

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

Appeal No. 6 of 2010

Dated 8th March, 2011

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

In the matter of:

- 1. M.P. State Cooperative Dairy Federation Ltd.
Through Shri R.S. Pathak, General Manager
(P.O.) & O.I.C.
Dugdha Bahawan, Dugdh Marg, Habibganj,
Bhopal (M.P.) PIN 462024**
- 2. M/s Rajsons Dairy Products,
Through Managing Partener
Shri Ish Arora,
Plot No. 4-8 Sec. H Industrial Estate
Goindpura, Bhopal (M.P.) 462023**
- 3. Anik Industries Ltd. Through
Shri Shailesh Kumuth C.S. and O.I.C.
Corporate Office at 2/1 South Tukoganj
Indore (M.P.) 452001**
- 4. White Star Milk & Milk Product
Through Shri Subhash Chandra Dubey, Director
85-A Industrial Area No. 1 A.B. Road
DEWAS (M.P.) 455001**
- 5. Shubham Food Pvt. Ltd.
Through Naresh Goyal Director
Shubham Food Pvt. Ltd. Corporate Office
33/2 Chhoti Gwaltoli Near Patel Bridge
INDORE (M.P.) 452001**

- 6. Delight Dairy Limited
Through Shri Surendra Singh Bayana
General Manager Delight Dairy Limited
Adm. Office BG-123 Scheme No. 74-C
Vijay Nagar INDORE (M.P.) 452010 ... Appellant(s)**

Versus

- 1. M.P. Electricity Regularity Commission
Through Chairman
Fifth Floor, Metro Plaza,
E-5 Bittan Market, Bhopal (M.P.) 462023**
- 2. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.
Through Chairman cum Managing Director
Nishtha Parisar, Govindpura
Bhopal (M.P.) 462023**
- 3. M.P. Poorve Kshetra Vidyut Vitaran Co. Ltd.
Through Chairman cum Managing Director
Shakti Bhawan, Rampur
Jabalpur (M.P.) 482008**
- 4. M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
Through Chairman cum Managing Director
GPH Compound, Polo Ground
Indore (M.P.) 452002 ...Respondent(s)**

Counsel for the Appellant(s) : Mr. Umesh Nigam

Counsel for the Respondent(s) : Mr. Sanjay Sen, Ms. Surbhi Sharma
for MPERC

Mr. M.G. Ramachandran,
Ms. Swapna Seshdri, Ms. Sneha
Venkataramani for R-2

Mr. S.S.Chauhan with Mr. P.K. Jain
for R-3

Mr. Naveen Sharma for R-4

JUDGMENT

PER HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

1. This Appeal by M.P. State Co-operative Dairy Federation Ltd. and five Dairy Industries is directed against tariff order dated 29.7.2009 for FY 2009-10 passed by M.P. Electricity Regulatory Commission (State Commission).

2. This impugned tariff order is with reference to the bifurcation of Dairy and its products in two different tariff categories for recovery of electricity charges.

3. The State Commission is Respondent No. 1. The three Distribution licensees in the State of M.P. are Respondents 2 to 4.

4. The brief facts of the case are as under:

4.1. In the tariff order dated 29.3.2008 for FY 2008-09 by the State Commission, Dairy

was classified under Tariff Schedule – HV 5 under tariff category HV 5.2 which was applicable to supply of power to other than pump connections for dairy, hatcheries, poultry farms, cattle breeding farms, grasslands, vegetables/fruits/floriculture/mushroom growing units, etc.

4.2. On 12.2.2009 the State Commission published proposals of Respondents 2 to 4, the Distribution Companies for tariff for FY 2009-10 inviting comments/objections from public.

4.3. On 26.2.2009 Respondent-2/distribution licensee filed an application before the State Commission, R-1 seeking clarification on applicability of HV tariff for Dairy/dairy

products processing units. The State Commission on 9.3.2009 communicated to the Respondent-2 clarifying that tariff schedule HV 5.2 shall be applicable for Dairy units where either only extraction of milk or its processing (such as chilling, pasteurization, etc.) is being done. For units where milk is used to produce other end products of milk, billing shall be done under HV-3.1 (Industrial) category.

4.4. On 29.7.2009 the State Commission (R-1) issued tariff order for FY 2009-10 where Dairy has been bifurcated into two categories on the same lines as indicated in its letter dated 26.2.2009 to Respondent-2 giving clarification on applicability of tariff for Dairy

Units for FY 2008-09. Aggrieved by the said order the Appellants have filed this appeal.

Appellants' submissions

5. Learned counsel for the Appellants assailing the State Commission's impugned order has submitted as under:

“5.1. Prior to the impugned order the Dairy and its products were treated under special category for the purpose of tariff. In 2006 when Respondents No. 2 to 4 had started shifting the Dairy from Agriculture HV-5 to Industry HV-3, the Appellant No. 3 was forced to approach State Commission (R-1) for seeking specific order to this effect. The State Commission (R-1) after hearing the parties on 4.4.2006 ordered that since the Dairy had been kept separate in Agriculture and

Irrigation sub-category for tariff, the Industrial tariff is not applicable to it.

5.2. The communication by the State Commission dated 9.3.2009 regarding classification of Dairy in reversal of its earlier order dated 4.4.2006 is nothing but modification of its earlier tariff order for FY 2008-09 which is not permissible. Moreover this order was issued without giving any notice and opportunity to hear the Appellants.

5.3. The tariff proposal for FY 2009-10 published for obtaining comments/objections did not have any proposal for bifurcation of tariff categories for Dairy. Thus deciding the bifurcation of dairy in different tariff

categories in the impugned order is against the principle of natural justice.

5.4. State Commission (R-1) is not justified in changing the definition of Dairy Industry and bifurcating into two categories ignoring provisions of Section 62(3)& (4) of the Act.

Respondent-1 (State Commission)

6. The learned counsel for the State Commission in support of the impugned order submitted the following:

6.1. The impugned tariff order dated 29.7.2009 was issued after following the mandatory procedure under Section 64 of the Act. The State Commission had held public hearing at various places in the State and considered all objections before issuing the tariff order.

6.2. The clarification issued by the State Commission vide letter dated 9.3.2009 for the earlier tariff order for FY 2008-09 was challenged by some of the dairy units before the High Court of Madhya Pradesh. On 2.12.2010 the High Court has dismissed the Writ Petition No. 3355 of 2009 filed by Delight Dairy Limited and other four Writ Petitions. Some of the dairy units who had challenged the clarification dated 9.3.2009 before the High Court are also Appellants in the present Appeal. Thus the Appellants can not claim ignorance about clarification of the State Commission regarding categorization of dairy units.

Respondents 2 to 4 (Distribution Licensees):

7. The learned counsel for the other Respondents 2 to 4 supporting the order of the State Commission has made the following submissions:

7.1. The earlier order dated 4.4.2006 was issued by the State Commission on Tariff Order for FY 2006-07 which was applicable for the period from 1.4.2006 to 31.3.2007, while the clarification dated 9.3.2009 was issued for Tariff Order for FY 2008-09. Thus the clarification pertain to different tariff order applicable for different time period and as such it can not be linked to earlier order passed by the State Commission.

7.2. The Public Notice for tariff for FY 2009-10 issued by the State Commission is based on

the Annual Revenue Requirement and Tariff proposal of the Distribution licensees. However, it is not mandatory for the State Commission to accept the proposal in toto. The State Commission is within its rights to bring about changes in the final tariff order.

7.3. Seven Writ Petitions had been filed by the Dairy units before the High Court of Madhya Pradesh at Indore and Bhopal challenging the clarification issued by the State Commission on 9.3.2009. Four of the petitioners in the Writ Petitions are Appellants in this Appeal. Thus the clarification issued by the State Commission regarding categorization of dairy units was within the knowledge of these Appellants.

Issues and Findings

8. In the light of the rival contentions referred to above, the following questions would arise for consideration:

- i) Whether the impugned order dated 29.7.2009 bifurcating the Dairy into two categories has been passed by the State Commission in violation of the principles of natural justice and it is contrary to its earlier order dated 4.4.2006?
- ii) Whether the State Commission is justified in bifurcating the Dairy industries into two categories ignoring Section 62(3) of the Act 2003?

9. Let us examine the first issue. The State Commission (R-1) had issued public notice on 12.2.2009 regarding the proposal of the Respondents 2

to 4 for the ARR and tariff for the FY 2009-10. Admittedly, there was no proposal indicating clear bifurcation of dairy in different tariff categories viz. Agriculture HV 5.2 and Industrial HV 3.1.

10. On 9.3.2009 the State Commission issued a clarification on an application from Respondent-2, the Distribution Licensee that the tariff schedule HV- 5.2 shall be applicable for dairy units where either only extraction of milk or extraction of milk and its processing (such as chilling, pasteurization, etc.) is done but the units where milk is used to produce other end products, billing has to be done under HV 3.1 (Industrial) category.

11. Even though the above communication was sent by the State Commission to Respondent-2, the Distribution Licensee a number of dairy units

challenged the said clarification dated 9.3.2009 of the State Commission in the High Court of M.P. at Indore and Jabalpur. It has been noticed that Appellants 2,3,5 and 6 had challenged this clarification before the High Court vide WP 10241/2009, WP 3307/2009, WP 5544/2009 and WP 3355/2009 respectively. The Respondents have admitted that the five Writ Petitions have been dismissed by High Court, Indore Bench by order dated 2.12.2010. Thus, the Appellants were not ignorant about the clarification issued by the State Commission on the tariff order for the FY 2008-09 regarding applicability of tariff for two different categories of dairy units.

12. Even though the Appellants were at liberty to raise objections to the proposal for the tariff for FY 2009-10, no such objection was raised by the Appellants during the public hearings or in writing.

13. Having availed a legal remedy before the High Court on clarification dated 9.3.2009 issued by the State Commission regarding bifurcation of dairy units for FY 2008-09 and having obtained the dismissal order, the Appellants can not raise the same issue before this Tribunal.

14. The order dated 4.4.2006 issued by the State Commission was relating to tariff for FY 2006-07 and by this order the State Commission had ordered applicability of all Dairy Units under one category i.e. HV-5. However, the State Commission has the authority to change the classification of different categories of consumers for the subsequent years.

15. It is noticed that the State Commission has followed due procedure as per Section 64 of the Act before determining the tariff for FY 2009-10. Thus, we

do not find any violation of principles of natural justice. Accordingly, we hold that the impugned order of the State Commission is legally valid.

16. The second issue is relating to bifurcation of Dairy Units into two categories. Let us first examine the applicability of two categories of Dairy decided in the impugned order. The two relevant categories described in Tariff Schedule are reproduced below:

“ Tariff Schedule- HV-3

INDUSTRIAL, NON-INDUSTRIAL AND SHOPPING MALLS

Applicability:

The tariff HV-3.1 (Industrial) shall apply to all HT industrial consumers including mines (other than coal mines) for power, light and fan etc. which shall mean and include all energy consumed for factory and lighting in the offices, main factory building, stores, canteen, residential colonies of industries, compound lighting and Dairy units where milk is processed to produce other end products of milk (other than chilling, pasteurization etc.).

“ Tariff Schedule- HV-5

IRRIGATION, PUBLIC WATER WORKS AND OTHER THAN AGRICULTURAL

Applicability:

The tariff category HV-5.2 shall apply to supply of power other than agriculture pump connections i.e. the connection for hatcheries, poultry farms, cattle breeding farms, grasslands, vegetables/fruits/floriculture/mushroom growing units etc. and dairy (for those dairy units where extraction of milk and its processing such as chilling, pasteurization etc. is done). However, in units where milk is processed to produce other end products of milk, billing shall be done under HV-3.1 (industrial) category”.

Thus, the State Commission has kept dairy units where extraction of milk and its processing such as chilling and pasteurization is done in HV 5.2 category, but the units where milk is processed to produce other end products of milk have been categorized under HV-3.1 (industrial) category.

17. Section 62(3) of the Act which deals with the determination of tariff for different consumers is reproduced below:

“62(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer’s load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required”.

Thus the tariff can be differentiated according to propose for which supply is required.

18. The State Commission has bifurcated the dairy units in two different categories according to the “purpose” for which supply is made. The Dairy Units where only extraction and its processing such as chilling and pasteurization etc., is done, for supply of

milk have been kept under HV 5.2 category. The Dairy Units where milk is processed to produce other end products of milk such as butter, ghee, etc., have been kept in HV-3.1(industrial) category.

19. Thus the State Commission has bifurcated the Dairy Units into two different categories according to purpose for which supply is required in consonance with Section 62(3) of the 2003 Act.

20. We, therefore, find that there is no infirmity in the impugned order of the State Commission. Accordingly, the second issue is also decided against the Appellants.

21. **Summary of findings**

21.1. The Appellants have contended that the tariff bifurcating the dairy into two categories has been determined by the

State Commission in violation of the principles of natural justice. We find that the State Commission has followed due procedure as per Section 64 of the Act before determining the tariff. The earlier order of the State Commission dated 4.4.2006 was for the tariff period of FY 2006-07 and the State Commission is within its authority to change the classification of different categories of consumers for the subsequent years. The Appellants have also argued that the clarification issued by the State Commission on 9.3.2009 regarding bifurcation of dairy units was nothing but modification of its earlier tariff order for FY 2008-09 which was not permissible.

We find that some of the Appellants had challenged the order dated 9.3.2009 in the High Court of M.P. under different Writ Petitions and the same have been dismissed. Having availed a legal remedy at a different forum the Appellants can not raise the same issue before this Tribunal. It also establishes that the clarification issued by the State Commission on categorisation of Dairy Units in two tariff categories for FY 2008-09 was well within the knowledge of the Appellants. Thus there is no violation of principles of natural justice and the State Commission's order is legally valid.

21.2. The State Commission in its tariff order dated 29.7.2009 has bifurcated the dairy

units into two different categories according to the purpose for which the supply is required, in accordance with Section 62(3) of the Act. Hence, we do not find any infirmity in the order.

Conclusion

22. In view of above findings, the Appeal is dismissed as devoid of merits. However, there is no order as to cost.

23. Pronounced in the open court on this **8th day of March, 2011.**

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

REPORTABLE / NON-REPORTABLE

VS