

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

Appeal No. 98 of 2008 and IA Nos.131 & 132 of 2008

Dated : 27th January, 2009

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

IN THE MATTER OF:

Spencer's Retail Ltd.
"Spencer Plaza", 769, Anna Salai,
4th Floor, Chennai – 600 002
and Corporate Office at:
"Duncan House", 31 Netaji Subhas Road,
1st Floor, Kolkata – 700 001.

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai – 400 005.
(Through its Secretary)

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

... Respondent(s)

Counsel for the appellant(s) : Mr. M. G. Ramachandran,
Mr. Sanjeev K. Kapoor
Mr. Avinash Menon

Counsel for the respondent(s) : Ms. Anjali Chandurkar

Ms. Smieetaa Inna for Resp.
No.2, REL

Mr. Buddy Ranganadhan
Mr. Varun Agarwal for Resp.
No.1, MERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The present appeal challenges the order dated 04.06.08, as corrected by order dated 17.06.08, in Case No. 66 of 2007, passed by the Maharashtra Electricity Regulatory Commission, the Commission for short, relating to annual performance review for the FY 2007-08 and annual revenue requirement and tariff determination for the FY 2008-09 of the Reliance Industries Limited, hereinafter referred to as the REL.

2) The facts leading to the filing of the appeal is as under:

The appellant is a company and carries on retail business in India from small to large stores. The REL, respondent No.2 is a distribution licensee in the suburbs of Mumbai. The appellant has been running its stores in various parts of suburbs of Mumbai which fall within the distribution area of REL which is an electricity distribution company. Till the year 2006-07, the electricity supplied to the premises of the appellant was covered by category LT-Commercial. In the tariff order dated 24.04.07, read with order

dated 21.09.07, relating to FY 2007-08, the Commission introduced a new category dealing with multiplexes and shopping malls and single ownership stand alone shopping/departmental stores as LT-IX. The tariff applicable to the new category LT-IX was increased over the existing tariff by about 70%. The appellant challenges that tariff order in appeal No. 16 of 2008 before this Tribunal. Similar orders providing separate category LT-IX was provided for the other distribution company namely Maharashtra State Electricity Distribution Co. Ltd., hereinafter referred to as MSEDCL. Certain shop owners challenged the order vis-à-vis MSEDCL in appeal No. 146 of 2007. This Tribunal, vide judgment dated 19.09.07, passed in appeal No. 146 of 2007 set aside the order creating LT-IX category for MSEDCL which placed the appellant in that matter in the LT-IX category. We directed vide that judgment that the appellants therein be charged tariff applicable to their respective parent category i.e. LT-II(non-domestic) and HT-industrial w.e.f. 01.05.2007, the date on which the new tariff had come into effect. The appeal No. 16 of 2008 was also allowed vide judgment dated 18.02.08. The new category LT-IX was set aside on the ground that the grounds on which this new category was created were not tenable under the Act. We also categorically observed that the Commission was required to progressively reduce the cross subsidy so that tariff could reflect the actual cost of supply. On account of the judgment, the appellant was charged tariff in the tariff category LT-II for the tariff period 2007-08. Those falling in LT-II

(Commercial) but having sanctioned load equal to or above 20 kW were placed in LT-IV category and were charged the same tariff as for LT-industrial category.

3) In the impugned tariff order the Commission refers to our decisions in the aforesaid matters and came out with a new dispensation for the LT-II category consumers. The LT-II category is divided into three sub categories, namely:

- (a) those having sanctioned load of 0 to 20 kW
- (b) those having sanctioned load above 20 kW and below 50 kW and
- (c) those having sanctioned load above 50 kW.

4) The Commission said the following in view of the ATE's decision:

“In view of the ATE's decision in this regard, the Commission has done away with LT-IX category, the separate consumer categorization for shopping malls and multiplexes. All these consumers will henceforth, be classified under LT-2 commercial category, as was being done earlier. Further, three new sub-categories have been created under LT-2 category on the basis of sanctioned load, viz. 0 to 20 kW, 21 kW to 50 kW, and above 50 kW

sanctioned load. Further, based on the data submitted by REL-D, it appears that the consumption of commercial category consumers having sanctioned load above 20 kW load is increasing very rapidly, which in a way, is contributing to the increased quantum of costly power purchase. Hence, the Commission has determined the tariffs for these two sub-categories at higher levels.”

5) The Commission calculated the average cost of supply including expensive power at 5.90 per kWh. Having said so the Commission proceeded to determine the tariff. The tariff fixed for the category in question in this appeal can be found from the following part of the impugned order:

“The existing cross-subsidy and the reduction in cross-subsidy considered by the Commission, if the reliability charges are also considered, are given in the Table below:

| Category | Average Cost of Supply (Rs./unit) (a) | Average Billing Rate (Rs./unit) | | Ratio of Average Billing Rate to Average Cost of Supply (%) | | % Variation w.r.t Avg. CoS (f)= (e)- (d) | % increase in tariff (g) = (c)/(b)-1 |
|--------------------|---------------------------------------|---------------------------------|--------------------|---|-----------------------------|--|--------------------------------------|
| | | Existing Tariff (b) | Revised Tariff (c) | Existing Tariff (d)= (b)(a) | Revised Tariff (e)= (c) (a) | | |
| LT Category | | | | | | | |
| LT-I Residential | | 4.00 | 4.25 | 63% | 73% | 9% | 6.3% |
| LT-II – Commercial | | | | | | | |
| Upto 20 kW | | 6.32 | 7.40 | 100% | 126% | 26% | 17.0% |
| >20 kW upto 50 kW | | 8.68 | 9.74 | 137% | 166% | 29% | 12.2% |

| | | | | | | | |
|---|------|-------|-------|------|------|-----|-------|
| > 50 kW | | 8.68 | 10.97 | 137% | 187% | 50% | 26.4% |
| LT III-LT Industrial upto 20 kW | 5.90 | 5.78 | 6.51 | 91% | 111% | 20% | 12.6% |
| LT-IV – IT Industrial >20 kW | | 5.91 | 6.63 | 94% | 113% | 20% | 12.2% |
| LT-V – Agriculture | | 1.29 | 1.27 | 20% | 22% | 1% | -1.5% |
| LT-VI – Street Lighting | | 7.31 | 7.51 | 116% | 128% | 12% | 2.7% |
| LT-VI (A) Temporary – Others | | 11.68 | 13.36 | 185% | 228% | 43% | 14.4% |
| LT-VIII – Advertisement & Hoardings | | 15.21 | 16.89 | 241% | 289% | 48% | 11.0% |
| HT Category | | | | | | | |
| HT-I-Group Housing | 5.90 | 4.54 | 4.24 | 72% | 72% | 0% | -6.7% |
| HT-II- Industrial | | 6.26 | 6.60 | 99% | 113% | 14% | 5.5% |

The above Table shows increase in the cross-subsidy levels for certain consumer categories, because the revenue gap is so huge that the Commission had no alternative but to increase the tariffs for all consumer categories. However, even after considering the reliability charges, the tariff increase in the given circumstances appears to be quite reasonable.”

6) The appellant is challenging this order on the ground that the hike in tariff for the appellant works out to 65% and 85% depending upon whether the sanctioned load was above 20 kW or above 50 kW. It may be further mentioned here that the appellant has alleged that “the existing tariff” for LT-II categories at 8.68 shown in the above table was an incorrect figure. The appellant contends that the existing tariff applicable for the appellant for those two categories was 5.91 per unit and said that the new tariff of 9.74 and

10.97 for LT-II above 20 kW and LT-II above 50 kW worked out to a rise of 65% to 85%. Further the appellant alleges that it also means increase in cross subsidy as shown in the above table itself. The ratio of average billing rate to average cost of supply in the existing tariff was 137% whereas the same ratio in the revised tariff is shown as 166% and 187%. It is, therefore, prayed by the appellant that the impugned tariff order to the extent challenged in this appeal be set aside and the tariff be re-determined for the categories of LT-II for sanctioned load above 20 kW to 50 kW and with sanctioned load above 50 kW for the FY 2008-09.

7) The Commission has not made any submission in this appeal. However, the REL has opposed this appeal. The opposition of REL is mainly on the ground that if the tariff category in question is set aside REL would lose revenue and would find it difficult to meet its ARR.

Decision with reasons:

8) The challenge to the impugned order is mainly on two grounds:

(i) The impugned order has increased the cross subsidy level for the appellant and simultaneously has given the appellant a tariff shock as the new tariff amounts to a hike of 65% and 85% depending upon the contract load falling in LT-II category,

(ii) The reason for increasing the tariff for the appellant as given in the impugned order namely that consumption of this category has been increasing rapidly requiring the distributing company to purchase electricity at a higher cost and therefore consumers of this category should be asked to pay electricity charges on the basis of the higher cost of procurement is untenable.

9) To substantiate the first ground the appellants cite the provision of section 61(g) of the Act. Section 61 requires the Commission to be guided by certain principles in fixing tariff. Clause (g) of section 61 is as under:

“61(g). that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission”

10) The National Tariff Policy, in paragraph 5.5.3 and 8.3.2., takes note of this direction of the Act and says the following:

“Clause 5.5.3

Over the last few decades cross-subsidies have increased to unsustainable levels. Cross-subsidies hide

inefficiencies and losses in operations. There is urgent need to correct this imbalance without giving tariff shock to consumers. The existing cross-subsidies for other categories of consumers would need to be reduced progressively and gradually”.

Clause 8.3.2

For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-11 tariffs are within \pm 20% of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross-subsidy”.

11) It is also not disputed that the Commission cannot raise the tariff so as to give tariff shock to any class of consumers. As rightly pointed out by the appellant the Commission worked with incorrect figures, as given in the table extracted above, and calculated cross subsidy at much lower percentage than what it actually was. With these principles in mind what the Commission has done cannot be sustained in law since the hike in tariff means an increase in cross subsidy coupled with a tariff shock.

12) So far as loading the appellants with the purchase of the costly power is concerned, the same also needs to be disapproved. The purchase of costly power depends upon the total demand for electricity at a particular area. No particular category can be burdened with the costly power. A similar situation was examined by this Tribunal in the case of Kashi Vishwanath Steel Ltd. Vs. Uttaranchal Electricity Regulatory Commission & Others in appeal No. 124 of 2005, decided by this Tribunal on 02.06.06. The Uttaranchal Electricity Regulatory Commission had fixed a very high tariff for the power intensive industries on similar grounds. We ruled as under:

“... However, we are constrained to observe, that this is not in line with the spirit of the Act wherein it is postulated that the cross subsidies have to be transparent and gradually brought down. Using the marginal cost of purchase of power for a particular category of consumers will perennially result in higher tariff for the category and, therefore, cannot be justified. At the same time it is also not in the intent of the Act to inflict tariff shock to the consumers”.

13) This view of this Tribunal has not been set aside. Nor does the REL say that this view is incorrect. What the Commission has done is to load the LT-II consumers with sanctioned load above 20 kW

with higher tariff on the plea that the costly power has to be purchased because the consumption of consumers of this category is rapidly increasing. This cannot be a good ground for a tariff hike for a particular category of consumers.

14) In view of the above findings we hold that the impugned tariff order for the category LT-II with sanctioned load of above 20 kW but below 50 kW and with sanctioned load of 50 kW and above cannot be sustained and has to be set aside. The Commission will now re-determine the tariff for this category of consumers on the basis of the observations made above. The respondent No.2 REL shall cause refund of excess amount collected from the appellant by equally adjusting the same in twelve monthly bills which will be raised hereafter against the appellant by the respondent No.2, REL. The Commission will also make suitable adjustments in the ARR of the respondent No.2 so as not to deprive the respondent No.2 of the ARR.

15) Appeal No. 98 of 2008 and IA Nos. 131 & 132 of 2008 stand disposed of.

Pronounced in open court on this **27th day of January, 2009.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member