

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**

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Case No. 34 of 2010

In the matter of

Petition filed by Jain Irrigation Systems Limited under Regulations 24, 85(a), 92 and 95 of Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, seeking review of the Commission's Order dated August 17, 2009 passed in Case No. 116 of 2008.

Shri. V.P. Raja, Chairman

Shri. Vijay L. Sonavane

M/s Jain Irrigation Systems Ltd...

Petitioner

Versus

Maharashtra State Electricity Distribution Company Ltd. .. Respondent

ORDER

Dated: November 30, 2011

M/s Jain Irrigation Systems Limited (JISL) submitted a Petition under affidavit on July 20, 2010 under Regulations 24, 85(a), 92 and 95 of MERC (Conduct of Business) Regulations, 2004, seeking review of the Commission's Order dated August 17, 2009 passed in Case No. 116 of 2008.

2. The main prayers of the Petitioner, are as under:

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1. *To recall its order dated 17th August 2009 passed in Case No. 116 of 2008 to the extent recorded “provided the power supply is exclusively utilized by such hi-tech Agriculture Consumers for purpose directly concerned with crop cultivation*
\process and further provided that the power is not utilized for any engineering or industrial process” in the said order be deleted;
2. *That in the event of prayer (a) above is granted, the Hon’ble Commission be pleased to issue errata and corrigendum order to the effect that the tariff HT-V is continued to be applicable to the Petitioner and the Respondent be directed to revise its old invoices by issuing fresh invoices as per Tariff HT-V Plan to the Petitioner;*
3. *To condone the delay, if any, in filing this Review Application; and*
4. *To pass such further and other orders and/or directions, as may be necessary in the interests of justice and equity.”*

3. The Petitioner in its Petition submitted as under:

A. Facts:

- 1) The Petitioner’s company M/s. Jain Irrigation Systems Ltd. is taking electric supply from the Respondent Maharashtra State Electricity Distribution Company Ltd. (MSEDCL). The Petitioner is engaged in various businesses including the development and supply of micro (drip and sprinkler) irrigation systems, manufacturer of the food (fruit) processing, onion and vegetable dehydration, green house (environment controlled agriculture), tissue culture, plant materials and seeds, etc under biotechnology and water management technology to promote high tech agriculture at three locations in the Maharashtra State. The Units of the Petitioner are at Mohadi, Shirsoli and Bambhori. The various businesses carried out at the three units are as under:
 - a) Mohadi: Tissue culture, green houses, shed houses and high tech farming
 - b) Shirsoli: Vegetable dehydration, food (fruit) processing
 - c) Bambhori: micro (drip) irrigation systems
- 2) Initially the Petitioner was charged the tariff applicable to HT Industries and General HT consumers (HTP II) as per the Tariff Regulations of erstwhile MSEB

(Maharashtra State Electricity Board). However, MSEB vide its Order dated November 3, 1998 and circular dated August 29, 1998 introduced a concessional tariff referred as 'SP I' which stated as under:

“applicable for agricultural (High Tech). i.e. tissue culture, greenhouse, mushroom, etc. For power-supply on HT or LT.”

- 3) Therefore, the Petitioner applied for the concessional tariff to MSEB. MSEB after several rounds of inspection and communications permitted the application of SP-I tariff to all the units of the Petitioner. However, later on MSEB informed the Petitioner that its Units are not eligible for the concessional tariff and raised invoices on the Petitioner claiming the tariff at higher rate.
- 4) Aggrieved by MSEB's actions, the Petitioner filed a Petition before the Commission in Case No. 21 of 2002. The Commission in its Order dated September 2, 2004 held that the activities carried out at the three units amounted to high tech agricultural activities and therefore the Petitioner is entitled for concessional tariff.
- 5) Further, MSEDCL filed an Appeal before the Hon'ble Appellate Tribunal for Electricity (ATE) bearing Appeal No. 83 of 2007 against the Commission's above mentioned Order. The ATE held that the Petitioner is carrying out High Tech agricultural activities and is entitled to the benefit of concessional tariff i.e. SP-I tariff. The ATE's Judgment was not challenged further; therefore, the ATE's Judgment is still binding on MSEDCL (erstwhile MSEB).
- 6) However, the Commission in its Order dated August 17, 2009, in Case No. 116 of 2008 ruled as under:

*“Consumers engaged in **Hi-Tech Agriculture activity** shall also be eligible for tariff applicable for agriculture pumping load, provided the power supply is exclusively utilized by such Hi-Tech Agriculture Consumers for purpose directly concerned with crop cultivation process and further provided that the power is not utilized for any engineering or industrial process.”*

Based on the aforesaid Order, MSEDCL issued a Circular No. 102 on November 3, 2009 wherein it stated as under:

“Agricultural Tariff is applicable to High-Tech Agriculture Consumers where the purpose is directly concerned with crop cultivation process and further provided that the power is not utilised for any engineering or industrial process.”

In view of the Circular, MSEDCL issued a bill dated November 19, 2009 to the Petitioner charging as per the HT-I Industrial tariff.

- 7) Aggrieved by the MSEDCL's arbitrary and prejudicial conduct, the Petitioner submitted a letter on December 18, 2009 stating that the bill is incorrect. Thereafter, MSEDCL vide its bill dated December 21, 2009 asked the Petitioner to pay the bill amounting to Rs. 2,86,12,430/- under the HT-I Industrial tariff. Later on, MSEDCL issued disconnection notice to the Petitioner. Therefore, in order to avoid the circumstances of disconnection, under protest, the Petitioner paid the bill.

B. Review Petition:

The Petitioner relied upon the following Sections and Regulations which can be taken in to consideration by the Commission for reviewing of the impugned Order dated August 17, 2009.

- 1) Regulation 94(1) (f) of the Electricity Act, 2003 (EA 2003) forms the basis of power of the Commission to review its own decisions. Further, Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 provides the grounds for review of the impugned Order. The said Regulation is reproduced below:

“Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or 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 direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission.”

- 2) The Petitioner referred to the Case No. 62 of 2008 filed by Maharashtra Rajya Veej Grahak Sanghatana under review Petition to amend the Order of the Commission dated June 20, 2008 praying for separate category for power consumers, which was categorised under LT-V Industrial. Further, the Petitioner referred to many such cases of the Hon'ble Supreme Court such as Supreme Court in K.Ajit babu v/s Union of India, AIR 1997 SC 3277, Chajjuram v/s Neko, AIR 1922 PC 112, where it has been held as under:

“

...

The words any other sufficient reasons means a reason sufficient on grounds at least analogous to those specified immediately previously.”

- 3) The ATE’s Judgment is not followed and it is “*an error apparent on the face of record*” and this ground for review may be invoked. Therefore, aggrieved by the impugned Order of the Commission, the impugned bill and the impugned payment of the bill, the Petitioner seeks for review of the impugned Order setting aside the bill issued by MSEDCL and the payment made by the Petitioner.

C. Grounds for the Case:

The Petitioner submitted that the Commission has failed to appreciate its own Order passed in Case No.21 of 2002. This is an error apparent on the face of record. Further, the Petitioner submitted that the Commission ought to have acceded to its earlier decision in Case No. 21 of 2002, as affirmed and confirmed by the ATE, in view of the settled law of precedents, which inter alia considers consistency, certainty and uniformity in the field of judicial decisions are considered to be benefit arising out of the ‘Doctrine of Precedent’. This is also an error apparent on the face of record.

Therefore, the Petitioner requested the Commission to pass appropriate directions and clarifications that the Order issued by the Commission in Case No. 21 of 2002 further, affirmed and confirmed by the ATE will not be affected by the Commission’s Order in Case No. 116 of 2008.

4. The Petitioner vide its letter dated August 17, 2010 submitted an amended Petition to the Commission. The Petitioner reiterated the facts averred to in its original Petition. The additional submissions in the amended Petition are as follows:

- (a) The Petitioner has entered in to an agreement with MSEDCL in case of the Bambhori Unit on April 8, 2009 for electricity supply for the Bambhori Unit at HT-V tariff for a period of two years. A flying squad of MSEDCL conducted a spot inspection at the Petitioner’s Bambhori Unit on July 8, 2010 and reported that agricultural activity is not carried out in the Unit. Further, the Respondent issued a bill amounting to Rs. 2,31,23,890 for the period of July 19, 2010. The tariff in the said bill was HT-IC [HT : Industrial (Continuous)]tariff and not HT-V (HT : Agriculture) . Therefore, MSEDCL issued a wrong supplementary bill of Rs. 17,44,23,900.

- (b) The supplementary bill dated July 19, 2010 has not been paid till date. On July 31, 2010, the Respondent issued a notice stating that if the amount under the supplementary bill is not paid, the electric supply at the Bambhori Unit will be disconnected within 15 days of the receipt of the notice. The said notice was received by the Petitioner on August 5, 2010.
- (c) Since, MSEDCL wrongly issued the bill under Industrial tariff; the Petitioner under Section 42 (5) of the EA 2003 read with Regulation 6 of the MERC (Consumer Grievance Redressal Forum) Regulations, 2006 filed a Complaint in the Internal Grievance Redressal Cell (IGRC) at Jalgaon. The Petitioner has also sought an Interim Stay Order against the disconnection notice issued by MSEDCL on July 31, 2010.
- (d) However, the IGRC did not issue an interim stay Order. Therefore, the Petitioner approached the Consumer Grievance Redressal Forum (CGRF), Nasik for the same. The Petitioner submitted that the present Petition is prejudicial to the Petitioner's averments in the applications filed before the IGRC, Jalgaon and the CGRF, Nasik.
- (e) Further, the Petitioner requested to delete the para 3(B) and para (C) to be deleted from the submission made above in this Order.

5. The Commission vide Notice dated August 23, 2010 scheduled a hearing in the matter on September 13, 2010 in the presence of authorised Consumer Representatives under Section 94 (3) of the EA 2003. However, the Petitioner vide its letter dated August 28, 2010 requested the Commission to postpone the said hearing. Therefore, the Commission issued a Notice dated September 6, 2010 stating that the scheduled hearing in the matter is postponed.

Further, the Commission vide its Notice dated September 15, 2010 scheduled a hearing in the matter on October 12, 2010 in the presence of Authorised Consumer Representatives.

6. The matter was heard on October 12, 2010. Advocate Aditya Mehta of Amarchand Mangaldas, appeared on behalf of the Petitioner and Ms. Deepa Chawan, Advocate, and Shri Kiran Gandhi, Advocate, Little & Co. appeared on behalf of MSEDCL.

Ms. Deepa Chawan, sought permission to move an adjournment application for twelve weeks as the Petitioner served the copy of the Petition on October 8, 2010, and MSEDCL could not get sufficient time to respond in the matter.

7. After hearing the Respondent MSEDCL, the Commission observed that the issue of drip irrigation systems has wider implications and needs to be addressed properly. Unfettered pumping of Ground Water is leading to fast depleting ground water tables, threatening the sustainability of Agriculture in the long term future. All scientific methods to conserve water including drip and micro-irrigation systems need to be encouraged. Therefore, the Petitioner and the Respondent should explore the possibility of addressing the core issues through mutual discussions, and if needed the Planning Department, Water Resource Department, and other related various departments of the GoM may also be got involved in the process. The Petitioner requested to accept the amended Petition filed before the Commission, and requested the Commission to direct the Respondent to submit its comments on the amended Petition.

After hearing, both the parties, the Commission accepted the request of the Petitioner and directed MSEDCL to file their comments accordingly. The Petitioner and the Respondent were directed to file their detailed submissions, including legal point of view, before the Commission with a copy served on each other and the Authorised Consumer Representatives.

8. The Respondent submitted its submissions on October 12, 2010. The Respondent reiterated the facts stated by the Petitioner in its Petition. In addition, Respondent submitted that it has issued an electricity bill on November 19, 2009, charging the Petitioner as per HT- I Industrial Tariff. Further, after eight months of the issuance of the bill, the Petitioner has filed the present Petition. Thus, the Respondent requested the Commission to adjourn the present case by twelve weeks, so that it can reply to the Petition in detail.

9. The Commission vide Notice dated October 14, 2010 scheduled a hearing in the matter on December 13, 2010 in the presence of authorised Consumer Representatives under Section 94 (3) of the EA 2003.

10. During the hearing held on December 13, 2010, MSEDCL submitted that a reply to the Petition is prepared and it has to be finalised. Therefore, time is required for submitting the same. Further, both the Petitioner and the Respondent submitted that they are into mutual discussions in the matter as directed by the Commission.

11. The Commission vide Notice dated December 14, 2010 scheduled a hearing in the matter on January 28, 2011 in the presence of authorised Consumer Representatives under Section 94 (3) of the EA 2003. However, on January 5, 2011 the Commission communicated to the Petitioner, Respondent and the Consumer Representatives that the hearing scheduled on January 28, 2011 is postponed and the matter is rescheduled to be heard on January 31, 2011.

12. MSEDCL vide its letter dated January 28, 2011 informed the Commission that the mutual discussions with the Petitioner is still in progress and therefore requested the Commission to postpone the hearing date by three weeks. Further, MSEDCL informed the Commission that the same has been conveyed to the Petitioner and they had orally consented for the same.

13. On request of the Petitioner and MSEDCL, the Commission vide Notice dated February 11, 2011, postponed the matter and rescheduled the hearing to March 9, 2011.

14. MSEDCL vide its letter dated March 8, 2011, submitted its submissions and requested the Commission to dismiss the Petition based on the below mentioned facts. The submissions are as under:

a) Review not maintainable:

The Petitioner filed a Petition for the review of the Tariff Order on July 20, 2010. However, the Tariff Order was issued on August 17, 2009. The Petition for review of the Order is based on Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004. The Petitioner failed to make out a case of error apparent on the face of record. Moreover, any attempt except an attempt to correct an error apparent or an attempt based on the grounds for review would amount to an abuse of the liberty given to the adjudicating authority under an enactment to review its Orders. The Petition is liable to be rejected on the grounds of delay and laches.

b) Tariff categorisation as per Law:

The tariff categorisation in the Tariff Order dated August 17, 2009 satisfies the criteria laid down under the Section 61 and 62 of the EA 2003. It is the right of the Utility to propose categorisation in accordance with law and it is an independent right of the Regulator to approve the same as long as it is in line with the principles laid down in the EA 2003. Moreover, MSEDCL also submitted that the judicial decisions interpreting

a tariff entry does not prevent the Utility from proposing and in the same way a Regulatory Commission from evolving a different and distinct categorisation.

c) Tariff categorisation in the Tariff Order:

The relevant paragraph from the Tariff Order in Case No. 116 of 2008 is reproduced below:

*“Consumers engaged in **Hi-Tech Agriculture activity** shall also be eligible for tariff applicable for agriculture pumping load, provided the power supply is exclusively utilized by such Hi-Tech Agriculture Consumers for purpose directly concerned with crop cultivation process and further provided that the power is not utilized for any engineering or industrial process.”*

MSEDCL submitted that on November 19, 2009, the Deputy Executive Engineer (Flying Squad), Jalgaon of MSEDCL verified the meters of the Petitioner and accordingly made the HT- Industry tariff category applicable to the Petitioner.

The tariff determination process is an independent proceeding for each year. Therefore, the Order of the Commission in Case No. 21 of 2002 cannot be applied as the Order in Case No. 116 of 2008 supersedes the former Order.

15. During the hearing held on March 9, 2011, Advocate Prateek Seksaria, and Advocate Aditya Mehta appeared on behalf of the Petitioner. Advocate Deepa Chawan and Advocate Kiran Gandhi appeared on behalf of MSEDCL.

a) Directions of the CGRF:

Shri. Prateek Seksaria submitted that they had filed a counter affidavit on March 9, 2011, where the CGRF has directed MSEDCL not to take any coercive action on the consumer till the Order is issued. MSEDCL has issued a Disconnection Notice on March 4, 2011 and had not complied with the directions of CGRF. However, Ms. Deepa Chawan informed the Commission that MSEDCL is a large Distribution Utility and is bound to issue the Notice for collection of its revenue from the consumers.

b) Reply on the Amended Petition:

Ms. Deepa Chawan submitted that MSEDCL has submitted the para-wise reply on the original Petition on March 8, 2011. However, the Petitioner requested the Commission to direct MSEDCL to file its submission on the amended copy of the Petition dated August 17, 2010.

c) Framing of Preliminary Issues on Maintainability of the review petition:

After hearing both the parties, the Commission directed the Petitioner and the Respondent to have reconciliation discussions between both the parties. In case, if the reconciliation process does not succeed, then both the Petitioner and the Respondent were directed to frame the issues precisely along with the 'burden of proof' within a week and exchange the same in order to file further submissions. The Commission adjourned the matter to April 13, 2011 at 15.00 hours.

16. The Petitioner vide its letter dated March 9, 2011 submitted its submissions in the matter as under:

- a) The Petitioner had filed a case in the IGRC at Jalgaon on August 7, 2010 and in the CGRF on August 16, 2010. The CGRF vide its letter dated August 27, 2010 directed the Respondent, not to take any coercive action like disconnection of the electric supply until a decision is taken by the IGRC or CGRF.
- b) The Commission directed both the parties to have mutual discussions. However, the Respondent issued a disconnection notice dated February 17, 2011 with an amount of Rs. 21,36,29,591.97/- where Rs. 3,92,05,692/- were collected for energy bills the amount of Rs. 17,44,23,900/- were collected towards debit bill adjustment. The Petitioner paid an amount of Rs. 3,92,05,692/- under protest.
- c) Further, the Respondent issued a notice on March 4, 2011 demanding for an amount of Rs. 17,86,96,496/- from the Petitioner and threatened to disconnect supply at the Bhambori Unit if the said amount is not paid within a period of 15 days.
- d) The Petitioner submitted that the notice of disconnection is an attempt of the Respondent to subvert and undermine the CGRF's direction. Moreover, on the one hand, the Respondent is stating that it is in the process of amicably settling the matter and on the other hand, it is surreptitiously serving the notice of disconnection to the Petitioner, which is arbitrary, unjust and perverse in nature.

17. The Commission vide Notice dated March 10, 2011, scheduled a hearing in the matter on April 13, 2011 in the presence of authorised Consumer Representatives under Section 94 (3) of the EA 2003.

18. The Respondent vide its letter dated April 11, 2011 submitted its reply on the amended Petition. MSEDCL reiterated the facts and the list of dates and events as mentioned in the Petition and in its earlier submissions dated March 8, 2011. The submissions are as under:

- a) The Respondent submitted that the SP-I tariff category was made applicable when the Regulatory regime was not evolved. However, after the formation of the State Commission, the Commission issued an Order in Case No. 21 of 2002 where the Order concerns the actions initiated by the erstwhile MSEB.
- b) Further, MSEDCL submitted a Petition to the Commission in Case No. 116 of 2008, where it requested the Commission to make the high tech agricultural activity applicable for HT Agriculture category tariff where these high tech agricultural activity should be concerned directly with crop cultivation and not with industrial activity. The Commission issued an Order in line with the proposed tariff applicability by the Respondent.
- c) The Respondent refrains from dealing with the proceedings filed by the Petitioner in respect of its bills as the same are pending adjudication before the appropriate authorities.

19. The Respondent on the hearing day, April 13, 2011, submitted the following issues to be considered by the Commission, dealt with the amended Petition.

- a) Whether the Commission is conferred with the powers under the EA 2003 to undertake tariff determination, without being influenced by the previous tariff determined under the Electricity Supply Act, 1948 and Orders passed thereon?
- b) Whether the tariff determined vide its Order in Case No. 116 of 2008 has been so evolved after following the procedure prescribed under the EA 2003?
- c) Whether the Review Petition is maintainable or not?
- d) Whether the Review Petition is barred by limitation?
- e) Whether the Petitioner is entitled to file the present Petition, where the issues concerned are initiated by the Petitioner before the CGRF?
- f) Whether the Order passed by the Commission in Case No. 21 of 2002 and Judgment of the Hon'ble ATE in Appeal no. 83 of 2007 precludes and fetters the Commission from undertaking the tariff determination all the time under EA 2003?
- g) Whether the Tariff Order passed by a Regulatory Commission is a separate and distinct proceeding?

20. Similarly, the Petitioner also on April 13, 2011 submitted its proposed issues to the Commission:

- a) Whether the Petitioner proves that the activities carried out at the three Units constitute high tech agricultural category and is the Petitioner entitled for the concessional tariff under HT V Agricultural tariff category?
- b) Whether the Respondent proves that the activities carried out at the three Units constitute industrial activities and merit the chargeability of industrial tariff?
- c) Whether the Review Petition is maintainable or not?
- d) Whether the Review Petition is barred by limitation?

21. During the hearing held on April 13, 2011, Advocate Aditya Mehta appeared on behalf of M/s. Jain Irrigation Systems Ltd. and Advocate Deepa Chawan appeared on behalf of MSEDCL for the hearing.

The Commission directed the Petitioner and the Respondent to submit their written submissions on the following three issues:

- a) Whether the Respondent proves that the review Petition filed by the Petitioner is maintainable or not?
- b) Whether the Petitioner proves that the activities carried out in all the three Units of M/s. Jain Irrigation Ltd. fall under high tech agricultural activity or not?
- c) Whether the review Petition is barred by the limitation?

Further, the Commission scheduled a hearing in the matter on May 5, 2011.

22. The Commission vide Notice dated April 18, 2011, scheduled a hearing in the matter on May 5, 2011 in the presence of authorised Consumer Representatives under Section 94 (3) of the EA 2003.

23. However, the Petitioner vide its letter dated May 2, 2011 requested the Commission to adjourn the hearing scheduled on May 5, 2011 and to reschedule the same after June 13, 2011, as the Petitioner will not be able to attend the hearing due to some difficulties. Therefore, the Commission in its Notice dated May 4, 2011 postponed the hearing from May 5, 2011 to June 16, 2011. Further, the hearing was postponed to July 21, 2011.

Meanwhile MSEDCL vide its letter dated June 20, 2011 requested the Commission to reschedule the hearing fixed on June 16, 2011 to July 22, 2011. Accordingly, the Commission informed the parties vide Notice dated June 23, 2011 about the same. MSEDCL vide its letter dated July 18, 2011 further requested the Commission to reschedule

the hearing fixed on July 21, 2011 to July 20, 2011. The Respondent also requested the Commission not to fix the hearing in the matter on July 22, 25, 26, 27, 28, 30, and August 1, 6, 2011. The Petitioner through its letter dated July 18, 2011 requested the Commission to prepone the hearing to July 20, 2011 or adjourn the matter to any other suitable date beyond July 21, 2011.

24. The Commission vide Notice dated July 20, 2011, scheduled a hearing in the matter on August 23, 2011 in the presence of authorised Consumer Representatives under Section 94 (3) of the EA 2003.

25. During the hearing held on August 23, 2011, J.J. Bhatt Senior Advocate, appeared on behalf of M/s Jain Irrigation Systems Ltd. and Advocate Deepa Chawan appeared on behalf of MSEDCCL for the hearing.

Shri. Bhatt referred to various paragraphs from the Hon. ATE's Judgment dated April 15, 2009 in Appeal No. 83 of 2007 and the Commission's Order dated September 2, 2004 to substantiate that the Petitioner was undertaking high tech agricultural activity. The relevant extract from the aforesaid Commission's Order is as under:

“(i) With regard to the Mohadi Unit, in view of the Commission's finding that its activities constitute 'Hi-tech Agriculture' for the purpose of application of the SP-I and successor tariff category, the excess amounts recovered by MSEB from JIS should be refunded to the Petitioner by adjustment through its energy bills or by other means.

(ii) This would apply to excess amounts recovered from the different units and their activities at the Shirsoli facility which the Commission has found eligible for SP-I and successor tariff category.

(iii) This would also apply to excess amounts recovered from drip irrigation unit at Bambhori which the Commission has found eligible for SP-I and successor tariff category.

(iv) MSEB will not recover three supplementary bills and subsequent interest for non-payment from all the locations, namely Shirsoli, Mohadi and Bambhori.”

He submitted that MSEDCL is applying the concessional tariff for Mohadi Unit, whereas for Units namely Sirsoli and Bambori industrial tariff is charged. However, Shri. Bhatt submitted that the Petitioner falls under high tech agricultural activity and therefore, industrial tariff should not be made applicable. Moreover, no change in the activity has taken place so far hence, requested the Commission to clarify the same.

Further, Shri. Bhatt submitted that the Bambori Unit is dealing with the manufacturing of the micro drip irrigation systems which is used for increasing the agricultural activities. Hence, it should be considered in high tech agricultural activity.

Smt. Deepa Chawan on behalf of the Respondent, submitted that the Petition is filed on the basis of Regulation 85 of the MERC (Conduct of Business) Regulations, 2004. However, there is a time bar of 45 days from the passage of the impugned Order that any review petition could have been filed. However, the Petitioner has delayed its submission and the Petitioner has not mentioned the reason thereof. Therefore, the ground to review this Petition itself is limited in nature.

With respect to Regulation 85, Shri. Bhatt submitted that the Commission has power to deal with the issue even if Regulation 85 proves to be limited in this case. He referred to the Regulations 92, 93, 94, 95, 96 and 97 of the MERC (Conduct of Business) Regulations, 2004 for the power of the Commission to rectify/amend the directions given by the Commission and the extension of the time prescribed.

Further, Shri. Bhatt submitted that MSEDCL has issued a notice of disconnection of the electric supply. Therefore, he requested the Commission to direct MSEDCL not to disconnect the supply, till the Commission issues an Order in the matter. Moreover, the Ombudsman has issued an Order stating that the matter cannot be judged in view of the fact that the said matter is sub-judice in nature.

26. The Respondent, MSEDCL vide its letter dated October 10, 2011 submitted that during the hearing held on August 23, 2011, the Commission directed both the parties to review the subsequent Tariff Order dated September 12, 2010 and file their respective submissions, w.r.t. Hi-tech agriculture activities. MSEDCL submitted that it had made the submissions earlier in the ARR and the Commission has considered the same. Therefore, now, MSEDCL is of the view that since the tariff is already approved by the Commission there is no necessity to file further submissions on the same.

27. The Petitioner vide its letter dated October 11, 2011 informed the Commission that it had filed a Writ Petition No. 6601 of 2011 before the Bombay High Court, Aurangabad bench inter alia to quash and set aside the MSEDCL's Commercial Circular No. 102 dated November 3, 2009. The High Court vide its Order dated September 13, 2011 directed MSEDCL to stay the disconnection notice till September 20, 2011.

28. The Hon'ble Bombay High Court, Aurangabad bench vide its Order dated October 4, 2011 disposed of the Writ Petition by directing the Commission to decide the review Petition within six weeks period from the date of the Order. The relevant extract of the Order is reproduced below:

“In view of the matter, we find that interest of justice would be met by disposing of the present petition with a direction to the Maharashtra Electricity Regulatory Commission to decide the Review Petition filed by the petitioners as expeditiously as possible within a period of six weeks from today.

...

In the event the order passed by the Maharashtra Electricity Regulatory Commission in the Review Petition is adverse to the interest of the petitioners, the respondent Authorities shall not take any coercive action against the petitioners for a period of three weeks from the date of passing of the order in the Review Petition.
”

29. The Petitioner vide its letter dated October 11, 2011 also submitted as under:

- (a) The Commission vide Order dated August 17, 2009 examined that though MSEDCL has not elaborated the rationale for specific proposal for the IT and IT enabled services (ITeS), the Commission has included the same under industrial category. The relevant para is reproduced below:

“5. LT V: LT- Industrial

Applicability

Applicable for industrial use at LT voltage, excluding Agricultural Pumping Loads. This Tariff shall also be applicable to IT Industry & IT enabled services (as defined in the Government of Maharashtra policy).”

“1. HT I : HT- Industry

Applicability

This category includes consumers taking 3-phase electricity supply at High Voltage for industrial purpose. This Tariff shall also be applicable to IT Industry & IT enabled services (as defined in the Government of Maharashtra policy).”

...

Consumers engaged in Hi-Tech Agriculture activity shall also be eligible for tariff applicable for agriculture pumping load, provided the power supply is exclusively utilized by such Hi-Tech Agriculture Consumers for purpose directly concerned with crop cultivation process and further provided that the power is not utilized for any engineering or industrial process.

Commission’s Ruling

The Commission finds merit in MSEDCL’s suggestion that consumers engaged in hi-tech agricultural activity should be eligible to be charged at agricultural tariffs, since this is in line with the Commission’s philosophy in this regard as outlined in earlier Tariff Orders. MSEDCL’s suggestion that the electricity supply should not be utilised for any engineering or industrial purposes is also logical, since if any industrial activity is being undertaken, then the industrial tariff would be applicable.

...

The tariffs and tariff categorisation have been determined so that the cross-subsidy is reduced without subjecting any consumer category to a tariff shock, and also to consolidate the movement towards uniform tariff categorisation throughout the State of Maharashtra.”

- (b) The Commission vide Order dated August 17, 2009 determined the tariff for HT V Agriculture and elucidated the same as under:

“HT V: HT – Agricultural

Applicability

Applicable for High Tension Agricultural Pumping loads, including HT Lift Irrigation Schemes (LIS) irrespective of ownership and also for

- (i) *Poultry (exclusively for Layer & Broiler Activities),*

- (ii) *High Tech Agricultural (i.e. Green Houses, Tissue Culture, Mushroom, etc) purpose;*
- (iii) *Pre-cooling & Cold Storage for Agricultural Produce of Farmer's Co-operative Societies."*

From the aforesaid, it is clear that the Petitioner's activity is clearly covered under High-Tech Agriculture category. The Commission for the FY 2010-11 has continued the same applicability as in the earlier Order. Therefore, it is apparent that a case has been made out for clarification that the Petitioner's activity falls within these schedules.

After hearing both the parties for several times and considering the material placed by them on record, the Commission is of the view that the first and foremost preliminary issue to be decided is the Petitioner's Review Petition is maintainable under Regulation 85(a) of MERC (Conduct of Business) Regulations, 2004 seeking review of the Order dated August 17, 2009 in Case No. 116 of 2008.?

30. **Maintainability of the Review Petition:**

Bar of limitation

(i) Higher courts have repeatedly held that the parties should approach for enforcement of their rights within a reasonable period. It has been held that any inordinate delay is fatal to the claim when raised. A classic example of this proposition of law is judgment of the Hon'ble Supreme Court dated 22.9.1964 in CA No. 140/64, titled Smt. Naraini Devi Khaitan Vs State of Bihar. This case had its origin through the proceedings before the High Court under Article 226 of the Constitution for enforcement of fundamental rights. The Hon'ble Supreme Court held that if the petitioner is guilty of laches and there are other relevant circumstances to indicate that it would be inappropriate to exercise its prerogative jurisdiction under Article 226, ends of justice may require that writ should be refused. However, the matters are left to the discretion of the court which must be exercised judiciously and reasonably. The observations of the Hon'ble Supreme Court are extracted below:

"It is well-settled that under Article 226, the power of the High Court to issue an appropriate writ is discretionary. There can be no doubt that if a citizen moves the High Court under Article 226 and contends that his fundamental rights have been

contravened by any executive action, the High Court would naturally like to give relief to him; but even in such a case, if the petitioner has been guilty of laches, and there are other relevant circumstances which indicate that it would be inappropriate for the High Court to exercise its high prerogative jurisdiction in favour of the petitioner, ends of justice may require that the High Court should refuse to issue a writ. There can be little doubt that if it is shown that a party moving the High Court under Article 226 for a writ is, in substance, claiming a relief which under the law of limitation was barred at the time when the writ petition was filed, the High Court would refuse to grant any relief in its writ jurisdiction. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court, in this matter too discretion must be exercised judiciously and reasonably.”

(ii). A similar proposition of law was laid down in P.S. Sadasivaswamy Vs State of Tamil Nadu [(1975) 1 SCC 152] as seen from the extracts placed below:

“.....A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.”

(iii). In Rabindra Nath Bose Vs Union of India [(1970) 1 SCC 84] the Hon’ble Supreme Court refused to grant relief in a petition filed before it under Article 32 when the petitioner approached the Supreme Court after the lapse of a number of years, as noted from the following observations:

“It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution-makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay. We

are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years.”

(iv). The Commission proceeds to examine whether there has been an unreasonable delay in the applicant approaching the Commission seeking review of the impugned Order. This matter is to be considered in the light of facts on record. Examined from this angle, the Commission notes that the present Petition was filed on July 20, 2010 initially and amended on August 17, 2010, thereby after nearly one year (365 days) from the passage of the Order dated August 17, 2009. The time limit for filing of review petition is only 45 days from the date of passage of the Order as per Regulation 85(a) of the Commission's Conduct of Business Regulations, 2004. Moreover, the impugned Order is a Tariff Order for the Respondent for Truing Up for FY 2007-08, Annual Performance Review for FY 2008-09 and Tariff Determination for FY 2009-10. Billing has already been done to lakhs of consumers under the impugned Order. However, if the Review Petition is simpliciter allowed then under law the decision contained in the impugned Order would stand to be reviewed and altered with retrospective effect. In such a situation it is likely to cause confusion and public inconvenience and bring in its train new injustices, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties being other consumers who have already paid certain tariffs under the impugned Order. Review of the impugned Order will have to be refused because the rights accrued to others by the delay in filing the review petition should not be disturbed and that the Commission should not harm innocent parties who have acted in terms of the impugned Order. In view of the above, the immense delay of nearly one year in filing the present review petition is not condoned. Hence the Commission holds that the Review Petition preferred by the Petitioner is time barred and is not within the stipulated timeline of 45 days from the date of Order, i.e., 17th August 2009.

31. Scope of Review

Moreover, the Hon'ble Supreme Court has held in a catena of judgments that the scope of review proceedings is limited. That decision cannot be re-heard and corrected by review proceedings. Review cannot be an appeal in disguise. Errors must be such that they stare at the face and should not need detection through detailed and complicated reasoning. Any decision must be corrected in appeal and not in review proceedings. Scope of an application for review is much more restricted than that of an appeal. No such ground for taking a review of the earlier decision of the Commission has at all been made out by the present review Petitioner.

32. **Tariff Categorisation based on Tariff Philosophy:**

The Commission determines the tariffs in line with the tariff philosophy adopted by it in the past, and under the provisions of law. As enunciated in the Tariff Orders issued by the Commission, while undertaking the rationalisation of tariff categories, the Commission has borne in mind the provisions of Section 62(3) of the EA 2003, which stipulates as under:

“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.”

A differential tariff can be fixed under Section 62(3) of the EA 2003 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**. The criteria of ‘**purpose**’ of supply has been used extensively to differentiate between consumer categories, with categories such as residential, non-residential/commercial purposes, industrial purpose, agricultural purpose, street lighting purpose, etc. The Commission observes that Bambori Unit is dealing with the manufacturing of the micro drip irrigation systems and criteria of **purpose for which the electricity is being utilized is Industrial (‘manufacture’ process)** and cannot be categorised under the Agricultural category. Since the Agricultural tariffs are subsidized, many consumers availing different activities (other than agriculture) try to get the same for availing the benefit of lower tariff. However, the Commission is of the view with regards to industrial activity that the categorisation of ‘Industry’ is applicable to such activities that entail in ‘manufacture’ process.

MSEDCL in its Tariff Petition for FY 2009-10 proposed for the following (Case 116 of 2008):

*“Consumers engaged in **Hi-Tech Agriculture activity** shall also be eligible for tariff applicable for agriculture pumping load, provided the power supply is exclusively utilized by such Hi-Tech Agriculture Consumers for purpose directly concerned with crop cultivation process and further provided that the power is not utilized for any engineering or industrial process.”*

Where the Commission ruled as under:

*“The Commission finds merit in MSEDCL’s suggestion that consumers engaged in hi-tech agricultural activity should be eligible to be charged at agricultural tariffs, since this is in line with the Commission’s philosophy in this regard as outlined in earlier Tariff Orders. MSEDCL’s suggestion that the electricity supply should not be utilised for any engineering or industrial purposes is also logical, **since if any industrial activity is being undertaken, then the industrial tariff would be applicable.**”(Emphasis added)*

The Commission opines that though the Petitioner is involved in high tech agricultural activity, still it involves the process of manufacturing of appliances/ instruments used for development of new technologies. Therefore, manufacturing of the same for new/ high tech technologies, comprise of industrial activity. Since, the Petitioner is using the electricity supply for engineering or industrial purpose, the tariff applicable for such purpose is HT I Industrial category.

In view of the above, the present Petition stands dismissed as not maintainable as also on merits.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman