Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 9 of 2009

Dated : 28th October, 2009

Coram : Hon'ble Ms. Justice Manju Goel, Judicial Member
Hon'ble Mr. H.L. Bajaj, Technical Member

IN THE MATTER OF :-

Multiplex Association of India
C/o Federation of Indian Chambers of Commerce and Industry
Krishnamai Building,
Sir Pochkanwala Road,
Worli,
Mumbai – 400 018 … Appellant(s)

Versus

1. **Maharashtra Electricity Regulatory Commission**
   World Trade Centre,
   Centre No.1, 13th Floor,
   Cuffe Parade,
   Mumbai – 400 005

2. **Tata Power Co.**
   Bombay House,
   24, Homi Mody Street,
   Fort,
   Mumbai – 400 001. … Respondent(s)

Counsel for the Appellant(s) : Mr. P. H. Parekh, Sr. Adv.
Mr. M. G. Ramachandran
Ms. Swapna Seshadri,
Mr. Kunal Vajani,
Mr. Avinash Menon,
Mr. Apoorve Karol,
Ms. Neha Garg,
Ms. Madhu Gadodia,
Ms. Mrinalini Rajpal,
Mr. Amit Naik,
Mr. Arvind Kumar and
Mr. Ravindra Suryavanshi

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms. Poonam Verma
Ms. Shobana Masters

Mr. J. J. Bhatt, Sr. Adv.
Ms. Anjali Chandurkar
Ms. Smieetaa Inna
Mr. Amit Kapur, Mr. Shreshth Sharma, Mr. Sanjeev Kapoor
Mr. Sushant Sharma

J U D G M E N T

Justice Manju Goel, Judicial Member

The appeal is directed against the order dated 04.06.08 passed by Maharashtra Electricity Regulatory Commission (hereinafter referred to as the Commission) in case No. 69 of 2007 relating to Annual Performance Review (APR) for 2007-08 and for determining

annual revenue requirement and tariff for 2008-09 of M/s. Tata Power Co. Ltd., the respondent No.2 herein. The members of the appellant association are operators of multiplexes in various places in Maharashtra including the area of supply of electricity by respondent No.2. During the financial year 2006-07, the multiplexes were classified for supply of electricity under category LT-II (non-domestic) and HT-II (Industrial). By the tariff order dated 30.04.07, read with clarificatory order dated 26.09.07, all multiplexes and shopping malls receiving supply at LT/HT voltage were placed under the new category created by the Commission being LT-V category. The multiplexes and shopping malls falling under the supply area of other distribution companies such as Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL for short) and Reliance Energy Ltd. (REL for short) were similarly placed under category LT-IX. The tariff for multiplexes and shopping malls by such classification had been raised to an exorbitant level. There were certain challenges to the classification of multiplexes and shopping malls for placing them in a category to pay higher tariff for electricity consumption. In appeal No. 146 of 2007 against the MSEDCL this Tribunal vide order dated 19.12.07 set aside the categorization of LT-IX and directed that tariff applicable to such consumers shall be the same as per parent category which was LT-II (non-domestic) and HT (Industrial) w.e.f. 01.05.07, the date on which the tariff order for 2007-08 came into

effect. In yet another appeal filed by M/s. Inorbit India Pvt. Ltd. & Ors. being appeal No. 125 and 126 of 2007, this Tribunal vide order dated 26.11.07 directed the State commission to reconsider the categorization of LT-IX in regard to those consumers who were earlier categorized under HT-II. The Commission reconsidered the categorization and vide an order dated 15.01.08 directed that those consumers who were being billed under HT-II category and started receiving bills as LT-IX consumers as multiplexes and shopping malls be charged tariff as applicable to the parent category i.e. HT-II w.e.f. the date on which the new tariff order came into effect. Thereafter vide an order dated 18.02.08 this Tribunal in appeal No. 16 of 2008 set aside the creation of LT-IX category of consumers in the area of REL and directed that the tariff for the consumers under LT-IX be charged as per their parent category namely LT-II (non-domestic) and HT-II as the case may be. The appellant itself filed an appeal challenging the introduction of LT-V category which is appeal No. 68 of 2008. Vide the impugned order dated 04.06.08 the Commission passed a tariff order for the period 01.06.08 to 31.03.09. The Commission created a new category and reduced the applicable tariff charges. However, the appellant claims that despite such reduction, the total cost per unit is exorbitantly higher than the average total cost prevailing in the period prior to introduction of LT-V category. Pending the present appeal, the LT-V

category was set aside in appeal No. 68 of 2008 on 19.01.2009 with the following direction:

> *"… For TPC the Commission calculated a revenue gap of Rs.256 Crores which required an increase of 21% over the existing levels of revenue although the rise in the tariff for the multiplexes falling in LT-5 was much higher. The increase in tariff for multiplexes and shopping malls works out to 65% to 135%. Coming to tariff philosophy adopted by the Commission for determining the revenue requirement and tariff for TPC the Commission says, in the order impugned in appeal No. 68 of 2008, that it has determined the tariff in line with the tariff philosophy adopted by it in the past to reduce cross-subsidy without subjecting any consumer category to tariff shock and also to consolidate the movement towards uniform tariff through out Mumbai. The Commission also declares in this order that the Commission has determined the tariff applicable to TPC's consumers keeping in mind the recently revised tariffs of BEST, MSEDCL and REL with the intention of balancing the tariffs applicable for the same consumer category across licensees in the State. It also gives the very same reason for the creation of the new category namely that it has decided to put a high cost on*

"unwarranted commercial consumption", "non-critical services", "higher capacity to pay" and "potentiality to conserve energy". Since the very philosophy which has led to creation of the new category has been rejected by this Tribunal in its earlier judgment in appeal No. 146 of 2007 and the same has not been challenged by any party before the Supreme Court, we think it appropriate to follow our earlier decision. We may add here that certain other appeals being appeal No.29 to 33 of 2008 and 125 of 2007 filed by individual shop owners challenging their inclusion in LT-IX category were also allowed by us in judgment dated 01.04.08. Accordingly, LT-IX category applicable to multiplexes, shopping malls has to be entirely set aside.

13) Both REL and TPC have submitted that the tariff period of 2007-08 is now over and in case the entire amount collected has to be refunded it will severely affect the cash flow for them. Mr. M. G. Ramachandran appearing for the appellant submits that for REL there is a categorical evidence that the revenue sought to be collected from LT-IX category was not a part of the ARR. He also says that similarly for TPC, LT-5 category was not really required to fill the revenue requirement and was

beyond the revenue requirement. Be that as it may we have to balance the equities. The two power companies, REL and TPC were not responsible for the creation of new category of LT-IX and LT-5. The collections made from the appellant's members have been taken into consideration in determining the ARR for the subsequent year. As they are now required to refund the revenue collected from them corresponding increase should be given to them in the truing up exercise. We think it will be appropriate to direct the two power companies to refund the additional amounts collected (amount billed under LT-IX category minus the amount which should have been billed as per the parent category) by adjusting the same equally in the bills of the next twelve months. The Commission shall make corresponding adjustments in the relevant ARRs.

14) Accordingly, we allow both the appeals and set aside the impugned order to the extent of creation of new category (LT-IX in appeal No. 69 of 2008 vis-à-vis REL and LT-5 in appeal No. 68 of 2008 vis-à-vis TPC) and direct that the additional amount collected from the members of the appellant association, by placing them in the new category, be refunded by adjusting the same equally in the future bills of next twelve months. The Commission, in

turn, shall make suitable adjustments in the ARRs of the two Distribution Companies."

02. By the impugned order dated 04th June, 2008, the Commission fixed new tariffs for LT-II category. The Commission fixed the following charges:

- 0-20kW

Demand Charges – Rs.150 per kVA per month Energy Charges – 425 paise/kWh

- 21 to 50 kW

Demand Charges – Rs.150 per kVA per month
Energy Charges – 520 paise/kWh

- Above 50 kW

Demand Charges – Rs. 150 per kVA per month
Energy Charges – 620 paise/kWh

03) The appellant assails the new tariff proposed on the ground that the Commission has continued with the old philosophy of increasing the level of cross subsidy and has purported to adjust higher marginal cost against particular class of consumers and therefore liable to be set aside.

04) The respondent No.2 has filed a counter affidavit denying the allegation that the hike in tariff has been exorbitant and is not in accordance with the legal principles. In its affidavit the respondent No.2 says that as per the tariff order dated 03.10.06, the tariff for the LT-II (Commercial)/(non-domestic) category was Rs.4.37 per unit and for HT-II (Commercial) Rs.4.32 and these two tariffs have been revised to Rs.6.32 for LT-II (Commercial) category with load from 20 kW to 50 kW and above 50 kW and to Rs.5.90 per unit for HT-II (Commercial) category. Thus according to the respondent there has been an increase by 43% and 37%. It is further contended that the increase in tariff is predominantly attributable to extraordinary increase in fuel price. The average cost of supply has increased by 1.10 kWh in the year in question as compared to the year previous to it.

05) The respondent No.2 subsequently filed an affidavit in which the facts have been given in further details. For April 2007, tariff applicable was as per tariff order dated 03.10.06. During the period

of 01.05.07 and 01.03.08 tariff applicable was as per tariff order dated 30.04.07 which was subject matter of appeal No. 68 of 2008. Vide judgment dated 19.01.09 the LT-V category was struck down and additional amount collected was ordered to be refunded. For April and May 2008 i.e. for the FY 2008-09 tariff applicable was as per tariff order dated 30.04.07. Between June 2008 to March 2009 the impugned tariff order dated 04.06.08 is applicable. It is contended that when compared to the immediately preceding period the average tariff, average cost of supply and cross subsidy has not substantially increased in the case of LT category whereas the HT category the average tariff, average cost of supply and cross subsidy has actually been reduced. At the time of arguments it turned out that the appellant has been assessing the rise in tariff by comparing the tariff applicable to the members of its association for the year 2006-07 whereas the respondent has been assessing the increase by comparing the tariff applicable for the year 2007-08. The members of the petitioner appellant association were being originally billed at the rate of LT-P-II in the year 2006-07. Their tariff was hiked by bringing the new category LT-V in the year 2007-08. As per our direction, mentioned above, in appeal No. 68 of 2008 the members of the appellant association were to be billed at the level of their parent category. However, for 2007-08 there was no LT-P-II and HT-II (Commercial) category to which the appellant belonged in 2006-07. Therefore, for 2007-08 the respondent No.2

billed them at LT-II (Commercial) & HT-II (Commercial) category which was applicable for all the consumers earlier falling in LT-P-II category. Therefore, whether the hike in tariff for the year 2008-09, which is in question in the present appeal, is unsustainable has to be assessed on the basis of comparison with LT-II (Commercial) & LT-II (Commercial) category of 2007-08. We required the appellant to state categorically in which category of consumers the members of the association were required to be billed as per tariff order for the year 2007-08. The appellant was further required it to state how the refund given by respondent No.2 pursuant to order dated 19.01.09 in appeal No. 68 of 2008 was calculated – whether in relation to category LT-P-II of the year 2006-07 or in relation to LT-II (Commercial) for 2007-08 and HT-II (Commercial) for the year 2007-08. The appellant then filed an affidavit. The appellant's association does not dispute that after the abolition of LT-P-II category the appellant's were billed as per LT-III (non-domestic)/(commercial) category and that the members of association have got the refund on that basis. Admittedly there has been no objection or protests to the refund coming from respondent No.2 to the members of the appellant association.

06) Mr. M. G. Ramachandran appearing for the appellant association however, contends that if from LT-V category the appellants are reverted to LT-II (Commercial) category or HT-II

(Commercial) and not to the parent category i.e. LT-P-II it would lead to the conclusion that this Tribunal had approved of a hike to the extent of 57% which is against the very spirit of the judgment in appeal No. 68 and 69 of 2008. It is stated in the affidavit that a tariff applicable to LT-II (Commercial)/HT-II (Commercial) category for 2007-08 was Rs.6.86 per unit as against Rs.4.37 in the FY 2006-07 and this shows that increase in tariff for LT-II (Commercial)/HT-II (Commercial) category in the FY 2007-08 was to the extent of 57% as against the increase in cost of supply of 29%. It is further stated that the appellant association could not have challenged the tariff applicable to the LT-II(Commercial) category or HT-II (Commercial) category for 2007-08 as its members had been in LT-V category in 2007-8 and not in LT-II (Commercial) or HT-II (Commercial) category. The appellant's had prayed for being placed in the same category where they were before the LT-V category was created. It is also admitted that if compared with the LT-II(Commercial) & HT-II (Commercial) category of 2007-08 the hike in tariff for 2008-09 would be within permissible limits.

07) We have carefully considered the pleas of the respective parties. A tariff order which has not been set aside by this Tribunal or by the Supreme Court is final. The tariff order for the year 2007-08 except to the extent which has been set aside by us has become final. Till date there is no challenge to the hike in tariff for the LT-II

(commercial) or HT-II(Commercial) category in the year 2007-08 or in the year 2008-09. The appellant's were earlier in LT-P-II category and were brought to LT-V category. Their prayer was that they be brought back to their parent category or a category in which they had earlier been placed. At that time they lost sight of the fact that LT-P-II category has been abolished altogether. They could not revert to LT-P-II category since LT-P-II category had been replaced or merged in LT-II (Commercial)/HT-II(Commercial) category. The respondent No.2 interpreted the judgment to mean that the members of the appellant association would be billed as per the LT-II (Commercial)/HT-II (Commercial) category and get refund accordingly. We find that in the facts of the case the interpretation to the judgment given by respondent No.2 cannot be faulted.

08) It was for the appellant to have been more categorical in making its prayer while filing appeal Nos. 68 of 2008 and 69 of 2008. The appeal has been allowed in terms of the prayer of the appellants. The LT-P-II category having been abolished and tariff in LT-II (Commercial) and HT-II (Commercial) having not been disputed the impugned tariff will have to be compared with the existing LT-II (Commercial)/HT-II(Commercial) category of the year 2007-08. We have to compare the tariff for LT-II (Commercial) category above 20 kW and upto 50 kW of 2007-08 viz. Rs.6.01 & above 50 kW viz. Rs.6.86 with the corresponding impugned rate viz

Rs.6.32 and for HT-II (Commercial) the rate of '07-08 viz. Rs.6.09 with the impugned rate viz. Rs.5.90. On such comparison the hike in tariff for 2008-09 does not appear to be disproportionate or exorbitant. Accordingly, we are unable to interfere with the impugned tariff to the extent it is applicable to the appellant association and challenged in this appeal. The appeal is accordingly dismissed.

09) With this all the IAs stand disposed of.

10) Pronounced in open court on this 28th day of October, 2009.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member

Reportable✓ / Non-reportable