

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

Appeal Nos. 68 & 69 of 2008

Dated : 19th January 2009

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

IN THE MATTER OF:

Appeal No. 68/08

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. Ltd. ("TPC")
Bombay House, 24,
Homi Mody Street, Fort,
Mumbai – 400 001. ... Respondent(s)

Appeal No. 69/08

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. Reliance Energy Ltd.
Reliance Energy Centre,
Santacruz (East)
Mumbai – 400 055

... Respondent(s)

Counsel for the appellant(s) : Mr. M. G. Ramachandran,
Mr. Venkatesh Dhond,
Mr. Manjul Dahiya,
Ms. Suruchi Suri,
Mr. Ameet Naik and
Ms. Madhu Chaudhary

Counsel for the respondent(s) : Mr. Amit Kapur,
Mr. Mansoor Ali,
Mr. Anupam Verma,
Ms. Shobana Masters and
Mr. Mohit Jolly for TPC

Ms. Anjali Chandurkar,
Smieetaa Inna for REL

Mr. Buddy A. Ranganadhan for
Resp. No.1, MERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

These are two appeals raising similar issues and have been heard together. The two appeals are disposed of by this common judgment.

2) For the purpose of facility we are taking up facts of appeal No. 69 of 2008.

3) The Maharashtra Electricity Regulatory Commission, arrayed as respondent No.1 hereinafter referred to as the Commission, passed the impugned order on 24.04.07 in case No. 75 of 2006 in the matter of approval of the Annual Revenue Requirement (ARR) for the controlled period 2007-08 to 2009-2010 and retail tariff for the FY 2007-08 for the distribution business of Reliance Energy Limited (REL for short). REL is arrayed as respondent No.2 in this appeal. It filed its ARR and tariff petition before the Commission under section 61 & 62 of the Electricity Act 2003 (the Act for short) on which the Commission held a technical validation session and thereafter issued public notices before passing the impugned order. Vide the impugned order, the Commission revised the tariff for the existing category of consumers and in addition inserted a new category under the low tension category, being category LT-IX,

which was made applicable for Multiplexes and Shopping Malls (MSM for short) under the low tension tariff having sanctioned load of 20 KW category. Thereafter the Commission issued a corrigendum on 26.07.07 stating that this category of LT-IX would be applicable to MSM within the category of high tension tariff. M/s. Inorbit Mall (India) Pvt. Ltd. and M/s. Vasudeva C. Construction challenged the corrigendum in appeals No. 125 of 2007 and 126 of 2007. Thereafter on 21.09.07 the Commission issued another clarificatory order clarifying that large shopping malls/departmental stores like Shoppers' Stop, Big Bazaar etc. with sanctioned load above 20 KW will be classified under LT-IX category. This Tribunal vide an order dated 26th November 2007, allowed the two appeals of M/s. Inorbit Mall (India) Pvt. Ltd. and M/s. Vasudeva C. Construction and directed the Commission to pass a fresh order on the issue of applicability of LT-IX category to HT-2 consumers after giving full opportunity to appellants of being heard as to whether they should fall in the category of LT-IX. On the tariff petition of M/s. Maharashtra State Electricity Distribution Co. Ltd., the Commission similarly created the new category LT-IX. M/s. Spencer's Retail Ltd. also challenged the same orders of the Commission in appeal No. 146 of 2007. This Tribunal allowed that appeal vide judgment dated 19.12.07 whereby the tariff order dated 18.05.07 to the extent it placed the M/s. Spencer's Retail Ltd. in the new category of LT-IX was set aside and it was directed that it be placed in the parent category i.e. LT-2 non-domestic and HT

industrial w.e.f. 01.05.07, the date on which a new tariff order came into effect. The Commission thereafter held a public hearing on 04.01.08 and on 15.01.08 passed an order to the effect that in view of the order of this Tribunal in the case of Spencer's Retail Ltd. the applicability of tariff category of LT-IX for MSM to consumers getting supply at HT voltage in the area of supply of Reliance can no more survive. Accordingly, the Commission directed all consumers of REL who were being billed prior to errata of the corrigendum dated 26.07.07 under the HT category and who started receiving bills as LT-IX consumers (MSM) be charged at tariff applicable to HT-2 with effect from the date on which a new tariff order came into effect. The present appellant is an association of multiplexes set up by the Indian Chamber of Commerce & Industry. They are hit by the main tariff order in which the MSM were put into a new category, LT-IX. By the order dated 19.12.07 all those who were included in the new category by the corrigendum were directed to be placed in the parent category. However, the earlier appeals before this Tribunal did not categorically challenge the new category of LT-IX although they challenged their inclusion in LT-IX which was done by corrigendum. The present appellant is challenging the creation of new category LT-IX itself for the purpose of recovering tariff from the MSM and challenges creation of this category on the ground that the same is in violation of the provisions of the Act, the Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2005 (Regulations for short) and

National Tariff Policy. It is contended that the Commission is not justified in classifying MSM under LT-IX and to subject them to exorbitant tariff on the ground of higher capacity to pay and other grounds mentioned in the impugned order. The appellant contends that on the basis of observations made by this Tribunal in the earlier appeals mentioned above, the creation of category LT-IX is liable to be set aside.

4) The Commission has not filed any response to the appeal and has not come forward to defend its order about creation of a new category LT-IX for MSM. The order, however, is defended by the REL who will be adversely affected, if appeal is allowed, to the extent of the inflow of cash from the consumers of this new category. An attempt is also made to distinguish this case from the earlier appeals disposed of by this Tribunal.

5) Since the appellant mainly depends upon the findings of this Tribunal in the previous appeals, mentioned above, it is necessary to examine the facts and bring out the relevant part of the tariff order which is under scrutiny in this appeal. The Commission calculated the average cost of supply for REL at Rs.4.98. The impugned order also recognizes that revenue to be recovered from tariff from 2007-08 will be Rs.3840 Crores and revenue at the existing tariff would leave a revenue gap of Rs.628 Crores apart from Rs.264 Crores, which the Reliance is entitled to recover, under

the earlier order of this Tribunal dated 04.04.07. The amount of Rs.264 Crores is proposed to be recovered over the period of three years of controlled period. The Commission decided that in every year of the controlled period an additional amount Rs.88 Crores would be recovered through tariff. Considering the revenue gap for FY 2007-08 of Rs.628 Crores and recovery of Rs.88 Crores due in FY 2007-08 (as per the Tribunal's order) the total additional revenue to be recovered from tariff is calculated at Rs.716 Crores. The Commission estimated that to bridge the gap of Rs.716 Crores, a tariff hike of 22% will be required on the existing tariff.

6) The Commission refers to the National Tariff Policy and claims to be guided by it. In paragraph 68 of the tariff order, the Commission says as under:

“As per National Tariff policy (NTP) and the Section 61(g) of the Electricity Act, the Commission is guided by the objective that the tariffs should progressively reflect the efficient and prudent cost of supply (CoS) of electricity. Further, NTP also mandates that by 2010-2011, the tariffs should be within +/- 20% of the average Cost of Supply. Therefore, the average CoS has been considered for designing category-wise tariffs.”

7) Proceeding further with the tariff philosophy, the Commission says as under:

“The Commission has determined the tariffs in line with the tariff philosophy adopted by it in the past, and the provisions of law. The tariffs have been determined so that the cross-subsidy is reduced without subjecting any consumer category to any kind of tariff shock and also keeping in mind the existing tariff structure of BEST and TPC-D, the other two players in the Mumbai electricity distribution.

Consumers in the Mumbai licensee area have been enjoying the privilege of uninterrupted power supply till now. However, this comes with a cost. All distribution licensees in Mumbai have a standby power arrangement with Maharashtra State Electricity Distribution Company Limited (MSEDCL (erstwhile MSEB)) that assures them of back up supply in case of an unplanned system failure in the Mumbai region. The Commission has clarified that this is not an arrangement to overcome short-term power deficits faced by Mumbai licensees. Short term shortfalls will have to be purchased from

elsewhere from elsewhere through short-terms arrangements.

Due to increasing energy consumption in its license area and no additional permanent source of supply, Licensee has been purchasing expensive short-term power to meet this demand.

In the earlier Tariff orders, the cost implication of standby charges and expensive power was embedded in the overall energy charges of all the consumers. However, while determining the tariff for FY 2007-08, the Commission has attempted to bring in transparency by unbundling the tariffs into energy and fixed tariff that reflect the power from non-costly sources, energy tariff that reflect the cost of expensive power and energy tariff that reflect the standby charges.

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Further the licensee is purchasing expensive power from Unit 4 of TPC and short term power to avoid the

peak deficit and power costs. The cost incurred for the expensive power is estimated at around Rs.240 Crore which included the Rs.195 Crore of purchase from TPC Unit-4 and Rs.46 Crore of short term purchase. The Commission Opines that this will be shared with all consumers other than the BPL category, LT-1 (formerly LF-1) category with consumption less than 300 units and LT-2 (renamed as LF-2) Category with consumption less than 300 units. The Commission has exempted these categories of consumers keeping in view the extra tariff burden that it would impose. This has been the approach followed by the Commission in its earlier Tariff orders for FY 2006-07 of MSEDCL dated October 20, 2006, where in Additional supply charge and Reliability charge for Pune were levied by the Commission based on the above mentioned principles. The Commission has fixed different rates for different consumer category to recover the cost of expensive power based on their purpose and consumption level.

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Further, considering the severe energy deficit situation of Mumbai and rest of Maharashtra,

Commission would like to put a high cost on unwarranted commercial consumption like flood lights, shopping malls, multiplexes, advertising and hoarding etc. by charging a higher tariff. The Commission feels that these are non-critical services and have higher capacity to pay. These categories also have a huge potential to conserve energy and a high price of power would send the economic signal for minimizing consumption.

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8) However, the Commission has in fact increased the cross-subsidy levels and says the following about the same:

“But there are categories which show increase in the cross-subsidy levels despite ignoring the expensive power and standby charges because the Commission in this tariff order has tried to inbuilt price signal in the economic signals in the tariffs to the categories to conserve energy especially in the context of severe energy deficits and these categories can easily

implement EE or DSM initiatives. Thus, the Commission has no intention of increasing the cross-subsidy levels but has tried to provide an economic signal to the categories having higher consumption.”

9) For LT-IX (for multiplexes and shopping malls) energy per unit is charged at Rs.7.40 whereas LT-2/LF-2 commercial, in which the shopping malls earlier fell, were charged at Rs.4.75 per unit. Annexure-VI of the impugned order gives a tabular statement of revenue proposed from tariff. As per this tabular statement the recoveries from tariff is shown to match the revenue requirement + the revenue gap. However this is done on the basis of consumer categories other than LT-IX, thereby suggesting that the entire proposed ARR and revenue gap is designed to be covered without the expected revenue from LT-IX. In other words, if those now being charged under LT-IX, are charged under LT-2, the revenue required would be recovered. As per Annexure-III – Bill Impact of Revised Tariff, the bill for MSMs falling under LT-IX would rise by 32%. Demand charge for LT-IX has been fixed at Rs.300 per KVA per month, energy charge at Rs.7.40paise per kWh, standby charge at .29 paisa per kWh and cost of expensive power at .80paise per kWh. This works out to a hike of 100% to 120%.

10) The facts, as disclosed above, are very similar to the facts that this Tribunal dealt with in appeal No. 146 of 2007 filed by Spencer's Retail Ltd. which was allowed vide a judgment dated 19.12.07. The appeal No. 146 of 2007 dealt with a tariff order in respect of Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL for short) for the FY 2007-08 being part of the controlled period of 2007-08 to 2009-2010. For MSEDCL also the same LT-IX category was created to impose an enhanced tariff on multiplexes and hoardings. A language very similar to the one quoted above was used to justify the creation of the new category. To put it simply, the Commission said that the Commission had to put a high cost on unwarranted commercial consumption like floodlights, shopping malls, multiplexes, hoardings etc. The Commission also discloses that it felt that these non-critical services have a higher capacity to pay and that these categories also had a huge potential to conserve energy by minimizing consumption. In that case also the Commission had expressed its determination to reduce cross-subsidy and avoid subjecting any consumer category to tariff shock. We observed in this judgment that Section 62(3) of the Electricity Act directs that the Commission shall not show any undue preference to consumers of electricity while it does allow differentiation according to the consumer's (a) load factor, (b) power factor, (c) voltage, (d) total consumption of electricity during any

specified period or the time at which supply is required, (e) the geographical position of any area, (f) the nature of supply and (g) the purpose for which the supply is required. We observed that the purpose of creating a new classification of LT-IX was not covered by any of the grounds on which the Commission could differentiate certain consumers on the ground that they indulge in “unwarranted commercial consumption” or had “a huge capacity to pay” or had potential to “conserve energy”. Further, we noticed that while the proclaimed tariff philosophy preferred reduction in cross-subsidy, creation of LT-IX category in fact led to raising the levels of cross-subsidy for those who fell in this category. The National Tariff Policy not only requires the cross-subsidy level to be gradually reduced it also requires the tariff to progressively reflect the cost of supply. In the facts of appeal No.146 of 2007, we found that cross-subsidy had been increased exorbitantly. Another pertinent observation in our judgment in appeal No. 146 of 2007 was that the proposal for ARR which came from MSEDCL for the multi year tariff did not include creation of new categories and the appellants therein and other consumers in the pre-existing categories of LT-2 (non-domestic) or HT (Industrial) were considered to be contributing to ARR at the respective original tariffs. We found that *“admittedly the revenue from the revised tariffs under LT-IX vis-à-vis LT-2 tariff has yielded additional revenue over and above*

the projected revenue gap claimed for by the licensee. We are of the view that recovery of tariffs over and above the requirements of ARR in the cost plus system is not authorised by the Act”.

11) There were further reasons for setting aside the orders impugned in appeal No. 146 of 2007 which was filed by Spencer’s Retail Ltd., an organization which had shops within and outside the multiplexes. The observations mentioned above not only cover such individual shops renting spaces within multiplexes but also the multiplexes themselves. The validity of the grounds for creating this new category of multiplexes themselves have been rejected by this Tribunal. In the present case, we find the same plea for the creation of this new category. In the present case also the tariff hike is rather exorbitant. While the Commission estimated that a tariff hike of 22% would be required over the existing tariff. The hike for the LT-IX category worked out to 100% or more. This not only means increase in the cross-subsidy but also a tariff shock. Further, applying the ratio of the judgment in appeal No. 146 of 2007 to the facts of this case, we can only conclude that the creation of new category of LT-IX for multiplexes who are the members of the appellant Association was entirely unjustified. Accordingly, the members of the appellant need to be placed in the same category in which they

were before the impugned tariff order was passed and be charged according to the parent category.

12) The only distinction between the facts of appeal No. 69 of 2008 and that of appeal No. 68 of 2008 is that the impugned order in appeal No. 68 of 2008 was passed on the ARR/Tariff petition filed by Tata Power Company Ltd. (TPC for short). The impugned tariff order in appeal No. 68 of 2008 is dated 30.04.07 along with clarificatory order dated 26.09.07 whereby a new category of LT-5 was created for multiplexes and malls. 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.

Pronounced in open court on this **19th day of January, 2009.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member