

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

PRESENT

**Shri T. M. Manoharan, Chairman
Shri P. Parameswaran, Member
Shri Mathew George, Member**

No 1470/CT/2013/KSERC

Dated 17-02-2014

PETITION IN THE MATTER OF

**On tariff applicable to LPG Bottling Plant Petition filed by Hindustan
Petroleum Corporation Ltd, Irumpanam, Kochi 682309**

**Ref: Petition filed by M/s Hindustan Petroleum Corporation dated 02-08-13 for
categorizing the consumer under industrial category.**

Petition	Dy No 1470	M/s Hindustan Petroleum Corporation Ltd. Kochi LPG Regional Office, Irumpanam P.O, Kochi- 682309	Petitioner
		The Secretary, Kerala State Electricity Board, Thiruvananthapuram	Respondent

ORDER

Background.

Hindustan Petroleum Corporation Ltd, a Government of India undertaking engaged in refining and marketing of petroleum products including Liquefied Petroleum Gas (LPG) and allied products, filed a petition requesting for industrial tariff for their plants at Kanjikode in Palghat District and Irumpanam, Cochin. The petitioner is using these LPG Bottling Units in continuation of manufacturing process for converting the bulk cargo of LPG brought into the plant into small consumable containers namely cylinders and then supply is made to various distributors. It is stated in the petition that the manufacturing process can be said to be completed only when the final product is processed and filled in cylinders. The bulk LPG is brought in cargo tankers and is filled into the cylinders. The petitioner points out that it cannot be stated that the manufacturing process is completed the moment the LPG is loaded into tank trucks.

2. Prayer

1. To declare that the LPG Bottling Units are carrying out only industrial activity and therefore the difference in electricity charges paid in excess of industrial tariff i.e. at commercial tariff must be refunded.

2. To declare that the activities carried on in a liquefied petroleum gas bottling unit including filling of cylinders is an industrial activity and no commercial activity is involved therein. Hence tariff for industrial consumption at HT industrial must apply and not HT commercial

3 Hearing of petition

3.1 In the hearing of the petition held on 09-10-13 and in the petition dated 02-08-13 Petitioner stated that manufacturing process can be said to be completed only when final end product namely LPG in cylinders is derived which can be used by the end user. The LPG brought in tanker Lorries cannot be used by the end user unless and until it reaches the bottling unit and is converted into cylinders. The LPG tankers are not like fuel stations. The tanker cannot supply the LPG to the end user, whereas the fuel in a fuel station can be supplied to the end user, since the end user is having the container in the form of fuel tanks in the motor vehicles. The dispensing of the fuel at a fuel station cannot be treated on par with dispensing of LPG from the tanker at the LPG bottling plants. That can be dispensed ordinarily where as LPG has to be compressed at high pressure into the cylinder to make it useful. This fact has not been considered by the respondents and LPG Bottling plants were categorized under commercial tariff

whereas these units are of industrial nature and eligible for categorization under industrial tariff. The petitioner further stated that pumping water for public is treated as industry. No commercial activity can be said to be in operation in LPG bottling plants. The activity involved is derivation of the final product which can be consumed by the end user. Respondents decision of treating LPG in tanker lorries as end product and its conversion to cylinders as not a part of manufacturing process is incorrect and unreasonable and contrary to facts. The matter was taken up with the Consumer Grievances Redressal Forum on 31-03-2009. The same was disposed of by Order dated 06-08-2009 directing the petitioner to approach KSERC. The petitioner is having another LPG Bottling Plant at Irimpanam, Cochin. The respondent is treating the petitioners LPG plants in Kerala as falling under LT IV Commercial tariff whereas the agreement itself was for industrial category. Petitioners units are holding valid license issued under Factories Act. National Industrial Classification shows that bottling of LPG and CNG is classified as industry for all purposes by the Ministry of Statistics and Programme through its Central Statistical Organization. Therefore there cannot be a classification of LPG, CNG bottling units as commercial activity. The State cannot overlook the classification by the Central Government. Tamil Nadu Electricity Regulatory Commission through Order MP 15 of 2007 and Common Order in MP 16 and 17 of 2007 held that LPG bottling plants are eligible for industrial tariff. Ombudsman of Maharashtra vide order dated 26-03-2012 directed the Maharashtra State Electricity Distribution Company Ltd to charge only HT industrial tariff for HPCL LPG Bottling Plant at Hazarwadi. CGRF, Kalyan, Mumbai vide its decision dated 03-10-2009 has ordered that HPCL LPG Plant at Husar is eligible to be included under industrial tariff. HPCL has got similar LPG Bottling Plants across the length and breadth of the country and the activities carried out in these units are of the same nature i.e. industrial activity of bottling/filling of LPG in to the cylinders for supplying to consumers and are classified under Industrial tariff. Goa, Jammu and Kashmir, Punjab, West Bengal and Rajasthan have all categorized LPG bottling plants under Industrial category. The petitioner filed a writ petition before the Hon High Court of Kerala and Hon High court disposed of the petition on 13-12-2012. Thereafter an appeal was filed before the Appellate Tribunal for Electricity on 12-04 -2013. Since there was no explanation for the delay between 13-12-2012 and 12-04-2013 in filing the appeal the application to condone the delay was dismissed. Consequently the appeal was also rejected with direction to approach the Commission once again and to have the matter considered on merit and hence this petition. It is further stated in the petition that the LPG that is brought into the plant in tank trucks is subjected to quality check and analysis after storing the same in high pressure vessels or tanks. There are standards for LPG fixed by specifications of Bureau of Indian Standards Act 1986. LPG becomes the final product of cooking gas only when it is filled into cylinders under high pressure. The application of high pressure makes it the cooking gas. The LPG that comes in tanker lorries is not termed as cooking gas unless and until it is filled into cylinders at high pressure. Other than the

filling process at high pressure other activities at the manufacturing plant or at the LPG factory before the bottling process of cooking gas is done includes washing, cleaning and drying of the cylinders , checking the same, repairing, rectifying, replacing defective walls, using electrical, electronics and mechanical equipments and gadgets like motors, pumps, high speed electronic weathers , compressors, controlling devices, dispensing units, pressure gadgets etc none of which is a commercial activity but purely industrial. The petitioner entered into an agreement for purchase of electricity with the respondents categorized under HT I Industrial. Subsequently respondent started charging the petitioner under HT IV Commercial tariff without any prior consent of the petitioner and without giving any notice. The higher charges under commercial tariff are a wrongful gain and an unlawful enrichment of the respondent it is stated by the petitioner and hence they are entitled for a refund of the difference between commercial tariff and industrial tariff.

Petitioner informed KSEB vide letter dated 31/08/2007 that they are charged under HT commercial tariff where as LPG Bottling Plants are to be categorized under industrial tariff and requested to change the tariff to HT Industrial. Since there was no reply petitioner sent a reminder on 16/09/2007. The respondent vide letter dated 1/11/2007 informed the petitioner that the tariff underwent revision on 14/05/1999 in exercise of quasi legal legislative power. As per the said revision HT consumers were categorized under five categories without assigning any reason for such categorization. The petitioner was categorized under commercial tariff without giving a notice or without giving any opportunity to hear it is stated. KSEB vide letter No HTB-1/44 dated 01-11-2007 informed the petitioner that in the case of petitioner electrical energy is mainly used for commercial purpose and there is no manufacturing / processing works. In the case of LPG bottling plants the petitioner is engaged in the activity of refilling of LPG from huge containers in bulk quantity to domestic and commercial cylinders for retail supply which is commercial activity in nature and hence tariff applied is in order and as per rules. It is stated in the petition that the core issue to be considered in this petition is whether the contentions of the respondent that no manufacturing process is involved and only commercial activity is involved like selling the LPG through retail outlets.

Hon High Court of Kerala in its order dated 03-04-2012 (in WPC 6530/2009 and WPC 1866, Indian Oil Corporation Vs KSEB and HPCLVsKSEB) had referred the matter to the Commission for appropriate decision on categorization after affording opportunity of hearing for the petitioners within three months. Commission heard the matter on 28-06-2012 and decided that the appropriate category of LPG bottling plants for HT category shall be HT IV Commercial category since the petitioners could not establish in the hearing that their process is an industrial activity and it is so categorized in other states. In the case of LT LPG Bottling plants Commission has already taken a decision to include them under LT VII A Commercial tariff vide order dated 19-03-2009. Hence in the tariff order for the year 2012-13(OP 23 of 2012 dated 25-07-2012) LPG bottling

plants both under LT and HT were categorized under commercial tariff and continues in the present tariff schedule vide Order No OP2 of 2013 dated 30-04-2013.

3.2 KSEB in the public hearing held on 9-10-13 and in the counter statement filed on 9-10-13 stated that Hon. Commission had categorized LPG Bottling Plants under Commercial category in the Tariff order dated 25-07-2012. Aggrieved by the above, the petitioner moved before Hon. High Court of Kerala by filing petition No. W.P.(C) 25684 of 2012. Hon. High Court of Kerala directed the petitioner to approach the Hon. Appellate Tribunal for Electricity, New Delhi (APTEL) vide order dated 13-12-2012. Hon. APTEL dismissed the Appeal No. IA – 164 of 2013 and rejected DFR – 788 of 2013 vide judgment dated 31-05-2013. In the said order Hon. APTEL had ordered that ***“Therefore. The Application to condone the delay is dismissed. Consequently, the Appeal is also rejected. However, this would not prevent the Applicant to raise the point before the Commission for re-categorization of tariff determination in the future proceedings.”***

It is further pointed out by the respondent that in a similar appeal (IA No. 118 of 2013 and Appeal No. 255 of 2012) filed by M/s. Indian Oil Corporation before Hon. APTEL, the appeal was dismissed vide judgment dated 02-05-2013 directing the appellant to move before State Commission in future proceedings of tariff determination with reasoning that *“the tariff period FY 2012-13 in respect of this proceeding has already over by 31-03-2013 itself and that the tariff Order for the FY 2013-14 also had been passed.”*

From the above, it is evident that Hon. APTEL had clearly placed on record that since the tariff order has already been issued, it is open for the petitioner's to approach the State Commission during future proceedings for tariff determination. The proceedings will start only with filing of ARR & ERC petition for the FY 2014-15 by KSEB by November 2013. Thus the petition is premature in nature. It is humbly submitted that Hon. APTEL has not remanded the matter to the Hon. State Commission, but has directed the petitioner to raise the point before the Commission for re-categorization of tariff determination in future proceedings and not with regard to the present tariff order. Since the petitioner was not remanded to this Hon. Commission by any judgment of any court of law, the petition lacks admissibility and hence may be dismissed without admitting.

Regarding matter of admissibility of petitions filed by a consumer before State Electricity Regulatory Commission, KSEB may humbly seek the kind attention of some of the various apex court judgments in respect of the power of the State Commission in entertaining a consumer's grievance through a petition, such as

- a. Supreme Court of India in **“Maharastra State Electricity Distribution co. Ltd Vs Lloyd's steel Industries limited (Appeal (Civil) 3551 of 2006)”**

- b. Hon'ble Supreme Court in "**Maharastra Electricity Regulatory Commission Vs Reliance Energy and ors Appeal (Civil) 2846 of 2006**"
- c. The Hon'ble Appellate Tribunal for Electricity in "**DHBVNL and ors Vs DLF services Ltd and ors (Appeal no: 104 of 2005)**"
- d. Hon'ble Appellate Tribunal for Electricity in "**DHBVNL and ors Vs Princeton estates condominium and ors (Appeal no: 105 to 112 and 141 to 149 of 2005)**"
- e. Hon'ble Appellate Tribunal for Electricity in "**Reliance Energy and ors Vs Maharashtra Electricity Regulatory Commission and ors (Appeal no: 30 of 2005, 164 of 2005 and 25 of 2006)**"
- f. Hon'ble Appellate Tribunal for Electricity in "**Chattisgarh State Electricity Board Vs Raghuvir Ferro Alloys and ors (Appeal no: 125, 126 and 127 of 2006)**"
- g. Hon'ble Appellate Tribunal for Electricity in "**Himachal Pradesh State Electricity Board Vs Himalaya International Ltd (Appeal no: 78 of 2007)**"
- h. The Hon'ble Appellate Tribunal for Electricity in "**UP Power corporation Ltd Vs Jagannath Steel(P) Ltd and ors (Appeal no: 153 of 2011)**"
- i. Hon'ble Appellate Tribunal for Electricity in "**Madhyanchal Vidyut Vitaran Nigam Ltd. And anr Vs Uttarpradesh Electricity Regulatory commission and anr (appeal no: 165 of 2005)**"
- j. Hon'ble Appellate Tribunal for Electricity in "**UP Power corporation and ors Vs Premier Ispat Pvt Ltd and ors (Appeal No: 42 of 2006)**"
- k. Hon'ble Appellate Tribunal for Electricity judgment in "**Reliance Energy Vs K.H. Nadkarni and ors (Appeal no: 11 of 2005)**"
- l. Hon'ble Appellate Tribunal for Electricity judgment in "**Himachal Pradesh State Electricity Board Vs Emm tex Synthetics Ltd (Appeal No: 117 of 2007)**"

Thus, it could be seen that the consistent position taken by the Apex Court as well as the Appellate Tribunal for Electricity is that the State Regulatory Commission lacks jurisdiction in entertaining petitions filed by consumers against a licensee for redressal of disputes, including disputes regarding tariff. Considering the legal position as well as directions of the Hon. APTEL, KSEB prays that the petition may be rejected at admission stage itself.

3.3 Advocate for the petitioner requested time to file a rejoinder and Commission allowed to file the rejoinder before 18-10-2013. In the rejoinder filed by the petitioner points raised by KSEB has been countered. It is stated that the petitioner is not challenging the order of the Hon Commission but is seeking fixation of tariff under 86 (1) (a). An order passed by the Commission does not operate as resjudicata. The petitioner is challenging the exercise of causing judicial power of legislation exercised by KSEB.

This Commission under its inherent powers as always got power to pass orders as may be necessary for meeting ends of justice or to prevent abuse of process of the Commission.

An application under Sec 22 (b) was filed by the Board much after it suo moto revised the tariff on its own seeking a classification. An order was passed upon the same and petitioner filed an appeal against such classification which was dismissed with a direction permitting the applicant to raise the point before the Commission for re categorization of tariff determination in future proceedings. It does not take away the right of the petitioner herein nor does the said order curtail to seek reclassification or re-categorization of the existing tariff, it only means the applicants points are left open to be considered for re categorization of the tariff. The word recategorization denotes something different from categorization which is what is sought by the Electricity Board, the respondent every year. The re categorization could include not a review but by itself something more than that. The scope of review is very limited whereas the recategorization is wide enough to admit additional facts or materials and this is what has been permitted by the Appellate Authority. The re categorization of tariff is sought for under Sec 22 (d) of the regulations, which provides that proceedings can be initiated under regulations namely The Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2002. It follows that a classification done can always be sought re classified either under review where scope of scrutiny is limited or by filing a fresh petition under Sec 22 (d) by the affected party with further material and on new facts. It may be noted that the petitioner has filed an application for re-categorization. Upon a reading of Sec 22 (d) with Clause 7 of the Regulation as per notification dated 03-01-2004, the effect of categorization will be ordered by the Commission. The Commission find that there is an unlawful enrichment by the Board, the petitioner is entitled to receive such difference or have the excess paid adjusted against future bills. The above answers the contentions raised in paragraph 1 to 4 of KSEB counter petition. The contention that the tariff Order for 2013-14 is over cannot be permitted to be raised to be raised more so in the nature of the fact that the procedure compliances are lacking. There was no publicity in news paper that such tariff is going to be fixed and respondent is very much aware that fixation of tariff for LPG units was a matter of interest to the consumer and no notice was caused to be served, thus even overlooking or ignoring the order of the APTEL.

The proceedings initiated is not premature as it pertains to matter related power and functions of the Commission under Sec 86 (1) of the Electricity Act, 2003 and it is far fetched for the respondent to say that recategorization can be done only in 2014-15. If a categorization is taken place without sufficient notice to the affected party as in this case as admitted by the respondent, the aggrieved parties are the affected party and is not barred from moving under Clause 22(d) of the Regulations. It is re categorization

which is sought for which can be done at any point of time. Because the very word denotes the categorization already fixed have to be re categorized on facts to be brought to the notice of the Commission and it does not mean categorization for a particular tariff period. Since what is done in a tariff period is categorization and not re-categorization. The various judgment quoted do not have any citations and hence it is difficult for respondent to respond in lawful manner.

4. Analysis

Hon High Court of Kerala in its order dated 03-04-2012 (in WPC 6530/2009 and WPC 1866, Indian Oil Corporation Vs KSEB and HPCLVsKSEB) had referred the matter to the Commission for appropriate decision on categorization after affording opportunity of hearing for the petitioners within three months. Commission heard the matter on 28-06-2012 and decided that the appropriate category of LPG bottling plants for HT category shall be HT IV Commercial category. In the case of LT LPG Bottling plants Commission has already taken a decision to include them under LT VII A Commercial tariff vide order dated 19-03-2009. Hence in the tariff order for the year 2012-13(OP 23 of 2012 dated 25-07-2012) LPG bottling plants both under LT and HT were categorized under commercial tariff and continues in the present tariff schedule vide Order No OP2 of 2013 dated 30-04-2013. The Hon Appellate Tribunal had ordered that the dismissal of the appeal would not prevent the applicant to raise the point before the Commission for re categorization of tariff determination in future proceedings. As pointed out by the respondent KSEB, the future proceedings on tariff determination shall commence only with filing of ARR and ERC petition for the FY 2014-15 by KSEB. The petitioner can represent their case during the public hearings conducted before finalizing the ARR and ERC and Tariff for 2014-15, as directed by Hon: APTEL. The petitioner cannot be allowed to agitate the same issue again and again. Hence the petition does not deserve to be admitted.

5. Decision of the Commission

Commission refuses admission of the petition under Regulation 26(1) of the KSERC (Conduct of Business) Regulations, 2003 since it is defective in pleading.

Sd/-
Member (F)

Sd/-
Member (E)

Sd/-
Chairman

By Order of the Commission

Secretary