Before the Appellate Tribunal for Electricity

Appellate Jurisdiction

Appeal No. 146 of 2007 and IA No. 163 of 2007

Dated: 19th December, 2007.

Present: Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Mrs. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Spencer's Retail Ltd.
Spencer Plaza, 769,
Anna Salai,
4th Floor, Chennai. …Appellant

Versus

1. Maharastra Electricity Regulatory Commission,
   13th Floor, WTC No.1,
   Cuffe Parade, Coloba, Mumbai.

2. Maharashtra State Electricity Distribution Co. Ltd.,
   Prakashgad, Bandra (East), Mumbai ….Respondents

Counsel for the Appellant : Mr. M.G. Ramachandran,
Mr. Sanjeev K. Kapoor and
Mr. Avinash Menon

Counsel for the Respondents : Mr. Amit Kapur,
Mr. Ravi Prakash,
Mr. Avjeet K. Lala,
Mr. Kunal Rajpal for MSEDCL
Mr. Buddy A. Rangnanadhan for MERC.

JUDGMENT

Per Hon'ble Mr. A.A. Khan, Member Technical

The Appellant, M/s Spencer's Retail Ltd., a public limited company having its registered office at Chennai (T.N.) and Corporate office at Kolkata (W.B.) (hereinafter to be called as M/s Spencer) is a company incorporated under the Companies Act, 1956, with the objective of carrying on retailing business in India through various types of formats such as Express, Daily, Super and Hyper Market Stores. The Appellant has filed the instant Appeal against the Maharashtra Electricity Regulatory Commission (for brevity to be called as 'the Commission/MERC') order dated 18 May 2007 in Case No. 65 of 2006 read with Order dated 24 Aug. 2007 in Case No. 26 of 2007 and Case No. 65 of 2006 relating to determination of Annual Revenue Requirement of Maharashtra State Electricity Distribution Company Ltd. (hereinafter referred to as 'MSEDCL') applicable for the control period from Financial Year (FY) 2007-08 to Financial Year (FY) 2009-10 and Tariff for FY 2007-08. The proceedings for tariff determination were conducted by the Commission under Section 61 and Section 62 of the Electricity Act (for short to be referred to as the 'Act') and all other powers enabling it. The Appellant has also filed an Application being I.A. No. 163 of 2007 seeking interim relief by staying the impugned orders and restraining the Respondent No. 2, MSEDCL, from charging based on the aforesaid orders.

2. Prior to the impugned orders various Retail outlets of Appellant Consumer spread across the state of Maharashtra having sanctioned load of more than 20 MW, were classified under LT-II (Non-domestic) and HT-industrial categories. The Commission vide its impugned order date 18 May 2007 has re-classified the Appellant

consumer in an additional new category of LT-IX created for 'Multiplexes and Shopping Malls' having a sanctioned load of more than 20 KW, excluding Single ownership establishments. In the clarificatory order dated 24 Aug. 07 against the petition filed by the second respondent, MSEDCL before the Commission the tariff category LT-IX was also extended to single ownership establishment having large shopping/departmental stores like shoppers stop, Big Bazaar, Shop Rite and Spencer's etc. without laying down any clear criteria for identifying such shopping/departmental stores.

3. The average cost of supply determined by the commission for Financial Year 2006-07 which was Rs. 3.30 per Kwh is increased to Rs. 3.50 per Kwh in the impugned Tariff Order i.e. an increase of 6%. Also, while as per the Tariff Order for FY 2006-07, the energy charges was fixed at the rate of Rs. 4.90 per Kwh (over an above the consumption of 200 units) and fixed demand charge of Rs. 150 per 10 KW of connected load or part thereof above 10 kw load for LT-II (Non-Domestic), the tariff as per impugned Tariff order for the consumers placed in new category LT-IX is fixed at Rs. 8.50 per Kwh in energy charge and fixed demand charge oF Rs. 300 per KVA per month.

4. The Appellant has submitted that while the average cost of supply has increased only by 20 paise per Kwh (i.e. 6%), by reclassifying it in the newly created category it has been subjected to an increase in composite tariff by about 400 paise per Kwh. (i.e. 80% increase with respect to previous year). Also against the average cost of supply of Rs. 3.50 per kwh, the tariff fixed for the Appellant and similarly situated consumers is exorbitant and is nearly three times the average tariff. Aggrieved by such excessive increase in retail tariff, the Appellant has filed the instant Appeal against the orders of the commission dated 18 May 2007 and 24 Aug. 2007 and has prayed for the following reliefs:

(a) Set aside the impugned orders dated 18 May 07 and 24 Aug. 07 passed by the Commission in as much as it creates a category of consumers for Multiplexes, shopping Malls and single ownership shopping/departmental stores

having a sanctioned load of more than 20 KW with tariff being fixed at the rate of Rs. 8.50 per kwh as energy charge and Rs. 300/- per KVA per month as demand charges.

(b) Direct the Respondent No. 1 to re-determine the tariff of Respondent NO. 2 for the FY 07-08 in accordance with the principles of Sections 61, 62(3) and other relevant provisions of the Electricity Act, 2003 read with the National Electricity Policy and the National Tariff Policy.

and

(c) Pass any other order as this Tribunal may deem fit and proper in circumstances of the present case.

Facts and Analysis

5. Appellant owns various retail outlets spread across the state of Maharashtra which have been mostly classified in LT-II (non-domestic) category of consumers for tariff purposes. The shops owned by it are located in Shopping Malls as well as stand alone single ownership establishments across the State. The applicable tariff rates for LT-II (Non-domestic) category as per the tariff order for Financial Year 2006-07 passed by the Commission and corresponding rates in the impugned order for the FY 2007-08 are placed below:

Tariff	**FY 2006-07**	**FY 2007-08 (Impugned order)**
- Energy Charges (Above 200 units)	- Rs. 4.90 per Kwh	Rs. 5.60 per Kwh
- Demand Charged	- Rs. 15 per 10 kw of load or part thereof above 10 kw load	Rs. 150 per 10 kw of load or part thereof above 10 kw load
- Composite rate	Rs. 6 per kwh	Rs. 6.70 per kwh

6. The average cost of supply as worked out by the Commission for FY 2006-07 was Rs. 3.30 per Kwh.

7. Respondent No.2, MSEDCL, filed petition in Case No. 65 of 2006 before the Commission for approval of ARR and multi-year tariff for the period from FY 2007-08 to FY 2009-10 and for determination of tariff for FY 2007-08. The petition did not propose for creation of additional category of LT-IX. The Commission vide impugned order dated 18 May 2007 decided the ARR for the aforesaid period and determined the tariff for the various categories of consumers for FY 2007-08 which *inter-alia* included a new category of LT-IX for Multiplexes and Shopping Malls, and the Appellant outlets which were earlier in LT-II category (Non-domestic) and HT-I industrial were placed in the tariff category LT-IX. The tariff for LT-IX category for consumers for Financial Year 2007-08 as fixed by the impugned order is as under:

-Energy Charges	Rs. 8.50 per Kwh
-Demand Charges	Rs. 300 per KVA per month

8. The Appellant avers that had it continued in Cat. LT-II (Non-Domestic), it would have paid energy charges at the rate of Rs. 5.60 per kwh whereas in LT-IX category in which it is now classified it has to pay at the rate of Rs. 8.50 kwh excluding rate for demand charges. Appellant has submitted that the hike to this magnitude has given a severe tariff-shock and adversely impacted its business operations.

9. The impugned order in the schedule of charges for the category LT-IX also specifies that the same tariff is *"Applicable for electricity supply at LT for Multiplexes and shopping malls (above 20 kw). This tariff will be applicable* ***also*** *in the event of extending supply to shopping malls and multiplexes at HT-Voltage."*

10. Thus, the 'multiplexes and shopping malls' placed earlier in LT and HT Categories were re-classified in tariff category IX for tariff purposes.

11. The average cost of supply by the impugned order is determined to be Rs. 3.50 per Kwh for FY 2007-08. MSEDCL, in its counter affidavit has submitted that the average cost of supply of Rs. 3.50 per kwh only reflects the cost of non-costly power contracted on long-term basis and does not refer to the costly power which MSEDCL supplies to specified consumer categories. MSEDCL further states that the average cost of supply of costly power during peak consumption, of which the Appellant and its class of consumers are the dominant consumes, is as high as Rs. 5.36 per Kwh after factoring T&D loss level of 7-10%. We observe that out of the total power of 85123 MU estimated to be purchased in FY 2007-08 only 4550 MU is the costly power constituting 5.7% of the total power purchased. We find that the Weighted Average cost of supply taking together non-costly and costly power is Rs. 3.6 per Kwh which is not significantly different from Rs. 3.5 pr kwh. It is, however, pertinent to mention that at para 2.8 of the impugned order dated 18 May 07, the Commission has stated that it has considered the average cost of supply by including only the non-costly sources of power, and has attempted to ensure that the cross-subsidy is reduced as regards base tariff. The non-costly power is utilized to minimize load shedding for all consumers in the State and costly power to minimize load shedding for the selected categories, whose extra cost is recovered through Additional Supply Charges (ASC). If the increased cost of costly power over and above the non-costly power is being recovered through ASC beyond the tariff determined, the average cost of supply is only to be considered on non-costly power and not on costly-power as contented by MSEDCL. Thus, the average cost of supply of Rs. 3.50 per kwh is correctly taken as reference for computing the cross-subsidy contribution by the various categories of consumers.

12. Respondent No. 2, MSEDCL approached the Commission by filing a petition on 05 Jul. 2007 in Case No. 26 of 2007 seeking clarifications with regard to certain calculations and typographical errors as well as other issues relating to billing of energy charges in the Tariff order dated 18 May 2007. As a matter of fact, MSEDCL in guise of the said clarificatory petition sought to expand the applicability of tariff of newly created category of LT-IX (multiplex and shopping malls) to all consumers irrespective of the categorization whether in LT-II commercial category or any other category but

having primary activity of shopping/sales etc. and load of more than 20 KW. The Commission, however, in its clarificatory order dated 24 Aug. 2007 declined to accept the change requested stating that it was beyond the scope of clarificatory order. The Commission, nevertheless, clarified and extended category LT-IX also to single ownership establishments stating that:

> *"Single ownership **large** shopping/departmental stores like shoppers stop, Big Bazaar, Shop Rite, Spencers, etc. with sanctioned load above 20 KW will be classified under LT-IX category"*

13. The Appellant is also aggrieved that the said clarificatory order unfairly extended the coverage of LT-IX category to its stand alone shops and departmental stores outside shopping mall which hitherto before were not considered to be in category LT-IX in terms of impugned order dated 18 May 07.

14. The Appellant has submitted that while the increase in the average cost of supply over the previous year (2006-07) being only 6%, the increase in the effective tariff for the Appellant has increased by 80%. It is borne out from Appendix 4 to the Tariff order dated 18 May 2007 giving the billing impact of the revised tariffs.

Basis of LT-IX Category

15. It is pertinent to record the basis on which the Commission has justified the tariff for LT-IX category of consumers in the impugned order dated 18 May 2007 and clarificatory order dated 24 Aug 2007.

16. **Tariff order dated 18 May 2007:** The impugned Tariff Order dated 18 May 07, stated under a subtitle of 'Tariff for Multiplexers and Hoardings' in para 6.2 titled 'Tariff Policy', an extract of which is placed below:

"***Tariff for Multiplexes and Hoardings***

Considering the severe energy deficit situation in the State, the Commission has 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.

17. The order further records that the Commission has determined the tariffs in line with the tariff philosophy adopted by it in the past and the tariffs have been determined so that the **cross-subsidy is reduced without subjecting any consumer category to a tariff shock.**

18. Respondent No. 2, MSEDCL has submitted that the state power sector has been reeling under widening gap in Demand-Supply creating a crisis of emergency situation, wherein the shortage has grown from peak shortage of 3100 MW in 2005 to 5700 MW in 2007 recording on average annual peak load shortage of over 26% and average annual base load shortage of over 17% as against the national average of 12% and 8% respectively. MSEDCL, states that, in order to manage and mitigate the shortages, the Commission under Section 23 of the Electricity Act, 2003, has issued series of directions in case Nos. 2, 4 and 5 of 2005 and Case No. 78 of 2006 introducing various measures such as, ASC recovery from specified class of consumers and a protocol of planned load-shedding and its enforcement across the State disincentivizing *"luxurious/wasteful/non-critical consumption by giving suitable price signals in line with the ABT regime"*. Thus, the main objective and the basis of creating LT-IX category in impugned orders, is to deter power consumption by using high cost pricing signal for the class of consumers who are allegedly in **non-critical services** and indulge in **unwarranted commercial consumption** and have **higher capacity to pay**.

19. We find that for determination of tariff as per the impugned tariff order the Commission has purportedly exercised powers under Section 61 and Section 62 of the Act and all other powers enabling it in this behalf and there is no direct or indirect reference to the power vested in it under Section 23 of the Act being invoked. The Section 23 of the Act, inte-ralia provide for regulating supply, distribution, consumption or use thereof, for securing the equitable distribution of electricity and promoting competition. The Commission in its submission before us stated that the Act has no specific provision for dealing with load shedding except under Section 23 which gives powers to the Commission to regulate the consumption, distribution, supply. The Commission goes on to say that the statute could not have presumed the practical aspects of shortage of electricity supply and availability and EA-2003 generally presumes that there is sufficient power and energy available to meet the requirements of existing consumers as well as new consumers. Contrary to the contention of the Commission, the Legislature had specifically recognized the existence of dismal deficit in supply and demand of electricity especially with the background of the country's per capita Consumption of 350 kwh in 2001-02 being the lowest in the world and large number of villages and households had no access to electricity and the power sector in the country was beset with endemic problem of inadequate power generation capacity, scheduled and unscheduled load shedding etc. These power woes amongst others became the causes for the enactment of EA-2003 by the Parliament. The report of standing Committee of Parliament, National Tariff Policy, etc. deal with this aspect.

20. MSEDCL, as mentioned above has also tried to explain the necessity to resort to Section 23 of the Act for load regulations involving load shedding etc. We have no quarrel of the Commission undertaking load regulations under Section 23 of the Act, and the charges thereof but it does not come into play in determination of tariff under Sections 61 and 62(f) the Act. The load regulation and the charges thereof cannot be mixed up with the tariff determination exercise.

21. MSEDCL has cited the following two judgments of this Tribunal to advance its arguments in support of providing high cost price signal to deter indulgence in

unwarranted consumption and a regime of incentives and disincentives to secure performance:

(a) Vidharba Industries Associations Vs. MSEDCL & MERC (Energy Law Report - 2007 APTEL 116) for load management and charge thereof under Section 23 of the Act.

(b) Neyveli Lignite Corporation Ltd. Vs. Southern Regional Electricity Board (Energy Law Report - 2007 APTEL 236) for enforcement of ABT regime.

22. In the case of Vidharbha Industries Association Vs. MSEDCL & MERC, we find that the aforesaid judgement held the following:

"20. On the filing of annual Revenue Requirement, the Tariff is fixed by the Regulatory Commission after adopting the procedures prescribed under Section 64 of the Electricity Act 2003. The Tariff determined in terms of Part VII (Section 61 to 64) of the Electricity Act 2003. The tariff is determined under Section 62 after following the procedures prescribed under Section 64 of the EA- 2003,. On a consideration of the Part VII of the Act and in particular Section 61 to 64, we hold that the levy and collection of load management charges will not take part the character of Tariff nor it forms part of the Cost of power, generation or transmission or distribution by the respective utility" [para 20 d, page 1123, Energy Law Report - 2007*]*

21. In the circumstances, we hold the contentions of the learned counsel for the Appellant, that load management charge forms part of the Tariff and that it is an increase in Tariff schedule, cannot be sustained. It, therefore follows that there is no requirement at all for the Regulatory Commission to follow Section 64 of the Electricity Act, 2003 before ordering or imposing load management charge and recovery thereof. [para 21 f, page 1123, Energy Law Report - 2007*]"*

23. From the above judgment it is clear that while load management charges can be imposed under Section 23 of the Act it does not form part of the tariff for generation, transmission and distribution of the concerned utility and, therefore, is not to follow the procedures prescribed in Section 64 of the Act for tariff determination. Yet, in the interest of natural justice, it is mandatory that the Commission before issuing orders on load management charges has to provide opportunity to consumers for being heard as practiced by the Commission in case of several orders issued by it relating to load shedding protocol and other measures keeping focus on the objective of Section 23 of the Act, for securing equitable distribution of electricity and promoting competition. It needs to be emphasized that load management charges need to be applied equitably on all category of consumers.

24. The second judgment in the case of Neyveli Lignite Corporation Vs. Southern Regional Electricity Board is also of no help to the learned counsel for the Respondent, MSEDCL in justifying the issuing of high cost pricing signal in the instant case as it is not comparable to ABT Tariff. The following extracts from the judgment of this Tribunal in the case of Neyveli Lignite Corporation Vs. Southern Regional Electricity Boards are of relevance:

> "*15. …….. The commission …… From the date of implementation of ABT, the beneficiaries are bound by the schedule of drawl,. IN the event of deviation, the beneficiaries are subject to UI Charges.*
>
> *……*
>
> *……*
>
> *The Appellant was, therefore, liable to pay penalty for the over drawl of power from the grid beyond its allocation under ABT regime. The Appellant cannot e allowed to benefit at the cost of other beneficiaries who had to suffer for the over-drawl of power by the Appellant."*

25. We understand that the objective of UI (unscheduled interchange) charges in the ABT (Availability Based Tariff) regime is to deter over drawl of power by the consumers over and above the allocated schedule, by imposing punitive tariff to prevent grid collapse and as long as the drawl remains within the schedule, the price liable to be paid by the consumers is at scheduled rates determined by the Commission. The penal charges in the form of UI-charge come into play only when the consumption is more than schedule. The instant case wherein the consumers placed in LT-II (Non-domestic) and HT- industrial were allowed to avail scheduled power of above 20 KW (without any consumption limit over 20 kw) is not comparable to ABT-regime as in the latter the consumption of power beyond the allocated schedule only attracts punitive charges in the form of UI-rate. It is in consonance with Section 62(3) of the Act which allows that in the determination of tariff the consumers may be differentiated on the basis of total consumption of electricity and not on undefined parameters of unwarranted commercial consumption, high capacity to pay etc. as in the instant case. The Commission without disturbing the then existing framework of classification of the consumers, in addition to effective implementation of measures already in vogue, had number of options available to deter excessive consumption such as fixing a threshold limit below or above 20 KW beyond which the consumption could be chargeable at higher punishing rate and / or increasing the slabs of consumption at disincentivizing rates of tariff etc. providing high cost pricing signals to curb consumption provided it is done in an equitable manner without discrimination and is based on commercial principles. We are of the view that the 'Capacity to pay' is only invoked for BPL consumers for which the subsidy is provided by the State Govt. as per Section 65 of the Act, and 'higher capacity to pay' is not a legally valid ground to discriminate the consumers and violates the principles of Section 62 (3) of the Act. LT-II (Non-domestic) category, in any event, is not classified as 'Critical Service' that it could justify creation of a separate category.

26. In support of its submissions, MSEDCL has also placed reliance on the judgment in case of Superintendent & Remembrance of Legal affairs West Bengal Vs. Girish Kumar & Ors. (1975(4 SCC 754. We find that the referred case relates to economic offences in contravention of Foreign Exchange Regulations Act, 1947 and is not relevant

in the instant case as no offence or violation of the provisions of the Act and rules framed thereunder have been committed by the Appellant consumer. The Appellant has, on the contrary, sought that load regulations if done under Section 23 of the Act should be applied equitably across all categories of consumers and should not be discriminatory.

27. The Appellant has averred that in order to discourage unwarranted consumption the Commission had introduced a separate category LT-VIII, previously, dealing with advertisements and hoardings by imposing punitive tariff which was maintained in the impugned tariff order dated 18 May, 2007 also. It further submits that the basis of classification of category LT-VIII being 'unwarranted commercial consumption' using flood-lights, advertisements and hoarding etc. have also been extended to the new category LT-IX 'Multiplexes and Shopping Malls' in the impugned order. The learned Counsel of the Appellant has submitted that the Commission's manifest intention in the impugned order dated 18 May, 2007 was to cover the common areas/facilities of Shopping Malls where the owner/operator of the Shopping Malls is the consumer and uses electricity for floodlights, hoardings and advertisements like category of LT-VIII consumers and not where the shops and establishments within the Shopping Malls are the consumers of MSEDCL and use electricity within the shops. The respondent Commission in its written submission while asserting the power of the Commission to create a new category on the basis of 'purpose for which the supply is required' under Section 62 (3) of the Act has, *inter alia*, confirmed that in the instant case the electricity meant for **the purpose of operating a Shopping Mall or Multiplex** has been the consideration. The purpose of operating a shopping mall necessarily means making the facility operationally available to the users of the facilities. It appears to us that the owners/operators of shopping malls and shops within them are two distinct entities in so far as the consumption of electricity is concerned. The Commission has not appreciated the distinction between operating the Shopping Malls and Multiplexes and running of shops located within them.

28. The Appellant has submitted that it, besides having shops within the Shopping Malls also owns stand alone exclusive shops and plaza, which clearly remain unaffected

by the re-classification of the impugned tariff order dated 18 May, 2007. The Appellant submits that its shops within the 'Shopping Malls' can not be alleged to be indulging in unwarranted commercial consumption and being in non-critical service if the same shops outside the Shopping Malls are not being so considered. Respondent No. 2 MSEDCL as mentioned above attempted to extend category LX-IX tariff to all shops with load of more than 20 KW irrespective of their present category. The plain reading of the main Tariff Order dated 18 May, 2007 does confirm the lacunae without any rationale and can be construed to unduly discriminate the Appellant consumer which is violative of Section 62(3) of the Act. We are of the view that the shops within the Shopping Malls which are direct consumers of licensee, MSEDCL can not said to be indulging in unwarranted conspicuous consumption and should be treated at par with the similar shops outside the 'Shopping Malls' with load more than 20 KW, in so far as tariff categorization is concerned. Pune circle of MSEDCL continued to bill the Appellant in category LT-II lends strength to this argument.

29. We are aware that section 62(3) of the Electricity Act, 2003, empowers the Commission to differentiate consumers on the basis of load factor, Power factor, voltage, total consumption of electricity etc. including the purpose for which the supply is required. We agree that the Commission is empowered for differentiating consumers based on the purpose for which the supply is required, but feel that frequent changes in classification of consumers and moving the block of consumers from the existing tariff-category to the newly created tariff category carrying excessive tariff, beside causing severe tariff-shock, suffers from lack of predictability (one of the main reasons for introducing Multi Year Tariff regime), commercial principles and, is bound to erase the traceability of past tariff profile of the effected group of consumers, making it difficult to track percentage deviation in tariffs with respect to cost of supply signifying whether the cross-subsidy contribution by the subsidizing group of consumers is increasing or reducing. Needless to point out that as per Section 61(g), *the determination of tariff shall be so guided that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies within the period to be specified by the Commission.*

Section 86(4) of the Electricity Act, 2003 also mandates the Commission to be guided by the National Electricity Policy and the National Tariff Policy.

30. National Tariff Policy in Clause 8.3.2 provides the progressive reduction in the level of cross-subsidy such that the level of cross subsidy is brought within the range of plus or minus 20% of the cost of supply by the year 2010-2011

31. **Clarificatory order dated 24 Aug. 2007**: In the impugned clarificatory order dated 24 Aug, 2007, the Commission has made following clarifications relevant to the issue:

> ***"Commission's Clarification and Ruling:***
> *MSEDCL has sought a major change in the categorization of consumers under LT-IX in its Clarificatory Petition, which effectively proposes that most LT-II commercial consumers having sanctioned load above 20 kw would be classified under LT-IX category. The commission is of the opinion that such a change is beyond the scope of this clarificatory order, especially since the impact of such a change cannot be determined. MSEDCL has neither submitted any details of the number of consumers who are likely to be affected by such a change, nor details of the additional revenue that MSEDCL is likely to earn by this change. If MSEDCL desires such a change in tariffs, it may propose the same in its next Tariff Petition, along with the requisite data, to enable the commission to estimate the revenue impact of such a tariff revision, and to take a considered view on the matter. Moreover, revenue through levy of higher tariffs under LT-IX vis a vis LT-II tariffs, has not been considered by the Commission while projecting revenue from revised tariffs, and will contribute additional revenue.*
>
> *However, the Commission recognizes that there is a need to issue a clarification with respect to the applicability of the LT IX tariff to*

> *Shopping Malls, which are multiple ownership establishments by design, vis-à-vis the tariff applicable for* ***single ownership large shopping/departmental stores,*** *such as Shoppers' Stop, Big Bazaar, Shop Rite, etc. For all practical purposes, such establishments are shopping malls, with the only difference being that they are single ownership establishments.* ***Hence, the Commission clarifies that such large shopping / departmental stores like Shoppers' Stop, Big Bazaar, Shop Rite, Spencers, etc. with sanctioned load above 20 KW will be classified under LT IX category."*** *(*Emphasis supplied)

32. The above quoted extracts of the impugned clarificatory order reveals that the respondent, MSEDCL considered the enhanced charges of energy and demand in new category LT-IX fixed in the tariff determination process as per prescribed procedure in Section 64 of the Act and wanted it to be applied uniformly to all similar consumers qualifying the criteria not fully defined. The Commission also was conscious of the fact that revenue through levy of higher tariff under LT-IX will contribute additional revenue and has decided that the same be not included in the projection of revenue from revised tariffs. Collecting additional tariff and not showing as revenue from revised tariff is legally not sustainable. Despite the aforesaid, MSEDCL has in its submission tried to explain the additional tariff on account of load management charges under Section 23 of the Act and the additional revenue so collected will be accounted for in a separate fund in the accounts of MSEDCL subject to its disposal under the instructions of the Commission whereas the impugned orders do not say so. We have already dealt with this aspect and concluded that the charges under Section 23 of the Act cannot take the character of tariff and has to be decided in a separate proceeding different from that for tariff determination and is to be applied equitably to all categories of consumers. In the instant case only a specific class of consumers are being taxed which is neither fair nor equitable and the tariff orders are ultravires to the provisions of the Act and are liable to be set aside.

33. **Commercial circular – Post clarificatory order**: Respondent NO. 2, MSEDCL has submitted the Commercial Circular No. 62 dated 10 Sep. 2007 which was issued subsequent to impugned clarificatory order of the Commission. The aforesaid circular at para 3 regarding categorization of consumers under LT-IX states as under:

> *3). **Categorization of consumers under LT-IX (Multiplexes and Malls)***
> *The Commission has issued the clarifications with respect to the applicability of the LT-IX tariff, which is applicable for Electricity Supply at LT or HT for Multiplexes and Shopping Malls (above 20 KW). As per the clarifications, in respect **of large Shopping/Departmental Stores like Shoppers Stop, Big Bazaar, Shop Rite, Spencers, etc,.** with sanctioned load above 20 KW even though these are single ownership establishments are to be classified under LT-IX Category. **Hence, this tariff is now applicable for electricity supply at LT/HT for Multiplexes and Shopping Malls (above 20 KW) and large single ownership shopping/departmental stores like Shoppers Stop, Big Bazaar, Shop Rite, Spencers, etc. with sanctioned load above 20 KW.*** (Emphasis Supplied)

34. The above Circular arising out of the impugned clarificatory order dated 24 Aug. 2007 betrays the unambiguous understanding of the licensee that even though the Tariff Order dated 18 May 2007 did not envisage the single ownership establishment within the ambit of Tariff Category LT-IX (Multiplex and Shopping Malls), the clarifications issued by the Commission is now, making it applicable also to **large** single ownership shopping/departmental stores like shoppers stop, big Bazaar, Shop Rite, Spencers, etc. with sanctioned load above 20 KW. The impugned clarificatory order has undoubtedly enlarged the scope of LT-IX category to cover consumers originally not intended to be covered. It is pertinent to note that the aforesaid circular is silent about the manner by which the targeted consumers for application of LT-IX in pursuance of the impugned orders are to be identified The impugned clarificatory order and circular based on it are

not capable of being implemented in respect of such consumers of LT-IX and are liable to be set aside, to that extent.

35. The commission has admitted that the LT-IX category coupled with the clarificatory order will yield additional revenue over and above the Annual Revenue Requirements of MSEDCL but has not indicated the purpose for which the same is to be utilized and under what provisions of the Act, the excess revenue is being charged.

36. As brought out in para 12 above, the second Respondent, MSEDCL has approached Commission for clarifications which, inter-alia, also included petition for uniform application of category LT-IX tariff to all commercial consumers of load more than 20 KW engaged in primary activity of shopping/sales, irrespective to which parent category they belonged. The Commission apparently disallowed the request of admittedly major change on the ground of being beyond the scope of clarificatory order and for non-submission of details about the number of consumers, additional revenue to be accrued from it and impact analysis of the proposal but, nevertheless, did concede substantially by providing clarification about single ownership of shopping/departmental stores in the absence of the requisite data. The Commission in the process, of providing clarification introduced yet another ambiguity of **'largeness'** of the single ownership as it will not be possible to discriminate such establishment without qualifying criteria as to whether **'large'** refers to contracted load, turn-over of the consumers' business, size etc., and, if so with what threshold limits and is, therefore, incapable of being given effect to. Even, Multiplexes and shopping Malls has not been defined in the impugned orders but has been used in generic sense.

37. The Appellant has submitted that but for the clarificatory order dated 24 Aug. 2007, which extended the scope of LT-IX category beyond that described in the order dated 18 May 2007, none of its establishment would fall under LT-IX category. The Appellant complains that the Commission, without holding proper hearing and without affording opportunity to effected consumers, should not have extended the application of tariff category LT-IX to them.

38. In light of the impugned order dated 18 May, 2007, we are constrained to draw distinction between 'Multiplexes and Shopping Malls' as Infrastructure Provider and operator of facilities consuming power for operation and maintenance of common facilities such as parking/security lighting, escalator, lifts, toilets, water/sewage pumps, Airconditionering Plant, common area lighting, advertisement, hoardings, etc. and those consumers who have taken space as lessees of the former to set-up their shops and establishment within the premises and are direct consumers of the electricity supplied by the licensee and are being billed directly by it. The Appellant has vehemently argued that the tariff category LT-IX as envisaged in the impugned Tariff Order dated 18 May, 2007 will only be applicable to owner of "Multiplexes and Shopping Malls" and not to Shops and establishments located within their premises who are the direct consumers of the licensee and has further submitted that it could not have been extended to stand alone **large** single ownership shops and plaza and further the criteria to determine 'largeness' not being defined, it is incapable of being given effect to.

Increased Cross-subsidy Contribution from LT-IX Consumers.

39. We have already held above that the basis of introducing category LT-IX in the impugned order on the factors like, **unwarranted Commercial Consumption, Non-critical Services, higher capacity to pay,** are vague and are neither relevant nor being capable of being given effect to in so far as the Appellant Consumer and similarly placed other consumers are concerned. The appellant is aggrieved that while the average cost of supply has increased by 6% compared to the previous year, the tariff of the category LT-IX has increased by about 80% and has alleged it to be unreasonable, discriminatory and unfair beside being violative of the provisions of the Sections 61 and 62 of the Electricity Act, 2003 and the National Tariff Policy and the National Electricity Policy.

40. It is not in dispute that the Appellant consumer was earlier in LT-II (Non-domestic) and HT-1 industrial categories and now placed in enhanced tariff category of LT-IX are subjected to contribution of higher quantum of cross-subsidy. The impugned clarificatory order itself records that tariff of LT-IX category **will yield additional**

revenue over and above the Annual Revenue Requirement of MSEDCL. While dealing with specific queries in regard to cross-subsidy raised in the public hearing at para 2.8 of the impugned order dated 18 May, 2007, the Commission's ruling is as under:

> **"Commission's Ruling**
>
> *In determining the category-wise tariffs, the Commission has been guided by the principle that consumer tariffs should reflect the cost of supply. The Commission has given due consideration to the provisions of the EA 2003 and NTP in this regard. The Commission has been steadily reducing the cross-subsidy over the years, by increasing the tariffs for subsidized categories in proportion to the cost of supply. However, it is not possible to significantly reduce/remove the cross-subsidy overnight, and this can be achieved over a period of time.*
>
> *While designing the tariffs for each category, the Commission has considered the average cost of supply by including only the non-costly sources of power, and has attempted to ensure that the cross-subsidy is reduced as regards base tariff"*
>
> *xxxxxxxxxxxxxxxxxxxxxx*

41. Inspite of the above assertion in the impugned orders, the Appellant consumer and other similarly placed consumers have been struck by the severe tariff-shock associated with substantial increase in the contribution of cross-subsidy in violation of Sections 61 (g) and 61 (i) read with Section 86 (4) of the Electricity Act, 2003. The latter two Sections mandate that the Commissions in discharge of its functions are to be guided by the National Electricity Policy and National Tariff Policy.

42. The Clause 5.5.3 of National Electricity Policy and clause 8.3.2 of National Tariff Policy which are extracted as under have also not been complied with:

" 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 ± 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".

43. The Commission is expected to safeguard consumers' interest and to effect recovery of the cost of electricity in a reasonable manner in the spirit of Section 61 (d) of the Act. We are of the view that the tariff of Appellant and similar consumers in Category LT-IX is far from being reasonable and does not safeguard the business interests of the consumers and is not based on the commercial principles.

44. Before we part with the issue of cross-subsidy it will be pertinent to refer to Full Bench judgment of this Tribunal in the case of SIEL Ltd Vs Punjab State Electricity Regulatory Commission and Ors. (2007) APTEL 931, that reads thus:

"107. The cross-subsidies have to be brought down by degrees without giving Tariff shock to the consumers. Though it is desirable that cross subsidies are reduced through very Tariff Order but in a given situation, it may not be possible. 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, the determination of Tariff by the Commission on account of existence of cross subsidy in the Tariff can not be flawed".

45. We have earlier found that the costly power purchase is limited to 5.7% of the total power procurement and is unlikely to make any significant impact on the average cost of supply determined only on non-costly sources of power. Be that as it may, the cross-subsidy computed as percentage deviation from the median or average cost of supply inclusive of the cost of costly supply should continue to be the same with new tariff if the cross-subsidy contribution is kept at the same level in percentage and may not be so in quantum.

46. The average cost of supply is modulated by numerous factors like AT&C losses, purchase cost of power, efficiency of operation, collection efficiency, theft of power, etc. In any case the percentage deviation of tariff fixed for subsidizing category of consumers with respect to average cost of supply should remain constant, if the cross-subsidy is not reduced. The cross-subsidy and the cost of supply have strong nexus. Keeping the cost of supply fixed, higher is the increase in tariff of the subsidized consumers, smaller will be the quantum of cross-subsidy. On the other hand, if the tariff of the subsidized category of consumers is not changed, then higher the cost of supply, larger will be the quantum of cross-subsidy. Thus, to progressively reduce the quantum of cross-subsidy, the tariff of the subsided category has to be gradually increased and cost of supply recovered by reducing AT&C losses in line with the planned targets and implementation of various other efficiency improvement measures.

47. In the instant case, the cross-subsidy is indisputably increased exorbitantly despite the Commission's expressed intention **to ensure that the cross-subsidy is reduced as regards base tariffs.** The Commission appears to have decided deliberately not to report the cross-subsidy contribution of LT-IX as it does not find mention in

'Cross-subsidy Reduction' table given on page 173 of the impugned order dated 18 May, 2007.

48. The Commission in the impugned order relevant to cross-subsidy as extracted below has mentioned that:

> *"The Commission has not accepted the tariffs proposed by MSEDCL, as it is contrary to the tariff philosophy of the Commission and the EA 2003. The Commission has continued with its tariff philosophy of cross-subsidy reduction, enunciated in earlier Tariff Orders, for the base tariff. The details of category-wise tariffs and the cross subsidy levels have been elaborated in Section 6 of this Order. However, the ASC has been levied in proportion to the benefit of reduction in load shedding for different consumer categories and regions, as undertaken in the last order, subject to modifications on account of revision in load shedding, quantum of costly power and costly power purchase rate."*
>
> *xxxxxxxxxxxxxxxxxxxxxxxxxx*
>
> *"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 <u>any</u> consumer category to a tariff shock."*** *(Emphasis added)*

49. Contrary to the above, we find the Appellant and similarly placed consumers in category IX have been subjected to severe tariff shock by steep increase in tariff by 80% and consequently much higher contribution of cross-subsidy, even though not reported in the impugned order, which is in violation of Act, National Tariff Policy and National Electricity Policy and commission's own Tariff philosophy.

Issues Arising Out of Annual Revenue Requirement (ARR).

50. The proposal of ARR from MSEDCL for multi-year tariff from FY 2007-08 to FY 2010-11 and tariff proposal for FY 2007-08 did not include the creation of new categories and the Appellant and other consumers in pre-existing categories of LT-II (Non-domestic) or HT (industrial) were considered to be contributing to ARR at the respective applicable tariffs. The revenue gap arising between admissible projected expenditure and the collectable revenue at the pre-existing tariff rates in the ensuing year is to be bridged by balancing the tariff rates of the various categories of consumers in the process of tariff determination by the Commission *while ensuring transparency in exercising its powers and discharging its functions under the provisions of Section 86(3) of the Act.* It appears to have not been complied with in re-classification of the aforesaid consumers in the newly created category of LT-IX carrying an increase in rate of tariff of 80% compared to its pre-existing tariff and increased cross-subsidy contribution while at the same time the Appellant has complained that it was not given opportunity of being heard. Admittedly, the revenue from the revised tariffs under LT-IX vis-à-vis LT-II 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 authorized by the Act.

DSM Led Energy Conservation

51. Primarily the Distribution licensee has obligations to achieve energy conservation by way of reducing Transmission and Distribution Losses; aggressive drive to control theft and pilferage; effective energy audit; reactive power compensation by installation of capacitor; separation of agriculture feeder; conversion of LT into High Voltage Distribution (HVD) System in theft prone areas; effective implementation of meter of all consumers and other efficiency improvement measure. We observe that the Commission in its ruling at page 41 of the impugned order has remarked that "*some of the key directives given by the Commission from time to time, which could have helped MSEDCL avert this crisis situation in the State, have not been undertaken by*

MSEDCL," and while dealing with the performance status in the certain aforesaid areas has expressed its dissatisfaction.

52. The Commission itself has observed in the impugned order that the demand management/load curtailment scheme are not Demand-Side Management (DSM) but are basically programmed or forced load shedding at Distribution transformers or feeder levels and is also not satisfied with its implementation by MSEDCL.

53. The commission quite aptly refers DSM to be an intervention on the consumer side of the meter to diversify consumer loads and to improve energy efficiency of end-use equipment or encourage its replacement by energy efficient equipment to reduce electricity consumption by the consumer. The aforesaid intervention is intended to increase consumers' awareness and dissemination of information about the cost benefit analysis of energy conservation measures and is obviously non-coercive and voluntary in nature in so far as its enforcement by the Commission is concerned. The Commission admits that it is for the mutual benefits of licensee and consumers.

54. We hold that the consumers could be incentivized for adopting DSM measures but cannot be penalized for not doing so with tariff higher than that determined under the provisions of he Act and enforcement of DSM measures is not within the jurisdiction of the Commission. Enforcement of DSM measures for energy conservation is subject to regulation under Energy Conservation Act, 2001, by agencies so designated.

Conclusion

55. In view of our above findings and observations, we allow the appeal and set aside the tariff order dated 18 May 07 in Case no. 65 of 2006 and clarificatory order dated 24 Aug. 07 in Case No. 26 of 2007 and Case No. 65 of 2006 passed by the Maharashtra Electricity Regulatory Commission in so far as the Appellant consumer who is the direct consumer of MSEDCL, and is located either in 'Multiplexes and Shopping Malls' or in single ownership stand alone Shopping/Departmental Stores, is placed in tariff category

LT-IX and direct that it be charged tariff applicable to their respective parent categories [i.e. LT-II (non-domestic) and HT industrial] with effect from 01 May 07, the date on which the new tariff orders came into effect. The difference in tariffs charges be adjusted in the future bills of the Appellant consumer. However, it is open to the Commission to hold separate proceedings for load regulation under Section 23 of the Act, if considered expedient, keeping in view of our observations in this regard. .

56. I.A. No. 163 of 2007 which is for interim reliefs has become infructuous and hence dismissed.

Pronounce in open court on this 19th Day of December, 2007.

(A. A. Khan)
Technical Member

(Mrs. Justice Manju Goel)
Judicial Member