Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 106 of 2008

Dated : 26th Feb. '09

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

IN THE MATTER OF:

Mumbai International Airport Pvt. Ltd.
Chhatrapati Shivaji International Airport
1st Floor, Terminal, 1B,
Santa Cruz (East),
Mumbai – 400 099 … Appellant

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre No.1, 13th floor,
Cuffe Parade, Colaba,
Mumbai – 400 001.

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

3. Ministry of Civil Aviation
Rajiv Gandhi Bhawan,
Safdarjung Airport,
New Delhi – 110 003 … Respondents

Counsel for the appellant : Mr. C. Aryama Sundaram, Sr. Advocate

Mr. Sitesh Mukherjee,
Mr. Sakya Singha Chaudhari and
Mr. Vishal Anand

Counsel for the respondents: Mr. J. J. Bhatt, Sr. Advocate
Ms Anjali Chandurkar and
Ms. Smieetaa Inna for Resp. No.2

Mr. Buddy A. Ranganadhan and
Mr. Arijit Maitra for Resp. No.1

J U D G M E N T

Justice Manju Goel, Judicial Member

The present appeal challenges the tariff order of the Maharashtra Electricity Regulatory Commission (the Commission for short) dated 04.06.08 to the extent it classified the appellant, namely the Mumbai International Airport Pvt. Ltd., in the category of HT-2 commercial and applied the tariff applicable under such category to the appellant.

Facts:

2) The background facts of the case can be stated briefly as follows: The Commission passed the Multi Year Tariff (hereinafter referred to as the MYT) order for the respondent No.2, namely Reliance Energy Ltd. (REL for short) vide its order dated 24.04.07 for the controlled period of 2007-08 to 2009-2010. The appellant was awarded the contract for operation, maintenance, development, design, construction, up-gradation, modernization, finance and management of Mumbai Airport vide an agreement dated 04.04.06

with the Airport Authority of India. The appellant in the order dated 24.04.07 included the category HT-II Industrial. In the MYT order certain commercial categories were loaded with high cross subsidy as the Commission considered that unwarranted consumption like floodlights, multiplexes, advertising and hoardings etc. are required to be put on a high cost. The Commission also considered that these consumers belonged to the non-critical services and had higher capacity to pay and simultaneously had potential to save energy. The Commission in that MYT order created LT-IX category consisting of multiplexes and shopping malls and also included some bulk consumers like hotels, cinemas, commercial establishments, flight kitchens etc. who were earlier in HT (industrial) category. Thereafter respondent No.2 filed a petition for Annual Performance Review (APR in short) for the purpose of truing up of its Annual Revenue Requirement (ARR) for the FY 2007, mid year review of ARR for the FY 2008 and revised ARR for the FY 2009 to enable the Commission to determine tariff for the FY 2009. In this application the respondent proposed tariff for, *inter alia,* LT-IX and HT-II categories. For LT-IX the billing rate proposed was 9.65 per unit with cross subsidy element of 4.28 and for HT-II 6.59 per unit with cross subsidy element of 1.22 per unit. The Commission vide the impugned order dated 04.06.08 passed on the basis of the APR petition of the respondent No.2 created a new category HT-III commercial to cater to all commercial consumers availing supply at HT voltages and earlier classified under HT-II industrial or LT-IX multiplexes and shopping malls. The tariff for

HT-III commercial was kept at a higher level by MERC than the HT-II industrial category on the same philosophy as was applied by the Commission for commercial consumption in the MYT order. For this category the Commission prescribed the following rates: fixed and demand charge at Rs.150/- per kVA, per month, energy charge at 600 paisa per kWh, standby charge 27 paisa per kWh and expensive power charges 250 paisa per kWh. For HT-II industrial the fixed charges levied was the same namely 150/- per kVA, per month. However, the energy charge was only 430 paisa per kWh. Expensive power charge for HT-II (industrial) was also substantially less namely 175 paisa. The appellant was placed in the new category, HT-III commercial and on account of this shift in placement of the appellant in the new category the appellant has to pay nearly Rs.2 Crores per month which is equal to an increase in its bills of monthly consumption by 35%. The appellant says that categorization of the appellant into HT-III (Commercial) is erroneous and requires reconsideration.

The respective pleas of the parties in the appeal:

3) The Commission says that the purpose of creating the new categories for imposing higher tariff was that the consumers brought under this category were of non-critical service, higher capacity to pay, had potential to conserve energy and were indulging in un-warranted consumption. The appellant challenges the order, *inter alia*, on the ground that the appellant is rendering essential services and its consumption cannot be said to be

unwarranted consumption. The appellant pleads that it is providing essential services and consumption of electricity is unavoidable for the proper and efficient functioning of the Mumbai Airport and therefore the rationale of fixing high tariff for commercial establishments does not apply to it. The appellant claims to be a public utility service and therefore liable to receive supply of electricity at the Mumbai Airport at the same rate at which other public utility services are getting electricity. It is further contended that MERC having computed the average cost of supply of Rs. 5.90 and per unit cost of power for the appellant being Rs.10.98 the component of cross subsidy comes to Rs.5/- per unit which has resulted in a tariff shock. The appellant further contends that it cannot compromise on the quality of any of the services provided by it although it is obliged contractually to provide such services at reasonable cost. The appellant also contends that it is difficult to recover the excess burden of electricity charges from its own customers on account of various reasons. The appellant therefore prays that the impugned order to the extent it places the appellant in a category HT-III commercial be set aside and the appellant be classified as a public utility services and be charged accordingly.

4) Before proceeding further it can be stated that the tariff philosophy on which new classification to charge for certain category of consumers at a very high rate has been a subject matter for challenge before this Tribunal in some earlier appeals.

5) The appellant points out that in an appeal filed by Inorbit Mall, appeal No. 125 and 126 of 2007, we directed the Commission to pass a fresh order on the issue of applicability of LT-IX category to the appellant therein who were HT-II consumers. This Tribunal vide its order dated 19.12.07 in the case of Spencer's Retail Ltd. Vs. Maharashtra Electricity Regulatory Commission and Ors., appeal No. 146 of 2007, held that the basis adopted by MERC for introducing the category of single ownership large shopping/departmental store was vague. We also found that the philosophy for creation of the new category LT-IX was incorrect. We directed that the appellant in that appeal, M/s. Spencer's, be charged tariff in its parent category i.e. LT-II and HT-industrial and not in LT-IX.

6) In an additional affidavit filed, the appellant contends that in the impugned order the MERC taking note of the earlier judgments of this Tribunal has done away with LT-IX category and classified those consumers under LT-II commercial category which were again divided into three sub-categories depending upon their sanctioned load i.e. 0 to 20 kW, 21 to 50 kW and above 50 kW. The MERC placed the LT consumers having load above 20 kW at higher levels on the ground that the consumption of that commercial category consumer was increasing rapidly and was contributing to increased quantum of costly power purchase. It is contended that MERC has created the new category HT-II (commercial) at the level higher than

HT-II (industrial) in line with the philosophy adopted for LT (commercial) consumers. However, the Commission's new categorization regarding LT-II also came to be challenged in a subsequent judgment in appeal No. 98 of 2008 titled Spencer's Retail Ltd. Vs. Maharashtra Electricity Regulatory Commission which was decided by us recently, on 27.01.09. The Commission had imposed higher tariff on LT-II category with load factor above 20 KW on the ground that on account of higher consumption by this category of consumers the utility was forced to purchase costly power. We observed that no category of consumers could be burdened with costly power as held by us in the Kashi Vishwanath Steel Ltd. Vs. Uttaranchal Electricity Regulatory Commission & Ors. in appeal No. 124 of 2005 decided by us on 02.06.06. For these reasons coupled with the requirement to progressively reduce the cross subsidy the new tariff category LT-II with sanctioned load above 10 kW but below 50 kW and with sanctioned load of 50 KW and above was set aside. In another recent judgment dated 19.01.09 in appeal No. 68 and 69 of 2008 we set aside the LT-IX category for multiplexes and shopping malls as well.

7) The appellant further pointed out that the respondent No.2 in its APR petition had not proposed any separate/new category as HT-III commercial and the appellant therefore had not been put to notice on its proposed new categorization at the time of public hearing of the ARR tariff petition of the respondent No.2. The appellant subsequently preferred a review petition which was

pending at the time of filing of the appeal. The same has since been dismissed during the pendency of the appeal.

8) The appellant further points out in the additional affidavit that MERC in its order dated 03.10.06 in case No. 25 of 2005 and 53 of 2005 imposed load management charges and load management rebate on various category of consumers for the purpose of incentivising reduction in consumption of electricity and that in that order the appellant Airport was treated as essential service. The appellant contends that the grounds on which HT-III commercial has been created are the same on which higher tariff was imposed on LT-II consumers with load above 20 KW.

9) The appeal is opposed by respondent No.2. It is contended on behalf of respondent No.2 that the appellant is a commercial establishment running two airports in Mumbai namely the National and the International Airport, that the yearly consumption of two airports is approximately 85 MUs, that there is no tariff category designated as public service, that if the appeal is allowed it would seriously effect the cash flow of the respondent No.2, that there was sufficient basis for creating the new category of HT-III commercial and that even if the appellant has any grievance he can be heard during tariff hearing for the year 2009-10 i.e. the next year.

10) The appellant has filed a rejoinder to reiterate its case made out in the appeal and to refute the objections raised by the respondent No.2.

Decision with reasons:

11) The appellant has assailed the impugned order on the ground that it is violative of principles of natural justice. It is contended that when the ARR Tariff petition was filed there was no proposal for creation of HT-III commercial category and as such when public notice was issued for determination of the tariff the appellant had no notice that the Commission might create the HT-III category for taxing the appellant at a higher rate and as such the appellant was deprived of an opportunity to make its submissions on the issue. It is further submitted by the appellant that while tariff proposal was pending the respondent No.2's power procurement cost went up substantially and the entire difference in the ARR caused by the rise in the power procurement cost was sought to be recovered from this newly created category of HT-III commercial. The appellant has cited a judgment of the Supreme Court in the case of *Commissioner of Central Excise Bangalore Vs. Brindavan Beverages Pvt. Ltd. 2007 (5) SCC 88* to plead that the show cause notice is the foundation on which the department has to built its case and further that allegations in the show cause notice are not specific and lacks details it would be sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. It is pointed out by the appellant that the rise in cost

was caused by the reduction in the procurement from TPC Generation from 762 MW to 500 MW. It is alleged that even during the public hearing there was no discussion on the contemplation of creation of the new category HT-III commercial. The appellant further has cited the judgment of this Tribunal in the case of Inorbit Mall where the question of categorization of consumer without prior notice was set aside.

12) The respondent No.2 on the other hand submits that the rise in the cost of power procurement was very much within the public domain during the process of fixing tariff. It is disclosed by respondent No.2 that, in response to a query raised by the Commission, the respondent No.2 gave details of power shortage for Mumbai and the pendency of proceedings before this Tribunal between Tata Power and the respondent No.2 over the allocation of Tata Power's generation. Further, the respondent No.2 submits that the respondent No.2 had sufficiently disclosed that if availability of power from TPCG is lower by 262 MW, equal to 1550 MU, the incremental cost would be approximately Rs.329 Crores. The respondent No.2 further submits that it is within the jurisdiction of Commission to create a category as can be permissible within the provisions of 62(3) of the Act. The judgment in the case of Inorbit Mall is sought to be distinguished by respondent No.2 on facts.

13) Let us first deal with our earlier judgment in the case of Inorbit Mall (supra), in appeal No. 125 of 2007, decided on 26.11.2007. In the case of Inorbit Mall (supra) the challenge was not to the original tariff order but to the clarificatory order. The appellants therein got included in the newly created category of LT-IX by the clarificatory order much after the tariff order was already issued. We, accordingly, said that the clarificatory order, which took the appellants therein out of the HT-II category and placed them in LT-IX category without having ever issued any notice in this regard came as a surprise. The appellant submitted that they were not ones guilty of unwarranted commercial consumption, the ground on which the new tariff category LT-IX was created. They further submitted that had they been allowed to put forward their case before the clarificatory order was passed, the Commission would not have included them in LT-IX. Accordingly we directed the Commission to give another opportunity to the two appellants of being heard. The facts herein are quite different. A proper public notice was issued when the ARR and tariff petition was filed. An extract of the proposal was also published. Further the question of rise in cost had come up for examination during the process of fixing tariff. The appellant, admittedly, did not participate in the proceedings before the Commission. Perhaps, had the appellants participated in the proceedings they would have come to know of the rise in the cost of power. The appellants could perhaps also speak of its own constraints in passing off its costs to its consumers in that hearing.

14) It is not the case of the appellant that the Commission had no power to create a tariff design different from the one proposed by the licensee. The Commission has the power to design the tariff as per its own wisdom. The Commission need not, before issuing the actual order, publicly announce the tariff it proposed and call for public comments. In fact this is not even the appellant's contention.

15) The rule of natural justice requires the Commission to issue a public notice about the ARR and Tariff petition of the licensee and to allow the public to make its submissions on the ARR and Tariff proposals. The Commission has, thereafter, to design the scheme for recovery of the ARR keeping in view various relevant factors. If the classification of the consumers can be supported on any of the grounds mentioned in section 62(3) it would not be proper to say that the tariff fixing was violative of principles of natural justice because the Commission did not issue a public notice of the tariff categories which the Commission had intended to create.

16) We have no hesitation to say that the Commission is entirely at liberty to create a new category which is not available in the licensee's proposal provided of course the new category falls within the scope of section 62(3) of the Act. The main contention of the appellant is that the new tariff category was created to meet the additional cost of power on account of decline of availability from

the TPC-g. The rules of natural justice, it is contended, has been violated because the loading of the power purchase on the HT-III commercial category was no where in the tariff proposal of the licensee. It is contended by the learned counsel for the appellant, Mr.Sundaram, that had the entire differential in the power procurement cost been equally distributed over all the categories of consumers there would not have been any violation of natural justice. Natural justice has been violated, as submitted by Mr. Sundaram, by publishing the entire load of the additional cost of power procurement on the HT-III commercial category. We are unable to accept the contention of Mr. Sundaram. That the power procurement cost had increased was within the public domain when the tariff proposal was under consideration. In the first place, the appellant has not placed any analysis from which it can be seen that the expected tariff from HT-III category was the same as the rise in the power procurement cost. Nor is there any analysis from which it can be said that no amount of rise in the power procurement cost fell on any of the other categories. Since the rise in the power procurement cost was within the public domain and the Commission has created a new category after hearing all the questions involved we do not find any substance in the appellant's plea that rules of natural justice were violated by creation of new category HT-III commercial without there being any such proposal from the licensee.

17) The appellant contends that the appellant has been made to pay a high level of cross subsidy under the new tariff fixation. The average cost of supply for the HT consumers has been worked out at Rs.5.90 per unit as can be seen from part 5.4 (at page 125) of the impugned order with the new tariff imposed on the appellant the cost of per unit electricity consumed by the appellant works out to 10.92 per unit. Therefore, there is cross subsidy of 5/= per unit amounting to 85%. Therefore the percentage increase in tariff for the appellant from the previous year is approximately 43% whereas the percentage increase for the HT-II industrial category is only 9.7%. This is as against the required average increase in tariff, caused by increase in the revenue requirement, of only 10.22%. The philosophy on which the sudden jump is caused is mentioned in Page 123 of the tariff order (page 147 of the appeal paper book) and is as under:

> *"The Commission has created a new category, viz., HT-II Commercial, to cater to all commercial category consumers availing supply at HT voltages, and currently classified under the existing HT-II Industrial or LT-IX (multiplexes and shopping malls). This category will include Hospitals getting supply at HT voltages, irrespective of whether they are charitable, trust, Government owned and operated, etc. The tariff for such HT-II commercial category consumers has been determined higher than the tariff applicable for HT-II industrial, <u>in line with the philosophy</u>*

adopted for LT commercial consumers (emphasis supplied). *Such categorization already exists in other licence areas in the State, and is hence, being extended to REL licence are also."*

18) The philosophy adopted is the same as that adopted for LT (commercial) consumers. The philosophy for raising the tariff for LT-II (commercial) consumers is available at the same page and the same is as under:

"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."

19) The Commission apparently felt that the licensee has been required to purchase costly power as the consumption of the commercial category of consumers having sanctioned load above 20 kW was increasing very rapidly. This reasoning for imposing a higher tariff on the LT-II category of consumers having sanctioned load of 21 kW to 50 kW and above 50 kW came to be challenged in the case of Spencer's decided recently i.e. on 27.01.09 in Appeal No. 98 of 2008. This Tribunal has been consistently taking the view that no particular category of consumers can be made to pay higher tariff on the excuse that those consumers were responsible for purchase of costly power. The purchase of costly power depends upon the total consumption in the area of distribution of the distribution licensee. No particular category of consumers can be blamed for such increase. The appellant particularly wants to show from the data available in the Commission's order that the increase in consumption of the category – HT-II (from which HT-III has been carved out) has not increased as rapidly as certain other category of consumers. It has also to be seen that increase in total consumption can be caused either by increase in the number of consumes or by increase in the consumption of each individual consumer. The Commission has made no effort to analyze whether the consumers of HT-III commercial category have increased in number or has increased individual consumption on account of which they can be penalized. We have already discarded the view that any category can be charged higher rate on account of

purchase of expensive power on the excuse of that category being responsible for excess power.

20) Accordingly view of the Commission that HT-III category consumers are responsible for purchase of costly power or that this category of consumers should pay a higher tariff has also to be discarded. In the case of Spencer's (supra) we held as under :

> "*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".

21) Our view expressed in the case of Kashi Vishwanath Steel Ltd. (supra) has not so far been set aside. Nor has the respondent argued that the view expressed by us calls for any change.

22) Another ground for interfering with the tariff order is increase in cross subsidy levels and tariff shock caused to the appellant as described in paragraph 17 above. The appellant, by virtue of nature of its business, has to consume huge quantity of electricity. It will be difficult for the appellant to reduce its electricity bill without affecting the quality of service provided by it. At the time of hearing it was stated to us at the bar that 25% of the operation cost of Mumbai International Airport, run by the appellant, is that of electricity bill. Keeping in view the nature of service provided by the appellant it will not be advisable that the appellant in any way reduce the quality of its service. Causing a tariff shock as well as raising the cross subsidy level are both opposed to the National tariff Policy. The Commission is required to pay due regard to the National Tariff Policy. Accordingly, the impugned order is required to be interfered with also on this ground.

23) The respondent No.2 while opposing the appeal has also expressed a concern that in case the impugned tariff is set aside it will severely impact its cash flow. As per data submitted along with the written submission by the respondent No.2 the yearly consumption of the two airports, domestic and the international, is approximately 85 Million units. The difference between the tariff for HT-III commercial and LT-II industrial has been calculated at Rs.2.45 per unit. Accordingly the respondent No.2 will be short of Rs.21 Crores if the appellant is treated as a consumer in the category of HT-II (industrial). The concern of the respondent No.2 can be well appreciated.

24) It has been submitted before us that airport being public utility service should be given special consideration and should not be exposed to commercial tariff. Whereas there is some substance in the arguments of the appellant, it cannot be denied that airports, apart from having the essential services pertaining to the aviation services, also have variety of non-aviation commercial activities such as shops, restaurants, bars, retail stores, duty free shops etc. While fixing tariff for the appellant, the Commission may like to have differential tariff for the electricity consumption pertaining to purely aviation services such as runway, lighting, control towers, checking and baggage handling areas, waiting lounges, air conditioning etc. and the pure commercial activities such as duty free shops, restaurants, commercial advertisement areas etc. because one cannot distinguish between a retail store inside the

airport and outside airport. It cannot be the case that similar commercial establishments outside the airports are subjected to commercial tariffs and inside the airports are subjected to lower tariff particularly when inside the airport passengers are required to pay exorbitant prices at the airport premises.

25) The Commission will now have to re-determine the tariff for the appellant keeping in view the monetary implications for the two sides, the nature of the consumption of the appellant, as also the observations made by us in this judgment. It will be appropriate that the Commission affords the appellant an opportunity of being heard on all relevant aspects before the tariff is re-fixed. On such re-determination amounts found to have been paid in excess by the appellant to the respondent No.2 will have to be refunded. We have to keep in view that sudden refund of this amount will cause a resource crunch for the respondent No.2. At the same time we have to remember that it may not be possible for the appellant to recover the excess amount already paid to be passed on to its own consumers.

26) In view of the above considerations, we allow the appeal and set aside the impugned tariff order to the extent of placing the appellant in the newly created category of HT-III for the purpose of higher tariff for the appellant. We also direct the Commission to re-determine the tariff payable by the appellant after affording the appellant an opportunity of hearing on all relevant aspects and

keeping in view the monetary implications for the appellant and the respondent No.2, the nature of consumption of the appellant and the observations made in this judgment, within the next eight weeks. The excess amount recovered from the appellant will be adjusted in the future electricity bills of the appellant at the rate of not more than Rs.1 Crore per month.

Pronounced in the open court on this ***26th day of February, 2009.***

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member