

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
**Appellate Jurisdiction, New Delhi**

**Appeal No. 131 of 2008 & IA Nos. 168/08, 59, 65 & 94/2009**  
**Appeal No. 3 of 2009 & IA Nos. 5/09 and 95/09**  
**and**  
**Appeal No. 11 of 2009 & IA Nos. 19/09 and 93/09**

Dated: 23<sup>rd</sup> October, 2009

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

**IN THE MATTERS OF:**

**Appeal No. 131 of 2008 & IA Nos. 168/08, 59, 65 & 94/2009**

**Inorbit Malls (India) Pvt. Ltd.**

Plot No. C-30, Block 'G',  
Opp. SIDBI, Bandra Kurla Complex,  
Bandra (East),  
Mumbai – 400 051

... Appellant(s)

Versus

**1. Maharashtra Electricity Regulatory Commission**

World Trade Centre, Centre No.1,  
13<sup>th</sup> Floor, Cuffe Parade,  
Mumbai – 400 005.

**2. Maharashtra State Electricity Distribution Company**

Prakashgad,  
Plot No. G-9, Anand Kanekar Marg,  
Bandar (East),  
Mumbai – 400 051

... Respondent(s)

Counsel for the appellant(s) : Mr. M. G. Ramachandran,  
Ms. Swapna Seshadri,  
Ms. Hemlata Jain, Mr. Kunal  
Vajani and Mr. Rahul Malhotra

Counsel for the respondent(s) : Mr. J. J. Bhatt, Sr. Advocate  
Ms. Anjali Chandurkar,  
Ms. Smieetaa Inna  
Mr. Varun Agarwal,  
Mr. Ravi Prakash,  
Mr. Rahul Sinha,  
Mr. A. K. Bansal and  
Mr. Aashish Bernad for Resp.2,  
MSEDCL

Mr. Sanjeev Kapoor for  
Intervenor  
Mr. Buddy A. Ranganadhan  
and Mr. Arijit Maitra for  
Resp.1, MERC

**Appeal No. 3 of 2009 & IA Nos. 5/09 and 95/09**

**Shoppers Stop Limited**

Eureka Towers, B Wing, 9<sup>th</sup> Floor,  
Mindspace, Link Road, Malad (West),  
Mumbai – 400 064

... Appellant(s)

Versus

**1. Maharashtra Electricity Regulatory Commission**

World Trade Centre, Centre No.1,  
13<sup>th</sup> Floor, Cuffe Parade,  
Mumbai – 400 005.

**2. Maharashtra State Electricity Distribution Company**

Prakashgad  
Plot No. G-9, Anand Kanekar Marg,  
Bandra (East),  
Mumbai – 400 051.

... Respondent(s)

Counsel for the appellant(s) : Mr. M. G. Ramachandran,  
Ms. Swapna Seshadri,  
Mr. Avinash Menon  
Ms. Hemlata Jain, Mr. Kunal  
Vajani, Mr. Arvind Kumar and  
Mr. Rahul Malhotra

Counsel for the respondent(s) : Mr. J. J. Bhatt, Sr. Advocate  
Ms. Anjali Chandurkar,  
Ms. Smietaa Inna  
Mr. Varun Agarwal, Mr. Ravi  
Prakash, Mr. Rahul Sinha,  
Mr. Puneet Limbha  
and Mr. Aashish Barnard for  
MSEDCL, Resp. No.2  
  
Mr. Sanjeev Kapoor for  
Intervenor  
Mr. Buddy A. Ranganadhan for  
MERC

**Appeal No. 11 of 2009 & IA Nos. 19/09 and 93/09:**

**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, 13<sup>th</sup> Floor,  
Cuffe Parade,  
Mumbai – 400 005

**2. Maharashtra State Electricity Distribution Co. Ltd.**

Prakashgad, Plot No. NG-9,  
Bandra East,  
Mumbai – 400 051

... Respondent(s)

Counsel for the appellant(s) : Mr. M. G. Ramachandran,  
Ms. Swapna Seshadri,  
Mr. Avinash Menon,  
Mr. Madhu Gadodia,  
Ms. Mrinalini Rajpal,  
Mr. Arvind Kumar, Mr. Amit  
Naik, Mr. Apoorve Karal and  
Ms. Neha Garg, Mr. Ravindra  
Suryavanshi, Mr. Kunal  
Vajani

Counsel for the respondent(s) : Mr. J. J. Bhatt, Sr. Advocate,  
Ms. Anjali Chandurkar,  
Ms. Smieetaa Inna,  
Mr. Varun Agarwal, Mr. Ravi  
Prakash, Mr. Puneet Limbha,  
Mr. Shiv K. Suri and  
Mr. Aashish Barnard for  
MSEDCL, Resp. No.2

Mr. Sanjeev K. Kapoor for  
intervener  
Mr. Buddy A. Ranganadhan for  
MERC

## **J U D G M E N T**

**Ms. Justice Manju Goel, Judicial Member**

These three appellants challenge the order of the Maharashtra Electricity Regulatory Commission (the Commission for short) dated 20.06.08, read with the order dated 31.05.08 and 05.06.08. The appellants are consumers of electricity in the areas in which the respondent No.2 namely Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL for short) is the distribution licensee. The appellant in appeal No. 131 of 2008, M/s. Inorbit Mall, is engaged in the business of constructing, running and maintaining commercial shops / malls / multiplexes and is in the process of setting up commercial shops / malls / multiplexes titled Inorbit in various locations of Maharashtra. The Shopper's Stop Ltd., the appellant in appeal No. 3 of 2009, is carrying out retailing business and is one of the large chains of departmental stores in India having its departmental stores in various locations in Mumbai and Pune. Multiplexes Association of India, the appellant in appeal No.11 of 2009, is an association of members of owners / operators of multiplexes in various places in the State of Maharashtra including the area of supply of respondent No.2. All the three appellants share common grounds of appeal and therefore were heard together and is being disposed of by this common judgment.

02) For the sake of convenience the narration of facts is being given with reference to the appeal petition of appeal No. 11 of 2009. In the FY 2006-07, multiplexes were classified for supply of electricity in the LT-II (non-domestic) and HT-II (industrial) as set out in tariff order dated 03.10.06. Vide a tariff order, passed by the Commission, dated 18.05.07 the MERC for the tariff year 2007-08 all multiplexes and shopping malls receiving supply at LT/HT voltage were placed in a new category named LT-IX category. The tariff fixed for LT-IX category during the FY 2007-08 was exorbitantly high much above the cost of supply. There was a steep increase in the level of cross subsidization by such category of consumers. The hike was caused on the premise that multiplexes and other similarly placed consumers were engaged in unwarranted commercial consumption. On an appeal filed before this Tribunal by M/s. Spencer's Retail Ltd. in appeal No. 146 of 2007 this Tribunal vide a judgment dated 19.12.07 set aside the categorization of multiplexes and other similarly placed consumers under LT-IX and directed that the tariff applicable to such consumers shall be the respective parent category i.e. LT-II (non-domestic) and HT (Industrial) w.e.f. 01.05.07, the date on which the tariff order dated 18.05.07 came into effect. In yet another appeal M/s. Inorbit Mall (India) Pvt. Ltd. (now the appellant in appeal No. 131 of 2008) and others filed appeals challenging the same order in appeal Nos. 125 and 126 of 2007. This Tribunal vide order dated

26.11.07 directed the Commission to re-consider the categorization in LT-IX in regard to those consumers who were earlier categorized under HT-II. The Commission on 15.01.08 directed that the consumers who were being billed prior to corrigendum dated 26.07.07 under HT-II category and who began receiving bills as LT-IX consumers (multiplexes and shopping malls) be charged tariff applicable to parent category i.e. HT-II w.e.f. the date on which the new tariff order came into effect. Vide order dated 18.02.08 in appeal No. 16 of 2008 the Tribunal set aside the order of the Commission dated 24.04.07 and clarificatory order dated 21.09.07 for area of supply of Reliance Energy Ltd. to the extent it placed M/s. Spencer's Retail Ltd., appellant therein in category LT-IX and directed that tariff be charged from M/s. Spencer's at the rate relevant to its parent category namely LT-II (industrial). The Commission passed the operating order dated 31.05.08 fixing tariff for the period 01.06.08 to 31.03.09. The Commission mentioned in this order that while withdrawing the category of LT-IX the Commission created three categories under LT-II on the basis of sanction load i.e. 0 to 20 kW, 21 to 50 kW and above 50 kW and three different tariffs were provided for the three categories. The tariff for LT-II was fixed as under:

➤ 0 – 20 kW

(0 to 200 units per month)	(above 200 units per month)
----------------------------	-----------------------------

Demand Charges – Rs. 150 per kVA per month Energy Charges- 340 paise/kWh	Demand Charges – Rs. 150 per kVA per month Energy Charges- 525 paise/kWh
---	---

➤ 21 to 50 kW

Demand Charges- Rs. 150 per kVA per month
Energy Charges- 550 paise/kWh

➤ Above 50 kW

Demand Charges- Rs. 150 per kVA per month
Energy Charges- 750 paise/kWh

03) The Commission mentioned in this order that the Commission without any request from the MSEDCL in that regard inserted a new category under high tension voltage viz. HT-II (commercial), to cater to all category consumers availing supply at HT voltages which were classified under existing HT-I or LT-IX (multiplexes and shopping malls). The order dated 05.06.08 supplied the rates for HT-II (Commercial) category which was as under:

- i) Demand charge Rs.150 per kVA
- ii) Energy charge – 700 paisa / kWh

04) On 20.06.08 the Commission confirmed the operative order of categorization of shopping malls, multiplexes, hospitals getting LT



supply under LT-II commercial category & shopping malls, multiplexes and hospitals getting supply at HT voltage under HT-II commercial category. It is alleged by the Multiplexes Association that the Commission while determining tariff for MSEDCL has increased existing level of cross subsidy and has purported to load higher marginal cost of power purchase on a particular category of consumers and has on this basis imposed on them a much higher tariff as compared to cost of supply.

05) The main basis for challenging the impugned order of increasing the tariff for LT-II with connected load of 20 kW to 50 kW is a steep increase of 46% and for LT-II with connected load of 50 kW a steep increase of 52% which has resulted in increase in cross subsidy as well as a tariff shock. Similarly for newly classified HT-II (Commercial) category also the association contends that the hike has caused increase in cross subsidy as well as tariff shock. The multiplexes are called upon to pay 220% or more of the average cost of supply. The appellant contends that such hike is in violation of the Electricity Act (hereinafter referred to as the Act) as well as of the National Tariff Policy, National Electricity Policy and the Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2005 and the tariff philosophy stipulated by the Commission itself.

06) The appellants further challenged the impugned order on the ground that the revision in tariff of the newly classified consumers has resulted in recovery of revenue more than the revenue requirement of MSEDCL. The said Commission has observed in so many words:

*“While the tariffs had been determined such that the revenue gap considered for the year is met entirely through revision in tariffs, it is likely that the actual revenue earned by MSEDCL may be higher than that considered by State Commission, on account of tariff changes such as introduction of demand charges for LT commercial category, as well as creation of new HT-II Commercial category”.*

07) The appellant in appeal No. 3 of 2009 M/s Shopper’s Stop has challenged the same impugned order on a further ground that principles of natural justice have been violated by not giving a notice to the appellants of the intended creation of new categories which had not been proposed by the MSEDCL in its own ARR and tariff petitions. The appellants in M/s. Inorbit Mall would have been categorized in LT-VI but with the impugned order being passed it comes in the new tariff categories i.e. HT-II (Commercial). Under the old category of HT-IV to which the appellant M/s. Inorbit

would have fallen the tariff was payable at Rs.7.11 per unit whereas now placed in the new tariff category the same appellant would pay at the rate of Rs.10.15 per unit. The grounds for challenge raised by M/s. Inorbit Mall (India) Pvt. Ltd. are same as those raised by the appellant in other two appeals.

08) The MSEDCL has filed counter affidavits in response to these appeals. It is contended, inter alia, in the response affidavits that the MSEDCL did not initially request the Commission to prescribe separate tariff category for the appellants although it did propose revision in tariff for each specific consumer category. The MSEDCL also submits that the proposal submitted by it was not binding on the Commission and that the Commission had the authority to carve out a separate category of consumer as High Tension (commercial) or LT-II as has been done in the impugned orders. It is also contended that public notice was duly given as per the provisions of the Regulations when the application for annual revenue requirement and tariff was filed. It is also contended by the MSEDCL that while the Commission has raised the energy charge the Commission has substantially reduced the fixed charges i.e. from 300 per kVA to 150 per kVA and thus there is no substantial change in the bill. So far as requirement of annual tariff policy to bring down cross subsidy to the level of  $\pm$  20% by 2011 is concerned, the MSEDCL contends that there is sufficient time to

achieve the target. Further it is contended that power purchase cost as well as service cost has gone up requiring hike in tariff and that surplus in recovery of revenue, if any, will be passed on to the consumers through the mechanism of truing up.

09) Let us first examine the extent of hike in the tariff for the three appellants. The average cost of supply is determined by taking into account the total revenue requirement of the licensees divided by the total energy sold and the energy adjusted for the transmission and distribution losses. For the FY 2006-07 the average cost to supply per unit was 3.30 per kWh as stated at the bar. For the FY 2007-08 the average cost of supply worked out to 3.50 per kWh. Thus there was a rise in the average cost of supply by 5.6%. This justified a hike in tariff by 5.6%. For the FY 2008-09 the average cost of supply works out to 3.62 per unit which is 3.43% higher than Rs.3.50 per unit. The consumers of LT-II category who were subjected to a per unit tariff of Rs.5.66 in 2007-08 have now in the year 2008-09 to pay Rs.8.25 per unit.

10) Similarly the consumers of HT-II category who was paying Rs.2.56 per kWh has to pay Rs.7.98 kWh as per the impugned order. The percentage increase in tariff for LT-II for above 50 kWh is 46% and for the HT-II category 52%. Thus the rise in tariff for these two categories is to an extent much higher than the rise in

average cost to supply. Consequently there is a rise in cross subsidy. The details for these calculations have been submitted by Mr.M.G.Ramachandran, Advocate appearing for the appellant in M/s, Inorbit Mall (India) Pvt. Ltd. in appeal No. 131 of 2008 by an affidavit as under:

“7. I say that in the above background, the impact of the appellants’ categories of consumers are as under:

Year	Per Unit Tariff	Average Cost to Supply	Increase required in Average Cost of Supply	Increase in Tariff	Increase in cross-subsidy
2007-08	Rs.5.66/- (LT-II) Rs.5.26/- (HT-II) <i>(After the Rs.10/- tariff was set aside by this Hon’ble Tribunal)</i>	Rs.3.50/- per KwH	6.76%  <i>[Page 222 of Appeal No. 131 of 2008 - Internal Page 198 of the Tariff Order dated 20.6.2008]</i>		
2008-09	Rs. 8.25/- (LT-II) Rs. 7.98/- (HT-II)	Rs.3.62/- per KwH  <i>[Page 229 of Appeal No. 131 of 2008 - Internal Page 205 of the Tariff Order dated 31.5.2008]</i>		<b>46%</b>  <b>52%</b>	<b>39% (Approx)</b>  <b>45% (Approx)</b>

11) The Commission itself in the tariff order has given the following table showing increase / decrease in cross subsidy at page 206:

Category	Average Cost of Supply (Rs./unit)	Average Billing Rate (Rs./unit)		Ratio of Average Billing Rate to Average Cost of Supply (%)		% increase / decrease in Tariff w.r.t. Avg. CoS	% increase in tariff (%)
		Existing Tariff	Revised Tariff	Existing Tariff	Revised Tariff		
LT I – Domestic	3.62	3.60	3.77	100%	104%	5%	1.8%
LT II – Non Domestic		5.40	6.27	149%	173%	24%	3.8%
LT III – Public Water Works		1.74	1.70	48%	47%	-1%	1.3%
LT IV – Agriculture		1.44	1.42	40%	39%	-1%	0.3%
LT V – LT Industrial		3.84	4.12	106%	114%	8%	-0.6%
LT\ -VI – Street Light		2.63	2.77	73%	77%	4%	0.2%
Temporary Connection		10.60	12.10	293%	335%	41%	0.7%
<b>HT Category</b>							
HT I – Continuous (Express Feeders)	3.62	3.70	4.61	102%	127%	25%	47.3%
HT I-Non Continuous (Non Express Feeders)		4.37	4.45	121%	123%	2%	-3.0%
HTII – Seasonal Category		5.54	5.59	153%	155%	2%	-8.7%
HT III Railways		4.15	4.70	115%	130%	15%	3.7%
HT IV- Public Water Works/PWW)		3.72	3.38	103%	94%	-9%	-6.2%
HTV – Agricultural		1.77	1.77	49%	49%	0%	0.0%
HT VI		3.35	3.74	93%	103%	11%	0.0%

<i>Mula Pravara Electric Co- op Society (MPECS)</i>		6.46	2.25	179%	62%	-116%	-13.6%
---	--	------	------	------	-----	-------	--------

12) The aforesaid calculations include the element of fixed cost. Although the Commission has reduced the demand charge the overall increase in tariff is as shown in the calculations above. The calculations do show increase in cross subsidy by a substantial margin. The respondent MSEDCL disputes the extent of rise in cross subsidy but does not dispute the fact that in effect cross subsidies for LT-II (Commercial) above 20 kW to 50 kW and above 50 kW & HT-II (Commercial) have actually increased

13) The question to be now answered is whether the tariff order which causes such rise of cross subsidy can be sustained. It is not disputed by the respondents that cross subsidies are required to be gradually brought down as that is the declaration in the National Tariff Policy and is one of the aims of the reform in the electricity sector as reflected in the Statement of objects and reasons of the Electricity Act, 2003.

14) The National Tariff Policy also makes a reference to cross subsidy.

*“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 2010-2011 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.”*

15) As extracted above the National Tariff Policy requires the Commissions to notify a roadmap within six months of promulgation of the policy which may lead us to cross subsidy levels within  $\pm 20\%$  of the average cost by 2010-11. We are very close to the target year. The respondent Commission is required to prepare and publicize a roadmap in this regard if not already so done.

16) The impugned tariff order came to be challenged in appeal No.107 of 2008 which was decided vide a judgment dated 01.07.09. We set aside the tariff determined by the impugned order so far it related to LT-II (Commercial) with sanctioned load above 50 kW and HT-II (Commercial) category. For the same reasons as contained in judgment in appeal No. 107 of 2008 as also the reasons given above the impugned tariff for category LT-II (Commercial) with sanctioned load above 20 kW and up to 50 kW also needs to be set aside. We



also refer to our judgment dated 27.01.09 in appeal No. 98 of 2008 wherein we observed that the cross subsidies have to be brought down without giving tariff shock to any class of consumers. We also observed therein that purchase of costly power cannot be loaded on a particular category of consumers.

17) We accordingly direct the Commission to re-determine the tariff for the categories of LT-II (Commercial) with sanctioned load above 20 kW and up to 50 kW and above 50 kW and HT-II (Commercial) keeping in view these observations. The respondent No.2, MSEDCL, shall adjust the excess amount received from the appellant against amount payable by appellants for future consumption by equally adjusting the same in twelve monthly bills which will be raised hereafter. The Commission is also directed to make suitable adjustment in the ARR of respondent No.2 so as not to deprive it from its ARR.

18) Before parting with the appeal we also direct the Commission that while formulating new order in pursuance to this judgment it will give similar relief to all consumers who are placed similarly with the appellants herein so that other consumers similarly placed are not made to approach this Tribunal and cause avoidable expenses and consequent rise in tariff.

19) The judgment in appeal No. 107 of 2008 has been challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court has been pleased to stay the operation of our judgment in appeal No. 107 of 2008 by its order dated 17.07.09 which is as under :

*"Taken on Board.*

*The civil appeal is admitted.*

*Until further orders, operation of the impugned order shall remain stayed.*

*It is directed that in case the appellant fails in this appeal, it will have to adjust the amount of interest at the rate of nine per cent per annum.*

*Tag the appeal with Civil Appeal No. 1602 of 2009."*

20) In view of the above order of the Hon'ble Supreme Court we direct that the operation of this judgment will remain in abeyance till the Hon'ble Supreme Court vacates the order of stay quoted above. We further add that the MSEDCL shall be liable to adjust the interest @ 9% per annum in the same manner in which the Honb'le Supreme Court has directed in its order date 17.07.09.

- 21) With this all the IAs in the above appeals stand disposed of.
- 22) Pronounced in open court on this **23<sup>rd</sup> day of October, 2009.**

**( H. L. Bajaj )**  
**Technical Member**

**( Justice Manju Goel )**  
**Judicial Member**

Reportable<sup>✓</sup> / Non-reportable