
Shri B.K. Misra, Member

Case No.85/2009

.... **Petitioner**

Vrs.

.... Respondents

relating to Case Nos.66, 67, 68 & 69 of 2008.

For the petitioner : Mr. R.P. Mahapatra, authorized representative

For the Respondents : Mr. K.V. Durga Prasad, CCO and
Mr. S.K. Harichandan, Manager (Law) for
CESU
Mr. S.K. Choudhury, GM(C), SOUTHCO
Mr. S.D. Bhanja, AGM(C)&RA, NESCO
No body is present for WESCO.

Date of Hearing : 17.07.2009

Date of Order : 11.8.2009

ORDER

1. The petitioner M/s Seafood Exporters Association of India has filed this petition for review of the Commission's observation in paras 253, 254, 255 & 258 in its Retail Supply Tariff Order dtd. 20.03.2009 passed in Case Nos. 66 to 69 of 2008. The petitioner prayed for applicability of Agro-industrial tariff to all the Cold storages that store flowers, fruits, vegetables, meat, fish, food, etc.

2. Mr. R. P. Mahapatra authorised representative of the petitioner stated that after the above observations of the Commission in its RST Tariff Order for FY 2009-10, the Distribution Licensee CESU has changed their category from 'agro industrial' to 'large industrial' and accordingly has raised bills claiming arrears w.e.f. 01.4.2008 with disconnection notices.
3. Mr. Mahapatra stated that the Commission vide Notification dtd. 11.9.2007 published in Orissa Gazette on 31.10.2007 had amended the OERC Distribution (Conditions of Supply) Code, 2004 and had created a special category consumer called as 'Agro Industrial Consumers' (Regulation, 80(5)(1). This category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry & cold storage (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat, fish, food, etc. can be kept fresh or frozen until needed). After such an amendment CESU executed fresh agreements with the petitioner's member Units by categorizing them as agro industrial consumers. But after the Commission's observations in their order dated 20.3.2009 in case No.66 to 69 of 2008 in paras 253, 254, 255 and 258 of its RST order, CESU discontinued the tariff for agro industrial consumers to the petitioner's member Units which has led to much hardships for their survival. He further stated that the ambit and scope of agro industrial consumer was very wide and at the time of amendment to the Regulation it was perhaps the intention of the Commission to provide special benefit to these consumers. The tariff for agro industry category has been determined as per the Irrigation Pumping and Agriculture category in order to give a boost to the growth of agro-economy of Orissa. The Commission had decided that energy charges for Agro- Industrial consumers would be 110 p/u at LT and 100 paisa p/u at HT level. Thus, the electricity charges for Agro Industrial consumers for the year 2008-09 stood reduced by a range of

73% to 75% compared to the level, approved for the previous year 2007-08. He pleaded that the paras 253, 254, 255& 258 in retail supply tariff order of the Commission for year 2009-10 is an error apparent and therefore may be omitted. In any case the Commission's observation in the tariff order of 2009-10 should not be given effect to retrospectively for the year 2008-09. He also prayed that before giving any effect to Commission's observations in the above paras in the RST for 2009-10, the Regulation 80(5)(1) need an amendment clarifying the category of consumers who qualify for the tariff applicable to Agro-industries and the category of consumers who do not qualify for this tariff.

4. He further stated that the licensees now have also threatened to disconnect the power supply to the Units of the members of the Sea Food Association of India if they did not enter into the fresh agreements. He also prayed the Commission to direct the licensees not to take any coercive action against the petitioner.
5. Mr. Durgaprasad, CCO, CESU stated that after the amendment of Regulations and introduction of new category namely 'Agro Industrial consumers', CESU had provided the benefit of doubt to the petitioners association Units; and sought the clarification and intention of the Commission, which has been debated and heard during the tariff proceeding of the next year. After the observations of the Commission clarifying clearly the intention of the Commission on "Agro Industrial Consumers" in its last RST Order (FY 2009-10), CESU issued notices to the aforesaid consumers for recategorization of the Units of the exporters' association under the correct head i.e. under 'large industrial categories and claimed the differential amount of energy charges as arrears w.e.f. 01.4.2008. He stated that the petitioner association's Units were doing commerce and business of prawn trading and in the true sense do not come under the ambit of 'agro industrial consumers'.

The petitioner's Units collect prawn/fish from different cultivators and after processing the same in the plants/units kept them frozen and exported them with huge margins of profits. The Commission's aforesaid observations in RST order for FY 2009-10 clearly reflects that the benefit of agro industrial consumer should be passed on to a real cultivator and not to a trader.

6. He also stated that the members of the Seafood Association of India have filed the cases before the State Consumer Dispute Redressal Commission, District Consumer Dispute Redressal Forums, Civil Courts at Puri, Bhubaneswar and Jagatsinghpur and obtained interim orders from the said Forums. After receipt of the notices from different Forums, the CESU (Respondent No.1) had filed its objections along with application for vacation of the interim orders. The said matters are subjudice before the said Forums. When the matters are pending before the different forums, the present application for grant of interim order and not to take any step for disconnection of power supply is prima-facie not maintainable.
7. Mr. Durgaprasad further stated that as per Clause 6 of the Agreement which was executed by the petitioner with the licensee, parties are bound by the terms of that agreement. According to Clause 6 of the said agreement, the members of the Association have to pay different charges in accordance with the provisions of the OERC Distribution (Conditions of Supply) Code, 2004 and as notified in the Tariff Notification from time to time. The authority and jurisdiction for determination of tariff vests with the Commission which binds both licensees and the consumers. The clarification made by the Commission in paragraphs 252-258 of its Tariff Order dtd. 20.03.2009 is the function which has been discharged by it. The clarification given in para 255 of the tariff order dated. 20.3.2009 that, "the Commission does not, therefore, want to enter into this area at all, other than to

state that the limited promotion that electricity tariff can provide to such activities has been provided as enumerated above and will be further clarified in the above Regulations” cannot be said to be given effect to only after an amendment is made to the Regulations. Since the determination of category of consumer, applicability of tariff to that particular category of consumers, and removal of doubt in fixing the tariff are all co-related and complementary to each other, this is within the jurisdiction of the Commission to adjudicate the issues raised before it at the time of hearing and this can not be treated as an error apparent on the face of the record. He also stated that when an order had been passed by this Commission in terms of the statutory provisions and the same is within its power to adjudicate, if any one is aggrieved by the order of the Commission, he may approach the Appellate Tribunal for Electricity under Sec. 111 of the Electricity Act, 2003 within the time stipulated therein. The petitioner without preferring an appeal before the Hon'ble ATE, has filed this review petition before the Commission which is in the nature of an appeal in disguise. So he prayed to the Commission not to admit the review petition of the petitioner, as remedy of an appeal is what is applicable rather than review.

8. The other two respondents- NESCO and SOUTHCO entirely agreed with the views of CESU and prayed to reject the application of the petitioner as there was no substantial ground for review of the Commission's Tariff Order for FY 2009-10.
9. For the sake of clarity the paras 252 to 258 of RST order for FY 2009-10 are reproduced below:

252. *“A new category, namely ‘Agro-Industrial Consumers’ has been introduced vide OERC Distribution (Conditions of Supply) (4th Amendment) Code, 2007. As per Regulation 80 (5)(1) of the said Supply Code, this category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other*

allied agricultural activities including animal husbandry, poultry & cold storage (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat, fish and food, etc. can be kept fresh or frozen until it is needed). The Commission has decided to allow tariff equal to the irrigation and pumping categories at LT/HT to this new category of consumers for rapid development of agro industrial consumption.

253. *During tariff hearing, objectors/consumers engaged in the following activities have pleaded for including their activities under the above Agro-Industrial category.*
(i) Prawn processing, (ii) Ice factory, (iii) Chilling plants for milk and other agricultural products
254. *We are inclined to agree with the contention of the Utilities/ DISCOMs. The intention was not to encourage business, commerce and trade, but storage as an adjunct to farming, for temporary periods, before the produce gets into the market and gets out of the farm. In other words, cold storages and chilling plants (which are also cold storages or temperature controlled storages) as a part of on-farm activities of storage, immediately following harvest and just before its exit from the farm, is what was intended to be covered. And that was why cold storages were included as a part of those activities related to agriculture or allied agricultural activity. They were certainly not intended to cover commercial activities or trade or manufacture or any kind of post harvest processing of farm produce into food products or even such processing that enables fresh marketing of produce or even as frozen produce.*
255. *Regulation 80 (5) (1) of the OERC Distribution (Conditions of Supply) Code, 2004 stipulates that Agro Industrial Consumers category shall relate to supply of power for pisciculture, horticulture, floriculture, sericulture, and other allied agricultural activities including animal husbandry, poultry and cold storage (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat, fish and food etc. can be kept fresh or frozen until it is needed). We feel this needs to be suitably amplified to include only activities, as an adjunct to farming and temporary storage immediately following harvest. While cold-chains are essential for the entire gamut of agricultural marketing, their promotion and encouragement is a function of Govt. and not that of electricity tariff. The Commission does not, therefore, want to enter into this area at all, other than to state that the limited promotion that electricity tariff can provide to such activities has been provided as enumerated above and will be further clarified in the above Regulations.*
256. *There is no doubt that prawn farming is one type of piscicultural activity but prawn processing cannot be called farming or rearing of prawn under controlled conditions. Prawn is processed after it is harvested in prawn farms. Hence, the Commission is not able to accept the claim that prawn processing is Pisciculture in a farm.*

257. *Ice Factories manufacture and produce ice as a part of their business and commerce in ice. Such ice goes into fish preservation, mortuary, preparation of ice-cream and various other downstream production and businesses involving cold processes, therefore, ice factories are by themselves not cold storages. Hence, the prayer of the Ice Factory consumers to be included in the Agro-Industrial Consumers category may not be appropriate and they should come under an appropriate category of industry as specified in Regulation 80 of Distribution Code, 2004.*
258. *Chilling plants for milk is certainly a process of storage of milk in its liquid form. But it is rarely done in the farm, unless it is a kind of production in a factory scale in large farms. Such large sized farms of milch-cows is extremely rare. The multitude of small farmers rear only a few milch animals and deliver their milk immediately at their cooperative collection centres who store it in chilling plants before delivery to processing units or before it is collected by the processing plants. At the processing plant also there may be large chilling plants for storage before processing is undertaken either for fresh marketing of milk in its liquid form or as various milk products such as curd, cheese, powdered milk and other milk based sweets. Such chilling plants are a part of commercial activities or industrial processing subsequent to production in the farm. These are not activities relating to on-farm storage or temporary storage immediately following farm production. We cannot, therefore, consider such chilling plants as agricultural activity or even allied agricultural activity. Such commercial and industrial activity is clearly outside the scope of our tariff classification”.*

The petitioner in his written submission has prayed for review of the Commission's observations of paragraphs 253, 254, 255 & 258 only and not asked for any review in the paragraphs 252, 256 & 257 of the said tariff order. During the hearing, in the oral submission of course, the petitioner representative pleaded for amendment of all the above clause of 252 to 258, specifically on 256 which is more relevant to the exporter's association.

10. After hearing the parties and perusal of the records, we do not find any ground for a review of the Commission's RST Order as prayed for by the Petitioner's Association. In the said Tariff Order, the Commission after considering the views of various stakeholders i.e. the Distribution Licensees and the objector has made certain observations on the

scope of 'Agro-Industry' category. We have analyzed the contention of the parties and are of the view that these observations make it clear that prawn farming is coming under the activity of pisciculture. But prawn processing is another type of post-harvest activity under controlled conditions. The Commission has made clear observations on the above matter in para 256 of its Retail Supply Tariff Order for FY 2009-10. The members of the Petitioner's Association are engaged admittedly in prawn processing but not in prawn farming activities. So we don't find any particular error which is apparent in the very face of the observations made in the Tariff Order for FY 2009-10. The Commission in para 255 has also expressed clearly its intention that the agro-industrial tariff will be applicable to such cold storages which are an adjunct to farming and temporary storage immediately following harvest. While cold chains (required for prawn processing activities) may be essential for the entire gamut of agricultural marketing, its promotion and encouragement is a function of the Govt. and not that of electricity tariff. So the Commission has clearly expressed its intention indicating the category of consumers who are qualified for the Agro-industrial tariff (lower even to that of small Domestic Consumers) and others who do not qualify for such concessional tariff may seek the support of Government for any relief, if required.

11. A review petition as has been filed in this case cannot be used to raise substantial questions and issues as to the category of consumers to which sea food exporters should be classified into and what tariff is applicable to their cold-storages. The petition also raises the question as to whether the Commission's observations on Agro-Industrial consumers amounts to an amendment of the relevant provisions of the OERC (Conditions of Supply) Code or whether these observations are Tariff Orders. These are all matters that needs be dealt in a substantive manner by a regular application under the OERC (Conduct of Business) Regulations and not by way of a Review Petition. A

review has very limited objectives. The observations of the Commission are observations per se and do not reflect any errors apparent as such. We do not see how those observations are erroneous on the very face of it. The petitioners' contention is that these observations are being treated and used to alter or re-interpret their consumer category classification and the tariff applicable to them and hence our observations are an error apparent on the face of the record. Such a contention, therefore, raises substantial issues of interpretation of the category and classification as applicable to seafood exporters and their cold storages which cannot be the subject matter of a 'review petition'.

12. The petitioners' claim for classification into an appropriate consumer category and the applicable tariff can only be considered in the appropriate forum by an appropriate petition and not by way of a Review. Order 47 Rule 1 of the Code of Civil Procedure provides for filing an application for review. Such an application for review would be maintainable, not only upon the discovery of a new and important piece of evidence but also when there exists an error apparent on the face of the record. Thus, an error which is plainly apparent by a plain reading of the Commission's observation which might include a mistake on the part of the Commission may call for a review. What the Commission has observed is that the original intention was to cover cold storages as an adjunct to farming for short-term storage before going to the market and not intended to cover commercial activities or trade or manufacture or any kind of post harvest processing of farm produce and that further clarifications in the matter will be reflected in the connected Regulations. In other words, the Commission's observation will need to be incorporated into the Regulations and continues be only an observations until such time as its incorporation into the Regulations. Hence, it is not quite apparent as to the errors in those observations as might be plainly evident by a plain reading of the

observations. It is needless to state that these observations by their very nature are neither orders of the Commission or automatically amend the existing regulations.

13. As such there is no apparent error on the face of the record nor have any new facts come before the Commission which calls for a review of our order dated 20.3.2009 in Case No.66, 67, 68 and 69 of 2008 vide para 252 to 258. Accordingly, the Review petition is not allowed.

Sd/-
(B. K. Misra)
Member

Sd/-
(K.C. Badu)
Member

Sd/-
(B. K. Das)
Chairperson