Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal Nos. 125 & 126 of 2007

Dated : 26th November, '07

Present : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Maju Goel, Judicial Member

A. No. 125/07:

Inorbit Mall (India) Pvt. Ltd. … Appellant
Versus
Maharashtra Electy. Regulatory Commission & Anr…Respondents

A. No. 126/07:

Vasudev C. Wadhwa Construction … Appellant
Versus
Maharashtra Electy. Regulatory Commission & Anr. … Respondents

Counsel for the appellant : Mr. Janak Dwarkadas, Sr.Adv. along with Mr. Kunal Vajani i/b M/s. Wadia Ghandy & Co. for A.No.125 & 126/07

Counsel for the respondents : Ms. Anjali Chandurkar, Adv. and Ms. Smieetaa Inna, Advocate on behalf of Respondent No.2, REL (A.No.125 & 126/07)

Mr. Buddy Ranganadhan, Advocate for Respondent No.1, MERC

The words and figures in **italic and bold are corrected versions** as per order of Tribunal dated 11.12.2007

O R D E R

These two appeals were heard simultaneously as they challenge the same order of the Maharashtra Electricity Regulatory Commission (MERC for short) dated 26.07.07 which was passed by way of clarifications of an earlier order dated 24.04.2007 in the matter of approval of Annual Revenue Requirement (ARR) for the control period of FY 2007-08 to FY 2009-10 of Reliance Energy Limited's (REL) distribution business. The learned counsel for the appellant Mr.Janak Dwarkadas vehemently argued that the impugned order should be set aside so as to remand the matter to the MERC for a fresh decision as the appellants were prevented from making their submissions on the issues involved in the absence of any notice. We have accordingly heard the counsel for the parties on this limited issue.

2) By an order dated 24.04.07, on the ARR and tariff petition of the REL, which is the respondent No.2 herein, the MERC created a new class of consumers namely LT-9 to whom an enhanced tariff was leviable. LT-9 category was described as "multiplexes and shopping malls". The appellants were earlier consumers in the tariff category of HT-2 industrial (HTP). HT-2 category continued in the tariff order. HT-2 category applied to HT supply for bulk usage (except group housing society HT-1) by Hotels, flight kitchen, storage, cinemas, theatres, film companies, commercial establishments, non-commercial establishments, educational institutions and HT industries. The respondent No.2, a distribution

licensee, continued to bill the appellants as consumers in HT-2 category despite the tariff order dated 24.0407. Subsequently vide the impugned order dated 26.07.07, the MERC issued certain clarifications. The portion of the impugned order that is in question is in Paragraph 15 which is as under:

"*15. Annexure-IV (Tariff Schedule) Page 97: Heading 9,.1 Applicability of LT-9 (Multiplexes and Shopping Malls (MSM) should be read as :*

"Applicable for electricity supply at LT for Multiplexes & 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."*

3) On account of this clarification the appellants who were hithertofore were being billed as HT-2 consumers began receiving bills as LT-9 consumers.

4) The grievance of the appellants is firstly that LT-9 category was created by the Commission in the regular tariff order without their being any proposal from the respondent No.2 to this effect and therefore when the ARR and Tariff Petition of respondent No.2 was being heard the appellants having no fear of their position being disturbed did not appear in those hearings. It is, however, not disputed that the appellants had received notice about the ARR petition of the respondent No.2. We are not going into the question

whether the tariff order of 24.04.07 is violative of the principles of natural justice or of the procedure laid down by Rules. What is, however, in issue here is whether the clarificatory order at Paragraph 15 quoted above whereby the placement of the appellants have been taken away from HT-2 category and have been included in LT-9 category in violation of the provisions of Section 64 of the Electricity Act, 2003.

5) The reason for creating the LT-9 category is the opinion of the MERC that these consumers were indulging in unwarranted commercial consumption but had higher capacity to pay and that their consumption required to be minimized in view of the severe energy deficit situation of Mumbai and rest of Maharashtra. Initially, the MERC did not include HT-2 category in this class of consumers indulging in unwarranted commercial consumption. The appellants are not challenging the original tariff order of 24.04.07 but they are aggrieved by the order dated 26.07.07 which brought them into the category of LT-9.

6) On behalf of respondent No.2 it is contended that Paragraph 15 of the impugned order does not do anything more than clarifying the original order and therefore the appellants cannot challenge the order dated 26.07.07 if they are not aggrieved by the first order dated 24.04.07. This submission is certainly not correct in as much as neither the appellants nor the respondent No.2 considered the appellants to be governed by LT-9 and the respondent No.2

continued to bill the appellants as HT-2 category. Since the original order had both the category of HT-2 and LT-9 and HT-2 also included consumers like cinemas, theatres, commercial establishments etc. there was sufficient reason to believe that the appellants fell in HT-2 category to which they initially belonged. Even if MERC did not intend to exclude HT-2 category answering the description of multiplexes and shopping malls from the category of LT-9 there was no pronouncements to that effect and therefore there is no reason why the interpretation of the original order should not have gone in favour of appellants.

7) Therefore, the impugned order i.e. paragraph 15 of the order of 26.07.07, does come as a surprise, there being no notice to the HT-2 consumers, particularly the present two appellants, about their being any further enlargement of category LT-9.

8) The two appellants contend that they have in fact taken praiseworthy steps to conserve energy. The appellant in appeal No.***125 of 2007*** has filed an affidavit that it has been in fact rewarded with 2007 Maxi Award of 'Save Power Have Power' Campaign by the International Council of Shopping Centers. The ***appellants*** in appeal No. 126/2007 also claim that it has received monetary incentives in the past for having been able to conserve power.

9) The appellants firmly believed that if they are allowed to put forward their case before the impugned order was passed, the MERC would not have included them in LT-9. The learned counsel for the MERC also conceded that the facts now placed on record by these two appellants were not before the Commission when the impugned order was passed.

10) In view of the above we think it would be appropriate to set aside paragraph 15 of the impugned order and direct the Commission to allow an opportunity to the two appellants as well as those who fall in that category, an opportunity of being heard and decide the issue afresh.

11) In view of the above we allow the two appeals and set aside the paragraph 15 of the impugned order and direct the MERC to pass a fresh order on the issue after giving full opportunity to the two appellants of being heard as to whether they should also fall in the same category as those in LT-9. This exercise should be carried out within a period of six weeks. During the interregnum period the appellants would be charged as per ***HT-2(Industrial)*** tariff subject to adjustment of excess payment made till date or deficit payment made hereafter in the subsequent bills that may be raised by respondent No.2 pursuant to the new order of the MERC

(Justice Manju Goel) **(A. A. Khan)**
Judicial Member **Technical Member**

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