an amount of Rs.11.25 lakh during 2017-18 and Rs. 7.32 lakh during 2017-18, with the approval of the Commission and assets worth Rs.7.38 lakh was capitalized in 2017-18 on an emergency basis. These amounts were incurred out of the equity of the company. The licensee also stated that in the truing up petition for 2017-18, the licensee has equalized the total equity of the distribution business and the approved total assets and requested the Commission to regularize this modification done in 2017-18. In addition, deposit to the tune of Rs.173.37 lakh given to M/s KSEB Ltd as security for the purchase of power is also included as part of the equity. Based on these submissions, the licensee sought a review of the RoE approved for the control period.

b. Interest on normative loan

5. The second issue raised by the licensee is the interest on normative loan. The licensee has claimed that after 1-4-2015 by infusing equity, assets worth Rs.92.44 lakh were added into the system i.e. from 2015-16 to 2017-18. The Commission in impugned Order considered the interest on normative loan for the debt portion of the assets capitalized during the control period and not for the assets added from 2015-16 to 2017-18.

6. In addition, the licensee has raised the question as to whether the entire depreciation of an asset can be treated as the principal repayment of loan since loan component is only 70%. According to the licensee, the company does not have any borrowings and the entire assets were created using their own funds. The principle followed by all SERCs is to treat investments from its own funds the equity beyond 30%, as normative debt. Since the licensee does not have any loans, no repayment of loan is to be considered. Further, the licensee contended that the Commission should have allowed interest on 70% of the investment during this period, treating these amounts as normative debt and without treating the depreciation allowed as deemed repayment of the principal amount.
7. The licensee further contended that even if, for the sake of argument, depreciation is provided for repayment of loan availed to create capital assets, such depreciation is to be utilized for repayment of not only debt but also repayment of the equity amount in instalments. But it cannot be a fact that the entire depreciation provided on a capital asset is exclusively utilized for the repayment of the principal amount of normative loan, when the normative debt portion of the capitalized asset is only 70%. According to the licensee, out of the total depreciation, only 70% of the depreciation can only be treated as the repayment of principal portion of the normative loan.
8. In addition, the licensee has again raised issues such as whether the Commission can disallow interest on normative loan for the asset additions till 2014-15, since the same was not claimed by the licensee etc., which were already considered and settled in the licensee's review petition on the truing up Order for 2016-17.

c. Depreciation

9. The licensee submitted that the depreciation proposed from the date of commercial operation was at a higher rate and on the straight-line method for the first 12 years. The balance depreciable value as on the 31st day of March after completing first 12 years, is spread over the balance useful life of the assets. However, the Commission has approved the depreciation based on the average rate for GFA at the beginning of 2018-19. Hence, the licensee has submitted that the depreciation as projected in the original ARR petition is to be allowed.

10. Based on the above, the licensee prayed for a review of the Order dated 8-11-2019, considering the matters as detailed in the review petition.

Hearing on the Matter

11. Public hearing was held on 4-3-2020 at the office of the Commission. The licensee was represented by Shri J. Krishnakumar, MD and Shri. Anees T.M Resident Engineer, who explained the issues in the review petition.
12. M/s KSEB Ltd. was represented by Shri Manoj, Executive Engineer, TRAC. M/s KSEB Ltd pointed out that any review is warranted only if there is an “*apparent error on the face of record*”. However, the petitioner has not pointed out any apparent error in the impugned order dated 08-11-2019. The contents in the petition is akin to an appeal petition which cannot be entertained in the guise of a review petition. Regarding return on equity, M/s KSEB Ltd. stated that, the Commission in the truing up Orders for 2016-17 had specified the equity as Rs.966 lakh. The Order on truing up for 2017-18 was not issued by the Commission while considering the ARR&ERC for the control period from 2018-19 to 2020-21. According to M/s KSEB Ltd. at this stage, the claim is premature since only firmed up values can be used for the projections and deviations, if any, can be claimed during truing up.
13. Regarding interest on normative loan, M/s KSEB Ltd. contented that the Commission did not approve any interest on normative loan since there was no loan portfolio in the licensee’s accounts from 2004-05 onwards. In order to qualify as normative loan for the assets capitalized prior to 1-4-2015, debt equity ratio allowed by the Commission for the period ending 31-3-2015 shall be considered. The equity investment by the Government agencies had taken place during 1998 to 2003. The equity investment at the start of the company during 1998 to 2003 does not qualify for interest and financing charges after a long period of 20 years. Further, the licensee has challenged the Commission’s decision on this account before the Hon. APTEL. Hence, the Commission may take a considered decision after Hon. APTEL decides on this matter and there is no basis at present for review of this item .
14. In the case of depreciation, M/s KSEB Ltd. stated that the Commission had approved depreciation based on the average rate of depreciation. As per the details furnished by the licensee, most of the assets are in use from 2004-

05. Hence, the assets have completed 12 years of operation and is eligible for depreciation only at the reduced percentage. The depreciation allowed is on the higher side and is to be limited, based on the vintage of assets and at a lower rate of depreciation after 12 years.

Analysis and decision of the Commission

15. The Commission has carefully considered each item submitted in the licensee's review petition, comments of M/s KSEB Ltd. and the arguments of the parties. Section 94(1) (f) of the Electricity Act, 2003 and Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003, vests the Commission with the powers for reviewing its decisions, directions and orders, as per provisions of the Code of Civil Procedure 1908. The application and the scope of the review of an Order are circumscribed under Order 47, Rule 1, of Code of Civil Procedure, 1908 which is reproduced below: -

“Application for review of judgment – (1) Any person considering himself aggrieved–

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed; or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the Court which passed the decree or made the order”.

16. Thus, as per the provisions of the Code of Civil Procedure 1908, review is justified on discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the parties at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons. The petitioner is required to provide such evidences for a successful review.

17. Similarly, the provisions of the KSERC (Conduct of Business) (Amendment) Regulations 2014 provides that:

“67. Powers of review, -

(1) Any person or party affected by a decision, direction or order of the Commission may, within forty-five days from the date of making such decision, direction or order apply for the review of the same.

(2) An application for such review shall be filed in the same manner as a petition under Chapter III of these regulations.

(3) The Commission may after scrutiny of the application, review such decisions, directions or orders and pass such appropriate orders as the Commission deems fit within forty-five days from the date of filing of such application:

Provided that the Commission may, at its discretion, afford the person or party who filed the application for review, an opportunity of being heard and in such cases the Commission may pass appropriate orders as the Commission deems fit within thirty days from the date of final hearing:

Provided further that where the application for review cannot be disposed of within the periods as stipulated, the Commission shall record the reasons for the additional time taken for disposal of the same”

18. As per Regulation 67 of the KSERC (Conduct of Business) (Amendment) Regulations 2014, any person or party affected by the decision, direction or order of the Commission may, within forty five days of making such decision, direction or order, apply for a review. In case, an opportunity of being heard is given to the party, the appropriate orders have to be passed within 30 days of the date of final hearing. In the present case, the hearing on the petition was held on 4-3-2020. However, due to the ongoing COVID 19 nationwide lockdown, this Order is being issued after beyond the stipulated 30 days.

19. The Commission has examined the contentions of the petitioner issue by issue and our findings and decisions are as follows:

(A) Return on Equity (ROE):

20. The petitioner has contended that the Commission in the impugned Order dated 8-11-2019 had considered the share capital as on 2016-17 and on the normative equity component of the asset addition proposed during the control

period . The actual asset addition for the period for 2017-18 and 2018-19 was not considered. According to the licensee, there was asset additions during 2017-18 and 2018-19 to the tune of Rs. 25.95 lakhs.

21. The Commission noted the contentions of the licensee. The Commission while approving the ARR&ERC for the control period had considered the licensee's latest trued up figures which was that of 2016-17. The Commission also noted that the licensee's truing up for 2017-18, to be filed before the Commission on 01-01-2019 was filed only on 18-02-2019. Hence, there was no trued-up figures for 2017-18 available. It is also fact that there may be differences between the capital addition amounts in the ARR&ERC and in the final trued up figures ordered by the Commission. Till the truing up Orders are issued, the final figures cannot be ascertained.
22. In the case of RPIL too, the Commission vide Order dated 22-07-2017 had granted approval for a capital expenditure of Rs.31.95 lakh as against the licensee's proposal of Rs.52.20 lakh. Of this approved amount, the licensee has actually incurred only Rs.11.25 lakh. Further, the licensee has spent an additional Rs.7.38 lakh without the approval of the Commission. Hence, this amount could be considered and finalized only during the licensee's truing up. Since the truing up for 2017-18 was not completed at the time of approving the licensee's ARR&ERC for the control period, the trued-up figures for 2016-17 was used as basis while approving the ARR&ERC for the control period. ***It is also to be noted that the licensee's proposal for asset addition for the control period was duly considered by the Commission for allowing RoE. Hence, the Commission hereby orders that the actual asset additions by the licensee and the corresponding financing charges can be claimed during the truing up for the respective year. Considering this, the Commission is of the considered view that there is no ground warranting review of the RoE figures at this point of time.***

(B) Interest on normative loan:

23. The licensee in their petition has submitted that asset additions approved from 2015-16 to 2017-18 are to be considered, while allowing interest on normative loan. In the licensee's Trued up Orders for 2015-16 dated 26-7-2017, the Commission has not permitted any normative loan as on 31-3-2015 as per the provisions of Tariff Regulations 2014, since there was no actual loan outstanding and no interest is payable as on 31-3-2015. Challenging the Commission's order, the licensee has filed a petition before

the Hon APTEL on this matter. ***Since the licensee in this petition has not brought forth any new material facts and this matter is sub-judice the Commission shall await the final outcome of the appeal before the Hon. APTEL.***

24. However, the Commission has allowed interest on normative loan for the subsequent years in the truing up Orders for 2016-17 and 2017-18. For this control period also, the licensee may approach the Commission during the truing up exercise with all details of asset additions for claiming interest on normative loan, if any for the respective years. The Commission will consider the same for appropriate decision as per the provisions of the Tariff Regulations, 2018. However, the Commission in para 58 of the impugned order has mentioned that the issue of normative loan up to 01-01-2018 is *subjudice*. Hence para 58 of the impugned order is modified as given below:

“58. The Commission notes that the licensee has approached the Hon’ble APTEL on the issue and the issue of interest on normative loan up to 01-04-2015 is sub judice and hence not considered. Accordingly, Commission is of the considered view that the licensee is not eligible for normative loan on the assets created prior to 01-04-2015”

Additional submissions by the licensee:

25. In addition to the above issues, the licensee has raised issues which are beyond the ambit of this review petition. The licensee raised the question as to whether the entire depreciation provided for an asset can be treated against the principal repayment of loan of 70%. According to the licensee, since there is no outstanding loan in their account, there is no repayment. The licensee has submitted that the Commission should have considered 70% of the total equity share capital as normative loan and allowed interest on this amount without treating the entire depreciation as deemed repayment of principal loan amount. The licensee has argued that the depreciation provision is not only for repayment of debt but also for payment of equity in instalments. Further, how can the entire depreciation provision of a capital asset be meant exclusively for the repayment of the principal amount of normative loan, when the normative debt portion of the capitalized asset is only 70%. Hence, the licensee submits that only 70% of the depreciation can only be treated as the repayment of principal portion of the loan.

26. The Commission has examined the arguments of the licensee. Prima facie, the licensee's argument is beyond the scope of the Review petition. Further, electricity distribution business is a regulated under the provisions of the Electricity Act, 2003 and Rules, Codes, Regulations made thereunder. Regulation 29 of the Tariff Regulation, 2018, governs the treatment of interest on normative loan. Sub Regulation (2) of Regulation 29 provides that *normative loan outstanding as on the First day of April, 2018, shall be worked out by deducting the amount of cumulative repayment as approved by the Commission up to the Thirty First day of March, 2018, from the normative loan.* Further, as per Sub Regulation (3) of Regulation 29, *notwithstanding any moratorium period availed by the distribution licensee, the repayment of loan shall be considered from the first financial year of commercial operation of the project and shall be equal to the depreciation allowed for that financial year.*
27. The Commission in the licensee's ARR&ERC for the control period 2018-19 to 2021-22 had approved the interest on normative loan based on the above provisions. A provision in a notified Regulation cannot be challenged through a Review Petition filed against an ARR&ERC Order. The licensee has argued that depreciation is provided for the repayment of capital (i.e. equity and loan), with 70% of the depreciation to be considered for repayment of normative loan and the balance 30% as return of equity. Further, equity should also be reduced to the tune of 30% of depreciation for calculation of RoE.
28. The basis of the licensee's argument is not known. The Commission is bound among others by its Regulations which is in the nature of a subordinate legislation and is approved after following the due process and procedures. If the licensee had any genuine grievance, they should have submitted the same either as a written representation or in any of the public hearings held by the Commission in various parts of the State when the draft regulations are notified. ***However, the licensee failed to make good these opportunities and is now attempting to raise the provisions of the notified Regulation through a Review Petition. In view of this fact and since this issue is beyond the scope of this Review Petition, the same is dismissed.***
29. The Commission would like to reiterate that it is bound by the Tariff Regulations 2018. Further, provisions of Section 4 and second and third proviso to Section 129 of the Companies Act 2013 clearly mention that the provisions of the Electricity Act 2003 shall be applicable to companies engaged in the generation and supply of electricity. In addition, Regulation 10(5) of the Tariff Regulations

2018 define the disclosures and form of financial statements applicable to electricity generation and distribution companies. ***As mentioned above, since this Regulation does not provide for any such treatment, the licensee's contention is rejected.***

(C) Rate of depreciation:

30. The licensee has contended that the Commission while approving the ARR&ERC for the Control Period has used the average rate of depreciation. In this context, it is pertinent to mention that the Commission had no option but to adopt this method since the licensee did not a furnish proper asset register. The licensee had claimed a depreciation of Rs. 44.57 lakh for 2018-19, whereas the Commission had approved Rs. 41.37 lakh for the year. The Commission notes that there is no substantial difference between the approved depreciation figures and the licensee's proposal, considering the approved capital additions for the control period.
31. The licensee has since furnished the year wise addition of assets. However, the veracity of these estimates cannot be verified at this stage and the licensee's actual depreciation can be worked out only if a detailed asset register with the date of commissioning and value of each of the assets is made available. Since this is yet to be provided by the licensee, ***the Commission hereby directs that the licensee shall furnish the proper asset register with all relevant details including the asset item, date of commissioning, life of the asset, its cost, depreciation claimed etc. during the truing up process for claiming the depreciation.***
32. From the above facts it is clear that the licensee has not made out any case for review of the impugned Order dated 8-11-2019, except as provided in para 24 above.

Orders of the Commission

33. In the light of the above analysis and after careful consideration of the submissions made by the licensee as well as the objectors, the Commission is of the view that the petitioner has not been able to provide sufficient justification for each of the points raised in this Review Petition. Hence, the Commission hereby orders that there shall be no modification of the Order dated 08-11-2019 on the ARR&ERC of the licensee for the control period from 2018-19 to

2021-22, except as provided in para 24 of this order. The impugned order is modified to that extent by this order.

34. Accordingly, the petition disposed of, Ordered accordingly.

Sd/-
S. Venugopal
Member

Sd/-
Preman Dinaraj
Chairman

Approved for issue
Sd/-
Secretary (i/c)