

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

**Appeal No.107 of 2008**

**Dated: July 01, 2009.**

**Present:- Hon'ble Mrs. Justice Manju Goel, Judicial Member  
Hon'ble Shri H.L. Bajaj, Technical Member**

**IN THE MATTER OF:**

**Spencer's Retail Limited  
Spencer Plaza, 769, Anna Salai  
4<sup>th</sup> floor, Chennai-600002 and  
corporate office at  
Duncan House, 31 Netaji Subhash Road  
Ist floor, Kolkata-700001** **.....Appellant(s)**

**v/s**

- 1. Maharashtra Electricity Regulatory Commission  
World Trade Centre, Centre No. 1  
13<sup>th</sup> floor, Cuffe Parade  
Mumbai-400005  
(Through its Secretary)**
- 2. Maharashtra State Electricity Distribution  
Company Ltd. (MSEDCL)  
Registered Office at  
G-P, Prakashgadh, Anand Kanekar Marg  
Bandra (E)  
Mumbai-400051** **.....Respondent(s)**

Counsel for appellant(s): Mr. M.G.Ramchandran  
Mr. Sanjeev K.Kapoor

Mr. Avinash Menon  
Ms Swapna Seshadri  
Mr. Anand K. Ganesan  
Mr. S. Patra

Counsel for respondent (s): Mr. Varun Agarwal for Resp.2.  
Mr. Vikrant Ghumre  
Mr. Ravi Prakash  
Mr. Rahul Sinha  
Mr. Buddy Ranganadhan

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

### **Per Hon'ble Mr. H.L. Bajaj, Technical Member**

This appeal challenges the order dated June 20, 2008 in case No. 72 of 2007 passed by the Maharashtra Electricity Regulatory Commission (MERC or the Commission in short) relating to Annual Performance Review for the financial year 2007-08 and Annual Revenue Requirement and Tariff Determination for the financial year 2008-09 of Maharashtra State Electricity Distribution Company Ltd., the Distribution Licensee (hereinafter referred to as MSEDCL).

2) Facts of the case to the extent, relevant in the present appeal, are given below in brief:-

3) Appellant is aggrieved by the tariff determined for LT-II Commercial category of consumers with the sanctioned load above 50 kW wherein the tariff has been increased by about 46% i.e. from about Rs. 5.66 per kWh to about Rs. 8.25 per kWh and the cross-subsidization provided by such category of consumers to other categories has been substantially increased from the existing level. Appellant has also been aggrieved with the classification of a new category in the form of HT-II Commercial (from HT-I category) where the tariff has been increased by about 52% i.e. from about Rs. 5.26 per kWh to about Rs. 7.98 per kWh, again with the level of cross subsidization increasing substantially. The average cost of supply, as worked out by the Commission has increased by only about 6.76% from Rs. 3.39 per kWh to Rs. 3.62 per kWh. For the new category HT-II Commercial, tariff has been fixed at about 220% of the average cost of supply and for LT-II category above 50 kW, tariff has been fixed at about 228% of the average cost of supply.

4) The aforesaid increases in tariff have given rise to the present appeal. Reasons given by the Commission in support of the above dispensation, as contained in the impugned order, are 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 Commercial category on the basis of sanctioned load viz. 0 to 20 kW, 21 to 50 kW and above 50 kW sanctioned load. The Commission has determined the tariffs for these two sub-categories at higher levels. (Refer to para 36 page 25 of the tariff order dated June 20, 2008).”*

*“ 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-I 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-I industrial in line with the philosophy adopted for LT commercial consumers. Such categorization already exists in other licence areas in the state and is hence being extended to MSEDCL licence area also.” (Refer to para 38 page 25 of the tariff order dated June 20, 2008).*

5) Mr. Ramachandran, learned counsel appearing for the appellant stated that the decision of the Commission is patently contrary to the provisions of The Electricity Act, 2003, the National Tariff Policy notified by the Central Government and the principles well settled by this Tribunal in a number of cases.

6) Learned counsel contended that Section 61(g) of The Electricity Act, 2003, inter alia, provides that the tariff should progressively reflect the cost of supply and there should be

reduction of the cross subsidy as specified by the appropriate Commission and that the National Tariff Policy requires the Commission to prescribe a tariff trajectory in a manner that the cross subsidy is reduced to the extent of  $\pm 20\%$  by the year 2010-11.

7) Learned counsel further submitted that the full bench of this Tribunal in Siel Ltd. vs Punjab State Electricity Regulatory Commission and others, 2007 APTEL 931 at para 107 had specifically held as under:

*“ The cross subsidies have to be brought down by degrees without giving a tariff shock to the consumers.....As long as cross-subsidy is not increased and there is a roadmap for its gradual reduction in consonance with Section 61(g) of the Act of 2003 and the National Tariff Policy, determination of tariff by the Commission on account of the existence of cross subsidy in the tariff cannot be flawed”.*

8) Learned counsel submitted that the above decision was followed by the Tribunal in the case of Spencer’s Retail Limited

v Maharashtra State Electricity Distribution Company Limited in Appeal No. 146 of 2007 which relates to the appellant's tariff qua MSEDCL for the previous year 2007-08. Further this decision was followed in Spencer's Retail Limited v Maharashtra Electricity Regulatory Commission and Reliance Energy Limited in Appeal No. 16 of 2008 in respect of the appellant's tariff qua Reliance Energy Limited, another distribution licensee in Maharashtra.

9) Learned counsel contended that the order dated June 02, 2006 passed in Appeal Nos. 124, 125, 177 of 2005 and 18 of 2006 in the matter of Kashi Vishwanath Steel Ltd. v Uttaranchal Electricity Regulatory Commission and Others it was held that 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 the intent of the Act to inflict tariff shock to the consumers (para 24). Again in para 25 of this judgment the Tribunal reiterated the need for progressive reduction of the cross-subsidy and a road map for such

reduction as per Tariff Policy is to be notified by the Commission.

10) Mr. Ramachandran contended that despite the above specific provisions in The Electricity Act, 2003, the National Tariff Policy and the decisions of the Tribunal, the Commission, in the impugned order has;

- (a) increased the level of cross-subsidy substantially instead of progressively reducing the same and fixing the tariff for the appellant's category significantly higher as compared to the cost of supply;
- (b) purported to provide for higher marginal cost of power purchase on a particular category of consumers and on this basis, imposing on them much higher tariff as compared to the cost of supply.

11) Per contra Mr. Varun Agarwal, appearing for the second respondent submitted that MERC while categorizing the appellant in LT II commercial category has determined the tariff as it was entitled to under the provisions of Section 62 read



with sub-section 3 thereof. The tariff so determined for LT II commercial categories has been differentiated in accordance with the load factor of the consumers in that category as well as total consumption of electricity and the nature and purpose for which the supply is required and that MERC was within its jurisdiction to so differentiate and determine tariff for this category of consumers. The tariff so determined by MERC is after considering ARR which had gone up substantially during the relevant year, inter alia, by reason of the approved power purchase expenses having been increased. Such increase is by reason of the quantum of expensive power required to be purchased by MSEDCL. MERC has loaded such expensive power over such categories of consumers who are able to bear the burden of a higher tariff.

12) Learned counsel contended that in the past also the high end consumers of the respondent No. 2 were subsidizing such low end consumer and submitted that the provisions of Section 61(g) are only guiding principles for fixation of tariff. The other

guiding principles such as the factors which result in, inter alia, economic use of resources, safeguarding of consumers interest and recovery of cost of electricity in a reasonable manner also are required to be followed by the Commission. While the National Electricity Policy as well as the Tariff Policy are also guiding principles, the legislature in its wisdom has only provided in Sections 61 and 86(4) that the principles set out therein are guiding principles especially in view of the power situation in the country and the EA 03 being a new legislation which has done away with the earlier legislation.

13) Learned counsel argued that insofar as reduction of cross-subsidy, the National Tariff Policy recognizes the fact that cross subsidies have been existing for the past several years and are solely by reason of inefficiencies and losses in operations. He contended that no case has been made out against the respondent No. 2 either of inefficiencies or losses in operation. Admittedly, the cost of power procurement has gone up substantially in view of the shortage scenario in the country

especially in the state of Maharashtra. On the contrary, the National Tariff Policy does not address the aforesaid issue but while recognizing the fact that imbalance by reason of cross-subsidy is required to be corrected specifically provides that no tariff shock to the consumers should be given while doing away with the cross-subsidies. He submitted that tariff shock ought to be understood and interpreted with reference to the capacity of a consumer to pay tariff for electricity.

14) Learned counsel submitted that the provisions of Section 61(g) of the Act and the Tariff Policy ought to be read and interpreted considering the glaring fact of shortage of power as well as the expensive power and need to curb consumption in view of the shortage situation.

### **Analysis and decision**

15) We have dealt with a matter similar to the facts in this appeal in our judgment dated January 27, 2009 passed in Appeal No. 98 of 2008 concerning Reliance Energy Ltd, another licensee in Maharashtra, in which order dated June 04, 2008 in

case No. 66 of 2000, relating to Annual Performance Review for the year FY 2007-08 and ARR and Tariff determination for the year FY 2008-09 of the Reliance Energy Ltd. passed by the Maharashtra Electricity Regulatory Commission, was challenged by the appellant. Our decision in the matter is contained in paras 11,12, 13 and 14 of the judgment dated January 27, 2009 which are reproduced below:-

*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.*

16) The above judgment squarely applies to the facts of the present appeal. In view of the above we decide that the Impugned Tariff Order for the category of LT-II Commercial Category of Consumers with sanctioned load of above 50 kW and HT-II Commercial Category cannot be sustained and has to be set aside. The Commission is directed to re-determine the tariff for these categories of consumers on the basis of observations made by us in our judgment of January 27, 2009. The respondent No. 2, MSEDCL 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 MSEDCL. The Commission is also directed to make suitable adjustment in the ARR of the Respondent No. 2, MSEDCL so as not to deprive it of its ARR.

17) Appeal No. 107 of 2008 stands disposed of.

18) No order as to costs.

19) Pronounced in the open court on **01<sup>st</sup> day of July, 2009.**

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

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

No. of corrections

GB