

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

**Appeal No. 42 of 2012**

**Dated 17<sup>th</sup> April, 2013**

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

**In the matter of:**

**Delhi International Airport Private Limited,**  
**New Udaan Bhawan,**  
**Terminal-3**  
**Indira Gandhi International Airport,**  
**New Delhi-110 037**

**...Appellant(s)**

**Versus**

**1. Delhi Electricity Regulatory Commission**  
**Viniyamak Bhawan,**  
**'C' Block, Shivalik,**  
**Malviya Nagar,**  
**New Delhi-110 017**

**2. BSES Rajdhani Power Limited,**  
**BSES Bhawan, Nehru Place,**  
**New Delhi-110 019**

**...Respondent(s)**

**Counsel for Appellant(s) : Mr. M.G. Ramachandran  
Mr. Milanka Chaudhury  
Mr. Sarojanand Jha  
Ms. Garima Sharma  
Mr. Puneet Yadav**

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Mr. Ravi S S Chauhan  
Mr. Ranjan Mukherjee  
Mr. Prateek Dahiya for R-1  
Mr. Amit Kapur,  
Mr. Vishal Anand  
Mr. Anupam Verma,  
Mr. Nikhil Sharma for R-2**

### **JUDGMENT**

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. Delhi International Airport Private Limited has presented this Appeal challenging its categorization under a separate category fixing its tariff higher than the HT Industrial category by the order dated 26.8.2011.
2. The short facts are as under:

a) Delhi International Airport Private Limited is the Appellant. Delhi Electricity Regulatory Commission (Delhi Commission) is the First Respondent. BSES Rajdhani Power Limited, the Distribution Licensee, is the second Respondent.

b) Indira Gandhi International Airport was earlier owned, managed and operated by the Airport Authority of India.

c) In pursuance of its open air policy and with a view to develop Airports in India, the Government of India had decided to involve the private sector in development, restructuring and modernization of Airports in India. Pursuant to this policy, the Appellant, a Private Limited Company was incorporated under the Companies Act, 1956.

d) The Appellant, thereafter, entered into the Operation, Management and Development Agreement dated 4.4.2006 with the Airport Authority of India. As per the terms, the Indira Gandhi Airport was taken over by the Appellant from Airport Authority of India w.e.f 3.5.2006.

e) BSES Rajdhani Power Ltd, the Distribution Licensee (R-2) filed a Petition before the State Commission for True Up for the FY 2007-08 and Aggregate Revenue Requirement for the FY 2009-10 proposing for a differential category and tariff for the Airport infrastructure i.e., the Appellant's category.

f) Accordingly, by the order passed in May, 2009, the Delhi Commission accepted the said proposal for a differential tariff for the electricity consumption

pertaining to Aviation services and commercial activities i.e. non aviation services till the Airport is fully operational.

g) In March, 2011, the Distribution Licensee filed a Petition before the Delhi Commission for approval of Aggregate Revenue Requirement for the FY 2011-12 and Review of FY 2010-11 and also for true-up for FY 2007-08 wherein the Distribution licensee proposed the Appellant to be put in a separate category. In this Petition, the Appellant filed its objection praying the Delhi Commission to determine the same tariff for the Appellant as applicable to other HT industrial category or fix a tariff by way of separate category based on the cost to supply without element of cross subsidization.

h) After hearing the parties, the Delhi Commission passed the impugned order dated 26.8.2011 holding that the tariff order for the FY 2009-10 has already created a separate category for the Airport and however, in view of the fact that the Appellant is providing services to the consumers belonging to higher strata, the Commission placed the Appellant in the special category which shall be higher than the Delhi Jal Board and lower than that of non Domestic HT consumers.

i) Aggrieved by this order dated 26.8.2011, the Appellant has filed the present Appeal before this Tribunal.

3. Challenging the said order, the Appellant has made the following submissions:

“(a)The State Commission having accepted the Appellant’s special category, ought to have placed the Appellant in the tariff not more than that applicable to HT Industrial category. In fact, the Appellant’s tariff should be on the same principle as is applicable to Delhi Metro Rail Corporation (DMRC) or at least at par with HT industrial category.

(b) The State Commission ought not to have placed the Appellant’s category which provides aviation infrastructure at a level higher than the HT industrial consumers when the infrastructure services provided by the Appellant cannot be treated as less important than the HT industrial category.

(c) The State Commission wrongly placed the Appellant’s category of consumer in the tariff design at a level much higher than all categories

of consumers excluding the non domestic high tension category.

- (d) The Delhi Commission failed to consider that the Airports like the one developed by the Appellant are infrastructure projects of national importance. Airports are utility sector and greatly impacted by the price of electricity. The burden of higher electricity charges would result in higher infrastructure cost affecting the commerce and industry and also availability of air transport services at competitive price to the public at large.
- (e) Although the Appellant has been placed in a separate category by the State Commission, the tariff of the Appellant has been fixed much higher than the HT industrial category which frustrates the whole purpose of putting the Appellant in a separate category. The major portion of the electricity consumption by the Appellant is for Airport operation and not for commercial activities.



Therefore, the tariff of the Appellant should not be fixed under high end”.

4. On these grounds, the Appellant has prayed for setting aside the impugned order dated 26.8.2011 with retrospective effect in respect of determination of tariff payable by the Appellant and to consequently to direct the State Commission to re-determine the tariff payable after taking into consideration of the relevant aspects.
5. In defending the impugned order, both the Delhi Commission as well as the Distribution Licensee (R-2) have made the following reply submissions:
  - (a) The Appellant having a non-domestic connection was earlier categorized as mixed load high tension consumer in the tariff order for the FY 2006-07. The Delhi Commission in the MYT order for the FY 2008-11 dated 23.2.2008 held that the Airports are not covered under the Factories Act, and therefore, it cannot be treated under the category of industry. Thereafter, in the tariff order for the FY 2009-10, the Delhi Commission on the request

of the Appellant, fixed a lower tariff than existing non domestic tariff as applicable to them and the same was accepted by the Appellant since these orders have not been challenged.

- (b) In the tariff order for the FY 2009-10, the *Delhi* Commission acknowledged that the Airports operation carry a mix of activities. However, it is held that the metering in the existing system is integrated and it will be difficult to segregate the commercial operation from the aviations service. Hence, till the time the commercial activities within the airport is separately metered, the Commission held that a uniform tariff be charged from the Appellant which shall be lower than the existing non domestic charges applicable to them.
- (c) The Delhi Commission following the same while passing the impugned order for the FY 2011-12 has differentiated and prescribed the tariff of the Appellant as being slightly lower than the non domestic high tension consumer. In regard to the

prayer, that was made by the Appellant that the category of the Airports must be put at par with the Delhi Jal Board, the Delhi Commission has specifically held that it is true that the Appellant is providing service to the consumers belonging to the higher strata but, it would not be fair to give same tariff at par with the Delhi Jal Board which is providing essential services to consumers including the lower strata of the society. Accordingly, the State Commission has decided to give the Appellant a tariff which shall be higher than that of the Delhi Jal Board and lower than the HT non-domestic consumers.

- (d) The Appellant's category cannot be treated under the industrial category since the Commission has already passed MYT order for the FY 2008-11 holding that they cannot be put in the industrial category since the Airports are not covered under the Factories Act.

- (e) The Appellant cannot claim the parity with that of DMRC since the said corporation has been availing supply at 220/66 KV whereas the Appellant has been availing the supply at 66/11 kv. Therefore, the Appellant's category cannot be compared with DMRC.
- (f) After considering the objections filed by the Appellant, the Delhi Commission has determined the preferential tariff for the Appellant (1) by retaining separate category of the Appellant as created in the tariff order dated 28.5.2009 which has not been challenged (2) by fixing the tariff of the Appellant less than the non domestic category but higher than the HT industrial category similar to tariff order dated 28.5.2009. Therefore, the impugned order is perfectly justified.

6. In the light of the rival contentions, the following question would arise for consideration:

- (a) Whether the State Commission has correctly placed the Appellant in the tariff design being at a

level higher than HT industrial category and whether the Appellant should have been categorized, based on infrastructure services being provided by the Appellant and having significant higher consumption, under the HT Industrial category or based on cost of supply?

(b) Whether the Appellant should have been categorized at par with HT Industrial category in view of the pre-dominant consumption by Appellant being for industrial purposes and not for commercial purposes?

7. According to the Appellant, the Delhi Commission wrongly placed the Appellant at a tariff category higher than the HT industrial category instead of placing under the HT industrial category or based on the cost of supply of the distribution licensee. It is also contended by the Appellant that it should have been categorized as HT industrial category in view of the predominant consumption being for industrial purposes and not for commercial purposes since 96% of the electricity

- is used on activities of Airport operation and only 4% is used for commercial establishment.
8. While dealing with the question, it would be appropriate to refer to the historical perspective on the basis of the earlier orders passed by the Delhi Commission.
  9. The Appellant was having a non domestic commercial connection and was historically categorized as mixed load high tension in the tariff year 2006-07. The applicable tariff for the supply of electricity to the Appellant at 11 kV was (a) Rs.150/-kVA/month as fixed charges and (b) 490 Paise/kVAh as energy charges.
  10. The 2<sup>nd</sup> Respondent Distribution Licensee filed a Petition in Petition No.51 of 2007 for approving the ARR and MYT i.e Multi Year Tariff for the control period FY 2007-08 to 2010-11. The Delhi Commission by the order dated 23.2.2008 while disposing of the said Petition rejected the prayer of the Appellant to shift the Airport from mixed category to HT industrial category. The prayer made by the Appellant before the Commission is referred to in the following paragraphs in Petition No.51 of 2007:

*“2.131: The stakeholder has submitted that DIAL has taken up the modernization of IGI Airport. DIAL has been striving for providing world class infrastructure and amenities at IGI Airport. At present, IGI Airport is drawing 90 Lakhs units of power from BRPL. Tariff charged is as per mixed load tariff with demand charges of Rs.150 per KVA and energy charges of Rs.4.90 per unit. Therefore, the effective tariff is Rs.5.50 per unit. Power consumption is going to be increased by 4 times. Since present load of 20 MW will get increased to 80 MW by the time IGI Airport modernization is completed by 2010.*

*2.132. As airports are categorized as core infrastructure projects having national importance, the stakeholder has submitted that power supply to IGI airport should be charged based on HT industrial Tariff as airports in other metros namely Mumbai, Chennai, Calcutta and at Cochin are charged.*

11. These paragraphs would indicate that a specific request was made by the Appellant before the Delhi Commission for re-categorization of power supply tariff to the Appellant from mixed load to HT industrial category.
12. In rejecting the said request, the State Commission has passed the order dated 23.2.2008 which is as follows:

*“2.135 The Commission understands the national importance of the airports and the vital nature of*

*the services being rendered by them. The Commission has taken note of the submissions of the Petitioner about the nature and type of load of the Airports and the crucial nature of continuous uninterrupted supply to them. Taking note of the above, the Commission opines that as the airports are not covered under factories act, they cannot be treaded under Industrial Category. Hence, it may be continued to be levied MLHT tariff as per the present practice. If power is taken at 33/66 KV or 220 KV, the tariff schedule provides for appropriate rebates...”.*

13. Even though his prayer to shift the Appellant from mixed up load category to HT industrial category was rejected, the Appellant did not chose to challenge this order dated 23.2.2008 in the Appeal.
14. Thereafter, the Distribution Licensee filed a Petition on 2.12.2008 for true-up of the Tariff Order for the first year of the Control Period FY 2007-08 and determination of tariff for the FY 2009-10. In this proceedings, the specific prayer made by the Appellant before the State Commission to the effect that a new tariff category should be created for the Appellant lower than the existing non domestic tariff and the



Appellant should not be required to bear the cross subsidy charges.

15. In this Petition filed by the Distribution Licensee, the Delhi Commission passed the order dated 28.5.2009 making the following observations:

*“(i) The Commission understands that airports play an important role in the economic development of the country. The commission is in the process of reducing the cross subsidy to the levels proposed by the Government of India over a period of time. The Commission also acknowledges that the airport operations carry a mix of activities however, the metering in the existing system is integrated and it will be difficult to segregate the commercial operations from purely aviation services. Hence, till the time the commercial activities within the airport separately metered, the commission proposes that an average tariff be charged from DIAL, which shall be lower than the existing non domestic charges applicable to them”.*

*(ii) Keeping in view the relevant parameters, the Ld. Delhi Commission shall propose a differential tariff for electricity consumption pertaining to purely aviation services and purely commercial activities in due course till the airport is fully operational. Till such time, the tariff as indicated in*

*the tariff schedule shall be applicable for the entire airport”.*

16. From the above order dated 28.5.2009, it is clear that the Delhi Commission has re-categorized the Airport by acknowledging the fact that the Airport operation which carry a mix of activities. However, the Commission held that till the time the commercial activities within the airport is separately metered, it has been decided to fix the average tariff to be charged from the Appellant which shall be lower than the existing non domestic charges applicable to them.
17. By this order, the Delhi Commission has created a separate category for the Appellant keeping in view of the category specified u/s 62 (3) of the Electricity Act, 2003. Due to the change in categorization, it cannot be denied that there was substantial reduction in the tariff of the Appellant. Thus, the tariff determined by the State Commission in its tariff order dated 28.5.2009 for the Appellant was lower than the existing non domestic tariff but was higher than the HT industrial category. Admittedly, the said tariff order also was not challenged by the Appellant.

18. In the light of the above factual situation, let us now refer to the current tariff fixed by the Delhi Commission in the impugned tariff order in respect of the Financial Year 2011-12 dated 26.8.2011.
19. In respect of financial year 2011-12, the Distribution Licensee filed the Petition for the approval of the ARR. In that petition, the Appellant filed his objection on 8.6.2011 praying to determine the tariff of the Appellant by way of separate category based on the cost of supply without any element of cross subsidization.
20. After considering the materials available on record and the prayer made by the Appellant, the Delhi Commission has prescribed the tariff of the Appellant as being slightly lower i.e 15 Paise than the non domestic high tension consumers but slightly higher tariff i.e. 50 paise than the Delhi Jal Board. The Delhi Commission has differentiated the tariff of the Appellant and the Delhi Jal Board on account of the fact that the Appellant is providing services to higher strata of the society whereas the Delhi Jal Board has been providing essential services to all the consumers including the lower

strata below poverty line. The relevant portion of the impugned order is reproduced below:

***Separate Tariff for Delhi International Airport Limited (DIAL)***

***Stakeholder's View***

*2.237 DIAL submitted that it has taken up the modernization of IGI Airport. DIAL has been striving for providing world class infrastructure and amenities at IGI Airport.*

*2.238 The airport being operated, maintained, modernized, restructured and developed by DIAL is an essential infrastructure for the economic development of the whole nation. Thus, DIAL should be continued to be given a "special consumer status" and accordingly the separate tariff applicable to the them should be retained.*

*2.239 Most of the stakeholders submitted that DIAL should not be given preferential status by providing separate tariff category and should be charged at the rate applicable to other non domestic consumers.*

***PETITIONER's Submission***

2.240 *The Petitioner submitted that the fixation of tariff for different categories is prerogative of the Commission. Therefore, in the materialization of Tariff Proposal or rationalization measures, the Commission has the final say while finalizing tariff for Wheeling of Electricity and Retail Supply.*

2.241 *The Petitioner has further submitted that in case any subsidy is to be given to a particular consumer category/ class of consumer, such subsidy should be in the form of direct subsidy by the state Govt. (rather than cross subsidization) as per provision of 65 of Act. The National Electricity Policy (NEP) and National Tariff Policy (NTP) notified in terms of Section 3 of Electricity Act, 2003 advocates progressive reduction of cross subsidy across various categories / group of consumers except in the case of consumers below the poverty line where certain conditions have been prescribed. The Commission has stated its views in this matter in the previous Tariff Order mentioning therein that aspect of reduction in the cross subsidies will be kept in mind, while determining the category-wise tariffs.*

### **Commission's View**

2.242 *The Hon'ble ATE in its Order in Appeal No.195 of 2009 in the matter of Mumbai Airports International Limited Vs. MERC and Reliance Infrastructure Limited has also ordered as under:-*

*“The State Commission could have differential tariff for the aviation as well as for the purely commercial activities, such as shops, restaurant, etc. at the airport. However, if it is not feasible to have separate metering arrangements for the aviation activities and purely commercial activities, then the State Commission could re-categorize the Appellant in a separate category other than HT Commercial II and determine the composite tariff for aviation and the commercial activities of the Appellant.”*

2.243 *The Commission, in the Tariff Order for 2009-10 has already created a separate category to cover the **consumption** for the infrastructure facilities at the airport. However in view of the fact that DIAL is providing services to consumers belonging to higher strata, it will not be fair to give the tariff at par with DJB, which is providing essential services to all consumers including the lowest strata of the society. Accordingly, the*

*Commission has decided to give DIAL, a tariff, which shall be higher than that of DJB but lower than that of Non Domestic HT consumers.*

21. On perusal of the above order, it is evident that the Delhi Commission through this order has retained a separate category for the Appellant as created in the tariff order dated 28.5.2009 which had not been challenged and fixed the tariff of the Appellant less than the non domestic category but higher than the HT industrial category similar to the tariff order dated 28.5.2009.
22. In addition to above, it is noticed that the tariff determined by the Delhi Commission for the Appellant is within  $\pm$  20% of the average cost of the supply which is in pursuance with Clause 8.3 (2) of the Tariff Policy issued by the Ministry of Power, Government of India.
23. The criteria and the reasons for creation of separate tariff category providing preferential tariff to the Appellant has been specified by the Delhi Commission in the tariff order dated 28.5.2009 for the FY 2009-10. The same approach

has been adopted by the Delhi Commission in the impugned order as well.

24. In the impugned order, the Delhi Commission has correctly observed that the benefit of commercial activity at the Airport is being availed by the higher strata of the society as compared to the service rendered by the Delhi Jal Board which caters to all the strata of the Society including the lower strata. Therefore, the Appellant cannot claim that the tariff of both the categories should be at par.
25. The Appellant incidentally has placed the reliance on the communication issued by the Ministry of Civil Aviation sent to Delhi Commission in the year 2012 expressing its view that the tariff for the Airports should be treated at par with industrial service. The communication issued by the Ministry of Civil Aviation is merely recommendatory in nature and the same may be considered by the Commission during the process of determination of tariff.
26. It is the prerogative of the Commission to determine the tariff of the utilities as an independent statutory authority as the Commission has been vested with the jurisdiction to



issue tariff order following the Regulations specifying the terms and conditions for determination of the tariff. Therefore, the communication issued by the Ministry of Civil Aviation cannot be binding upon the Delhi Commission at the time of the determination of the Tariff.

27. This principle has been laid down by this Tribunal as well as Hon'ble Supreme Court in the following judgments:

(a) Polyplex Corporation Ltd., vs UERC:2011  
ELR(APTEL) 0195

(b) Chittor Zilla Vyavasayadadrula Sangham Vs  
APSEB: (2001) 3 SCC 396

28. Therefore, the reliance on this communication by the Appellant is of no use.

29. Strangely, the Appellant during its argument has placed the reliance on its Affidavit dated 25.5.2012 filed before the State Commission. The Appellant's reliance on this Affidavit has to be rejected on the ground that the impugned order was passed as earlier as on 26.8.2011 and at that time, this Affidavit dated 25.5.2012 was not available with the Commission for considering the same.

30. While going through the affidavit, it is noticed that the Appellant had contended that the metering system now has been installed and therefore, the supply of power and its utilization for aviation purposes can be measured on real time basis. This issue cannot be raised in this Appeal.
31. As correctly pointed out by the learned Counsel for the Delhi Commission, as per the Affidavit furnished by the Appellant before the Commission dated 25.5.2012 if the Appellant establishes before the State Commission that metering system has now been segregated, then the Delhi Commission will consider the case of the Appellant for deciding that issue for fixing the tariff in future.
32. Already, we have observed in our judgment in Appeal No.195 of 2009 in the case of Mumbai International Airport Limited Vs Maharashtra State Commission as follows:

*“The State Commission could have differential tariff for the aviation as well as for the purely commercial activities, such as shops, restaurant, etc., at the airport. However, if it is not feasible to have separate metering arrangements for the aviation activities and purely commercial activities, then the State Commission could re-categorize the*

*Appellant in a separate category other than HT Commercial II and determine the composite tariff for aviation and the commercial activities of the Appellant”.*

**33.** The Delhi Commission also has taken into consideration these observations and held that the State Commission prescribed a lower tariff than the non domestic high tension tariff, till such time, the commercial activities are separately metered and billed.

**34. Summary of Our Findings**

**(i) The State Commission by its MYT tariff order dated 23.2.2008 rejected the contention of the Appellant to place them in industrial category as the Airport is not covered under Factories Act.**

**(ii) The State Commission by its order dated 28.5.2009 recognised that it was difficult to segregate the Commercial activities from purely aviation activities at Delhi Airport and decided to re-categorise them from the existing non-domestic tariff category to a separate category with tariff lower than the non-domestic tariff,**

thereby reducing the tariff for the Appellant. The orders dated 23.2.2008 and 28.5.2009 were not challenged.

- (iii) The State Commission in the impugned order has retained the same tariff philosophy for the Appellant and decided a tariff lower than the non-domestic tariff and higher than the industrial tariff similar to the previous order dated 28.5.2009.
- (iv) The tariff for the Appellant is within  $\pm 20\%$  of the average cost of supply as per the clause 8.3.(2) of the Tariff Policy.
- (v) The State Commission has correctly decided that the tariff of the Appellant can not be at par with Delhi Jal Board tariff as the latter is providing essential services to all consumers including the lower strata of the society.
- (vi) The Communication by the Ministry of Civil Aviation to the State Commission expressing its view that the tariff for the Airports should be at par with the industry is not binding on the State Commission.

(vii) The affidavit dated 25.5.2012 filed by the Appellant before the State Commission regarding measurement of consumption of aviation activities in real time can not be considered in the present Appeal as this affidavit was not available before the State Commission at the time of passing of the impugned order. However, the Appellant is at liberty to put forth its case before the State Commission for fixing of the future tariff and the State Commission shall consider the same while fixing the tariff in the future.

35. In view of the above, we do not find any merit in the Appeal. Therefore, we feel that the Appeal is liable to be dismissed.
36. Accordingly, the same is dismissed.
37. However, there is no order to cost.
38. Pronounced in the Open Court on 17<sup>th</sup> day of April, 2013.

(Rakesh Nath)  
Technical Member

(Justice M. Karpaga Vinayagam)  
Chairperson

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Dated: 17<sup>th</sup> April, 2013

REPORTABLE/NON-REPORTABLE