Before the

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

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Case No. 69 of 2008

In the matter of Petition filed by Association of Hospitals, Pune, seeking review of the Order dated June 20, 2008 in Case No. 72 of 2007.

> Shri A. Velayutham, Member Shri S. B. Kulkarni, Member

Association of Hospitals 40, Sasoon Road Pune 411 001

..... Petitioner

V/s.

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

.... Respondent

ORDER

Dated: April 2, 2009

Association of Hospitals, Pune filed a Petition on August 4, 2008. It is averred in the Petition as under:

- The Petitioner is an Association of Hospitals in Pune, having 20 members. They are Public Trust hospitals, registered under the Bombay Public Trust Act, 1950. They are philanthropic organizations and are not working with a profit motive. They are providing medical relief services to the public at large. The surplus generated by them is not distributed to their trustees or members but utilized by the trust for the benefit of society for the purposes of medical relief only. The surplus is not utilized for luxurious purposes. The medical services are provided to common men at reasonable and concessional rates.
- (2) Maharashtra State Electricity Distribution Co. Ltd ("MSEDCL") supplies electricity to the Petitioner's hospitals. They receive electricity bill from MSEDCL every month. The bills for the use of electricity in the month of June 2008 have been received in the month of July 2008. The amount of bills



due and payable were higher by 70% to 95% than each of the previous 12 months' bills. These high amount bills inflicted a great shock to the Petitioner. On verifying the bills the Petitioner found that the energy charge for the month of June 2008 was charged at Rs. 7/-per unit whereas the previous bills were made at Rs. 3.40 Paise per unit. Also, the consumer category has been shifted from category HT-1 Industry to category HT - II (Commercial).

- (3) On further enquiry, it came to the knowledge of the Petitioner that the Commission passed an Order dated 31st May 2008 on an Application / Petition filed by the Maharashtra State Electricity Distribution Company Limited for Annual Performance Review (APR) and determination of tariff for the year 2008-2009 in Case No. 72 of 2007. The said Application / Petition appears to have been filed under an affidavit. It also appears that the Commission had directed that MSEDCL should issue a Public Notice in leading Newspapers and make the copies of the Petition available to enable interested parties to submit their suggestions and objections. However, the said Public Notice, so published, was not noticed by the members of the public at large, and more particularly, the Management of the Hospitals.
- (4) The said Public Notice does not mention any proposal about the recategorisation of Trust Hospitals and about increasing their Electricity Tariff for the financial year 2008-2009.
 - The objections and suggestions therefore, could not be advanced and placed before the Commission by the Petitioner.
- (5) The operative Order issued by the Commission on 31st May 2008 (Page 37 of 224) does not mention the Tariff Rate against the category HT II commercial, and the columns are blank. On 5th June 2008 the Commission published the errata / corrigendum, specifying the Tariff Rates for HT II commercial @ Rs. 7- per unit (Page 43 of 224). The detailed Order was passed by the Commission on 20th June 2008.
- (6) The Commission has created a new category of HT – II Commercial and has approved an increase of almost 106% in the tariff. Hospitals have been recategorized into this HT-II Commercial category along with commercial consumers. This reflects complete non-application of mind. Multiplexes and shopping malls and other High Tension Voltage Electricity consumers are basically profit motivated establishments. The policy of cross subsidization that has been followed, accepted and adopted by the Commission makes it necessary to levy an additional burden on such profit motivated establishments. Public Trust Hospitals are predominantly operated on charitable/no profit no loss motives. Increasing the tariff structure for such weak consumers and equating them with commercial users is unreasonable, and is therefore, unconstitutional. The approved increase in tariff is arbitrary, as it is not based on any rational criteria. The re-categorization has no basis whatsoever and hence, the same is violative of the Constitution inasmuch as the same is capricious.



- (7) MSEDCL has neither proposed in its application to change the category of Hospitals from HT I to HT II nor an increase in energy charges from Rs. 3.40 to Rs. 7/- per unit. The change of category and raising of the tariff rate to Rs. 7- per unit from Rs. 3.40 per unit has been done by the Commission. It has no bearing and logic and it is arbitrary and without application of mind.
- (8) An opportunity of putting forth the case on behalf of Public Trust Hospitals ought to have been given before the tariff was made effective. Petitioner Trust Hospitals are entitled to be heard in this matter of re-categorisation and increase in Tariff.
- (9) By passing the impugned Order, the Commission has treated unequals as equals. This is a clear violation of Article 14 of the Constitution of India. Consumers who utilize electricity to generate profits are in a class apart from the consumers such as Public Trust Hospitals utilizing electricity for life saving and need based purposes.
- (10) The findings recorded by the Commission and its order that the Hospitals getting supply at HT Voltages irrespective of "whether they are Charitable, Trust, Government-owned and operated, etc." would be classified under HT II commercial category along with multiplexes and shopping malls are not supported by any reasons whatsoever. The same are, therefore, arbitrary and violative of the Constitution.
- (11) The findings recorded by the Commission are so unreasonable that no person trained in the domain of Law would ever reach the same conclusion on the basis of the material, which was before the Commission, and hence, the findings are perverse.
- (12) The proposal of creation of a new category HT II Commercial and shifting Trust Hospitals from HT I Industry to HT II commercial category, and fixing the Tariff for the Financial Year 2008-2009 at Rs.7- per unit is neither in the Petition of MSEDCL nor in the public notice. Hence, the question of receiving suggestions and objections from the Public, more particularly from Public Trust Hospitals does not arise. Hence, the findings are vitiated.
- (13) The Commission has not applied its mind to Section 62(3) of Electricity Act 2003 ("EA 2003"). It has not considered the purpose of supply to Public Trust Hospitals which function on life saving and need based, non-profit making motives and not luxurious purposes.
- (14) The impugned increase in tariff is shockingly harsh, disproportionate, uncalled for and has no nexus with the purpose sought to be achieved and hence, the same is arbitrary.
- (15) The approved increase is not in consonance with the recommendations and is directly contrary to the National Electricity Policy more particularly Clause 5.5.3, which provides for an urgent need to correct the imbalance without



giving "tariff shock" to consumers. The approved increase is also inconsistent with the provisions of Sections 61 and 62 of the EA 2003 inasmuch as the same does not safeguard the consumer's interest. The Commission is expected to be guided by sub-Section 3 of Section 62 and differentiation has to be made only according to the purpose for which the supply is required. This inherently means that the proposed use is a relevant and important criteria for determining tariff rates and category.

(16) The Petitioner states that:

a) Page No. 33 of 224 of the detailed Order dated 20th June 2008 mentions that the average Tariff increase allowed for the Financial Year 2008-2009 is 6.76%. If this rise is calculated on the previous Tariff rate of Rs. 3.40 applicable to hospitals, the rise comes to Rs. 0.23.

$$3.40 \times 6.76$$
---- = 0.23

and hence, the New Tariff rate for Trust Hospitals comes to 3.40 + 0.23 i.e. Rs. 3.63 per Unit. This new Tariff rate of Rs. 3.63 per unit should have been mentioned in the Order made by the Commission. Instead of Rs. 3.63 the impugned Order mentions Rs. 7/- per unit. It shows that the new determination of Tariff for the Financial Year 2008-2009 is not commensurate with the % increase allowed by the Order on Page 33 of 224. It is prayed to amend the Tariff accordingly.

b) Public Trust Hospitals were in category HT - I (Industrial) previously and the Tariff was Rs. 3.40 per unit. Now the revised Tariff is Rs. 7/- per unit. The increase is (7.00 - 3.40) = 3.60

% Increase =
$$(7.00 - 3.40) \times 100$$

= 3.40
= 3.60×100
= 105.88%

The increase allowed as per the impugned Order is 6.76% The actual rise is 105.88

This 15.87 times rise is a heavy burden and bound to give a painful shock to the affected consumers.

(17) The policy on "Tariff Shock" is mentioned in the National Electricity Policy at Para 5.5.3. It reads as follows:



"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 reduce progressively and gradually."

- (18) Such an increase of 106% (15.87 times the allowed % rise) is not tenable and needs to be rolled back and should be restricted to 6.76% or thereabouts. Members of Petitioner Association Public Trust Hospitals, were previously in category HT I. There is no convincing reason mentioned for shifting them to category HT II Commercial. Consumers using HT supply for commercial purposes have been categorized separately. HT II Commercial now includes consumers such as Hotels, Shopping Malls, Film Studio, Cinema Theatres, Charitable Hospitals, Private Hospitals, and Government Hospitals, etc.
- (19) Except the Public Trust Hospitals and Government Hospitals all other establishments have a purely profit-making motive. It is definitely not the purpose of the Trust Hospitals to make a profit, and therefore, it is unfair and unjust to classify them in the same category as Profit making establishments. Public Trust Hospitals provide medical services to the public at large, they have no profit motive, are philanthropic in nature and hence, they should be given separate and special treatment in the matter of applicability of a lower Tariff.
- (20) The Average Cost of Supply for the Financial Year 2008 -2009 as mentioned in the Order on Page 205 of 224 is Rs. 3.62 per unit. The Tariff for Public Trust Hospitals in HT I category with an increase of around 6.76% comes to Rs 3.63 per unit, which is almost equal to the average cost of supply and it is in consonance with the policy of Cross Subsidy and bringing the Tariff near to the average cost of supply per unit.
- (21) Referring to Page 71 of the impugned Order dated 20th June, 2008, MSEDCL has pointed out that the National Tariff Policy provides for cross subsidy levels within the range or +/- 20% of the average cost of supply, latest by the end of the year 2010 2011.

The Cross Subsidy levels \pm 20% of the Average Cost of supply of Rs. 3.62 per unit

With a 6.76% rise on the previous Tariff of Rs. 3.40 per unit, the New Tariff for the Financial Year 2008-2009 comes to Rs.3.63 per unit, which is very much within the cross subsidy level, and need not be disturbed by raising it to Rs. 7-per unit. However, the Order dated 20th June, 2008 has disturbed it without any reasons.



- (22) Moreover, use by consumers such as Hotels, Malls, Multiplexes is luxurious, whereas use by Trust Hospitals, is not at all luxurious but need based and life saving. It is earnestly prayed that the Commission should take a decision in favour of Public Trust Hospitals and their category may be restored to HT -1 Industrial.
- (23) MSEDCL has secured its complete revenue requirement without the creation of new category in its proposal. Also the Commission has not counted the revenue from HT II commercial category in arriving at the ARR, at the revised Tariff Rates. Hence, it is not necessary to create new category HT II commercial.
- (24) The Commission has ignored several relevant facts and has in fact acted contrary to the provisions in the National Electricity Policy, National Tariff Policy, provisions in the EA 2003 and MERC (Terms & Conditions of Tariff) Regulations, 2005, in the matter of creation of a new category, Cross Subsidy, Tariff Shock, and Determination of excessively high Tariff.
- (25) The Commission has jurisdiction to receive, entertain and determine this Review Petition under Regulation 85 of the MERC (Conduct of Business) Regulations, 2004.
- (26) The detailed Order in Case No. 72 of 2007 was passed on 20th June 2008 and this Review Petition has been filed within the prescribed time.
- 3. In the above background, the Petitioner has prayed as under
 - "1) The M.E.R.C. Order dated 20th June 2008 in case no. 72 of 2007 may be reviewed & amended in respect of category of the Petitioner Public Trust Hospitals and they may be restored to category HT I Industry.
 - 2) M.S.E.D.C.L may be directed to revise the electricity bill of June 2008 and send further bills as per the HT -1 Industry category.
 - 3) For such other appropriate relief and orders as the Hon. Commission may deem fit in the circumstances of this review petition.
- 4. An interim application has been filed by the Petitioner on 5.11.2008 stating that pending adjudication of the Review Petition, in the meanwhile, the members of the Petitioner's Association are being made to pay the increased tariff rate, which is causing huge losses to the Public Charitable Trusts. The Petitioner / Applicant has excellent chances of success in the matter. No harm or prejudice would be caused to the Distribution Company if interim relief is granted as the members of the Petitioner's Association are always diligent in making the reasonable and due payments. However, irreparable losses and grave hardships would be caused to the members of the Petitioner Association if interim relief as prayed for is not granted in this matter. Balance of convenience therefore, lies in favour of the Petitioner. The Petitioner has prayed as under:



- "1) During pendency of the Review Petition filed by the Petitioner / Applicant, the implementation, execution, effect and operation of the Tariff Order dated 31st May 2008 passed in Case No. 72 of 2007 be stayed and the members of the Petitioner Association be permitted to pay their electricity bills as per the rates prevailing prior to the said Tariff Order being passed.
- 2) Ad-interim relief in terms of prayer clause 1) be granted;
- 3) For such other appropriate relief and orders as the Hon. Commission may deem fit in the circumstances of this application.
- A hearing was held in the matter on 5.11.2008. Shri. Nargolkar, Advocate appeared for the Petitioner. He submitted that he would make submissions on the admissibility of the present review petition. He submitted that the tariff stands immensely increased in the impugned Order for the members of the Petitioner. He submitted that the EA 2003 required the Commission to have granted an opportunity of hearing to the members of the Petitioner before the impugned Order was passed. Public Notice should have been given for the increase in tariff proposed in the impugned Order. However, the Public Notice as published did not even mention about the tariff increase or change in tariff categorisation proposed in the Public Notice. Counsel referred to Section 64 of the EA 2003 regarding the procedure of issuance of a tariff Order by the Commission. Referring to Regulation 85 of the MERC (Conduct of Business) Regulations, 2004, Counsel submitted that the present review petition is maintainable because there is an error , which is apparent from the face of the record of the impugned Order because the Public Notice that was published did not mention about the tariff increase or change in tariff categorisation, thereby depriving the members of the Petitioner an opportunity of hearing. This is contrary to the EA 2003 and therefore, there is a patent error. This is a sufficient ground for the Commission to grant the present review petition. Per contra, Shri. Ravi Prakash, appearing for MSEDCL submitted that the present review petition in effect challenges the impugned Order, which cannot be taken up under review jurisdiction of the Commission. Counsel submitted that the procedural irregularities as pointed out by the Counsel for the Petitioner can never be a ground to seek review. Accordingly, he submitted that the present review petition is not maintainable. Counsel for the Petitioner submitted that any violation of the principles of natural justice is not merely an irregularity, it is an illegality. This is a sufficient ground for grant of review. It is within the jurisdiction of the Commission to hold that the Public Notice which was published was not a proper notice as it did not call for suggestions and objections in relation to the tariff re-categorisation. It was contended that the Commission can direct the re-publication of the notice and a hearing may be held all over again with respect to the impugned Order and a fresh order could be passed after the review is undertaken. Per contra, according to the Counsel for MSEDCL, this Review Petition is in effect an appeal.

An application to take objection as to maintainability of the present review petition was filed by the Respondent on 19.11.2008. It is stated therein that the said Review Petition was heard at length on 5.11.2008, and the Counsel appearing for the



Respondent submitted to the Commission that the present Review Petition is not maintainable and in furtherance to that submission present application is being filed. The Respondent reserves its right to file detailed reply, in case, the Commission holds that the present Review Petition is maintainable. It has been further stated that the present Review Petition is filed under Regulation 85 of the MERC (Conduct of Business) Regulations, 2004. It is submitted that the Petitioner herein have failed to point out any ground for review in terms of provisions of Regulation 85 of the MERC (Conduct of Business) Regulations 2004. Even if the whole case of Petitioners is taken on face value, they might have a case for Appeal and not for Review. Further, the present application is bonafide and it is in interest of justice to consider it.

6. A rejoinder to the objection as to maintainability of the Review Petition has been filed by the Petitioner on 14.1.2009. It has been submitted that Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 is a statutory provision enabling the party aggrieved by direction, decision or order of the Commission to take recourse to a proceeding of review. Accordingly, the Association of Hospitals has filed the Review Petition under the provisions of Regulation 85 of the said Regulations. Furthermore, several grounds have been mentioned in the Review Petition including the ground that no notice was given in respect of change of category. It is submitted that merely for the reason that the grounds, in the opinion of the counsel and officers of the Distribution Company, are not sufficient grounds for review, it cannot be said that the Review is not maintainable. The Distribution Company has not been able to show that the review is not maintainable though the application is in respect of the question of maintainability of the Review Petition. Whether a sufficient ground has been made for allowing the Review is an aspect which has to be considered at a stage when it is held that the review is maintainable. To say that the grounds taken in the Review Petition are not sufficient for the review being allowed is to make a statement on the merits of the matter. Sufficiency of cause to entertain Review is an aspect which is different from the maintainability of the Review Petition. The Review Petitioners that is the Association of Hospitals have demonstrated the enabling provision to file a Review Petition. It is submitted that the Commission does not have the power to dismiss matters in limine which is prerogative reserved for Courts of Record that is the High Courts and the Supreme Court. No such power is available as is evident from Regulation 85, and more particularly, Clause (c) and (d) thereof. The Commission is expected to exercise the powers of the Civil Court in proceedings for review and where there is no sufficient ground for review that is on merits, the Commission may reject the Review Application. However, the Commission cannot decline to exercise its discretion on the basis that Review is not at all maintainable. It is further submitted that the Distribution Company has failed to file any reply on the merits of the matter, and therefore, the contentions and averments raised by the Association of Hospitals have gone unchallenged, uncontroverted and therefore are admitted by the Distribution Company. This is sufficient ground to entertain the Review. The Apex Court as well as the High Courts have consistently taken a view that unless a reply on merits is filed, an objection as to maintainability cannot be raised by way of an application. On this ground alone, the application filed by the Distribution Company deserves to be dismissed. Having demonstrated the statutory provision enabling the Association of Hospitals to file a Review Petition, the



Commission ought to exercise its review jurisdiction and deal with the matter on merits.

- 7. Having heard the parties and after considering the material placed on record, the Commission is of the view that the present review petition needs to be tested against the requirements of review proceedings. The EA 2003 gives the power to the Commission to review its decisions, directions and orders, as under:-
 - "94. (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -
 - ... (f) reviewing its decisions, directions and orders;"

The proceedings before the Commission are held in accordance with the MERC (Conduct of Business) Regulations, 2004. Regulation 85(a) has been inserted therein keeping in view the provisions of Section 94(1) above. Regulation 85(a) provides as under:-

"85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission." (emphasis added)

At Page No. 265 of the Petition as filed appears a list as under:-

"List of Trust Hospitals (Members of the Association)

S NO NAME OF THE HOSPITAL

- 1 Aditya Birla Foundation Public Trust
- 2 Bharati Vidyapeeth Medical Foundation
- 3 Deenanath Mangeshkar Hospital
- 4 Deendaval Hospital
- 5 Grant Medical Foundation, Ruby Hall Clinic
- 6 Hardikar Hospital
- 7 Inlaks & Budhrani Hospital
- 8 Jehangir Hospital
- 9 Joshi Hospital & Ratna Hospital (MMF)
- 10 KEM Hospital



- 11 Kokan Mitral Mandal Medical Trust
- 12 Kotbagi Hospital
- 13 Krishna Hospital
- 14 Lokmanya Care Hospital
- N.M. Wadia Institute of Cardiology
- Niramaya Hospital
- 17 Poona Hospital & Res. Centre
- 18 Prayag Hospital
- 19 Hastimal Sancheti Memorial Trust
- 20 Sanjeevan Hospital
- 8. The Petitioner has stated that it is an Association of Hospitals in Pune. It has 20 members. The above are those members all or some of whom have preferred appeals under Section 111 of the EA 2003 before the Appellate Tribunal for Electricity from the said Order dated June 20, 2008 in Case No. 72 of 2007. The Commission has been made respondent to the said appeals. That is how the Commission is aware of the fact of the pendency of the appeals. However, this fact was not disclosed to the Commission by the Petitioner Association. The members of the Petitioner Association cannot be held to be different than the Petitioner Association. Under Regulation 85(a) as above, review can be filed from an "order of the Commission, from which (i) no appeal has been preferred ..". Since, all or some of the above members have preferred appeals under Section 111 of the EA from very same Order dated June 20, 2008 from which the present review has been sought, the Review Petition has to be dismissed because appeals have been preferred by the members of the Petitioner Association. The first criteria for grant of review has not been fulfilled. As regards the other grounds of admissibility of the Review Petition based on violation of principles of natural justice, the Commission is of the view as under:-
- (i) The impugned Order does not violate the principles of natural justice nor is it illegal. The Respondent company supplies energy to lakhs of consumers. However, the statute that is EA 2003 does not give rights to every one of these consumers to be heard individually and separately. The principles of natural justice while passing tariff Orders is circumscribed by the procedure of tariff Order laid down in Section 64 of the EA 2003, which reads as under:-

"Procedure for tariff Order.

- 64. (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.
- (2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.
- (3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-



- (a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;
- (b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

...

(6) A tariff order shall, unless amended or revoked, shall continue to be in force for such period as may be specified in the tariff order."

Thus, it can been seen from sub-section (3) of Section 64 that the Commission is required to consider all the suggestions and objections received from the public before issuing the tariff Order. Sub-section (2) of Section 64 requires the applicant to publish the application, in such abridged form and manner, as may be specified by the Commission. In the present case, the Respondent Company has complied with the above requirement. Furthermore, the text of the publication of the tariff application in newspapers mentions that suggestions and objections can be provided by the public on the same.

- (ii) The ratio laid down by the Appellate Tribunal For Electricity in <u>Appeal No. 106 of 2008 in its judgment dated 26th February 2009 in the matter of Mumbai International Airport Pvt. Ltd. Vs. MERC and Ors, as given below squarely applies to the present review petition:-</u>
 - "14) It is not the case of the appellant that the Commission had no power to create a tariff design different from the one proposed by the licensee. The Commission has the power to design the tariff as per its own wisdom. The Commission need not, before issuing the actual order, publicly announce the tariff it proposed and call for public comments. In fact this is not even the appellant's contention.
 - 15) The rule of natural justice requires the Commission to issue a public notice about the ARR and Tariff petition of the licensee and to allow the public to make its submissions on the ARR and Tariff proposals. The Commission has, thereafter, to design the scheme for recovery of the ARR keeping in view various relevant factors. If the classification of the consumers can be supported on any of the grounds mentioned in section 62(3) it would not be proper to say that the tariff fixing was violative of



principles of natural justice because the Commission did not issue a public notice of the tariff categories which the Commission had intended to create.

- 16) We have no hesitation to say that the Commission is entirely at liberty to create a new category which is not available in the licensee's proposal provided of course the new category falls within the scope of section 62(3) of the Act...."
- (iii) After considering all suggestions and objections received from the public, the Commission is empowered under Section 64(3)(a) to issue a Tariff Order accepting the application with <u>such modifications or such conditions</u> as may be specified in that Order. Section 64(3(a)) provides as under:-
 - "(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;"

The words "with such modifications or such conditions" are important. This means that even if any specific categorisation was not proposed by Respondent Company and consequently was not published in the abridged application in newspaper, under Section 64(3)(a), the Commission could create any category because the Commission had the power to issue the impugned Tariff Order accepting the application of the Respondent Company with such modifications or such conditions as specified in that order. Creation of the specific categorisation is a modification to the application of the Respondent Company as specified in the impugned Order. This does not require to call for suggestions and objections from the public once all over again after the first such public process has been conducted.

- (iv) The rationale for creating any specific categorisation or re-categorisation is that the Commission is required to determine the tariffs in such a manner that bridges the revenue gap which results from the difference in the
 - (i) aggregate revenue requirement that the licensee believes it is permitted to recover with such modification approved by the Commission, and
 - (ii) the expected revenue at the prevailing tariff rates.

Therefore, the difference between revenues and costs are to be bridged by inter alia a tariff increase and / or categorisation or re-categorisation of tariff categories. Due to these reasons, it is not possible for the Commission to always accept the tariff rates as proposed by the licensee because the same may not enable the difference between revenues and costs to be bridged. The Commission has to therefore modify the rates as proposed by the licensee in order to balance the factors mentioned in Section 61 of the EA 2003.



- (v) The Parliament neither stipulated calling for suggestions and objections from the public before the Commission could effect the modification as stated above nor has therefore the same been stipulated in Section 64 of the EA 2003. This means that the Parliament did not envisage that the Commission would need to consider suggestions or objections of the public on the proposed modifications or conditions with regard to the application filed under sub-section (1) and published under sub-section (2) of Section 64.
- (vi) The ratio laid down by the Hon'ble Supreme Court in "W. B. Electricity Regulatory Commission v. C.E.S.C. Ltd." AIR 2002 SUPREME COURT 3588 = 2002 AIR SCW 4212 in the said case squarely applies to the present petition, as under:-
 - 40.A combined reading of these provisions of the Act, rules and regulations, clearly shows that the statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right is to be regulated by the Commission. This right of the consumers is neither indiscriminate nor unregulated as erroneously held by the High Court. It is true that in Calcutta the respondent-company supplies energy to nearly 17 lacs consumers, but the statute does not give individual rights to every one of these consumers. The same is controlled by the Regulations. Therefore, the question of indiscriminate hearing as held by the High Court will not arise." [Emphasis supplied]
- (vii) In line with the above judgment, there are certain provisions in the MERC (Conduct of Business) Regulations, 2004, which are reproduced hereunder:-
 - 2(viii) "Proceedings" mean and include proceedings of all nature that the Commission may conduct in the discharge of its functions under the Act;

Participation of Consumer Associations and Other persons:

- 18. The Commission may permit any person, including any association or other bodies corporate or any group of consumers, to participate in any proceedings before the Commission. In this behalf, the Commission may if it considers necessary –
- (a) notify a procedure for recognition of associations, groups, forums or bodies corporate as registered consumer association for the purposes of representation before the Commission;
- (b) appoint any Officer or any other person to represent the consumers' interest in the proceedings before it, on such terms as to fees, costs and expenses by such parties in the proceedings as considered appropriate.

Proceedings to be open to public:

87. The proceedings before the Commission shall be open to the public. Provided that admission to the place of hearing shall be subject to availability of sitting accommodation.



Provided further that the Commission may, if it thinks fit, and for reasons to be recorded in writing, order that the proceedings of any particular case shall not be open to the public or any particular person or group of persons."

In light of the above legal provisions, the contention raised by the Petitioner is absolutely devoid of merits because neither does the statute require hearings to be iterative nor requires the issuance of draft tariff Order with the modifications (creation of new category or re-categorisation) to the public for their suggestions or objections. Therefore, the contention raised by the Petitioner is dismissed. The Commission holds that there is no error in the impugned Order. Moreover, the impugned Order was hosted on the website of the Commission as every order passed by the Commission is hosted on its website and thus comes into public domain and becomes public knowledge once the same is uploaded in the website. Since, there are millions of consumers whose tariff was decided in the impugned Order, it is neither possible to send copies of the impugned Order to each of these consumers nor is it required under Section 64(4) of the EA 2003. In accordance with such requirement, the Commission uploaded the impugned Order on its website, which is accessible by all concerned.

(viii) Regulation 13 of MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 provide as under:-

"13. Classification and Reclassification of Consumers into Tariff Categories

The Distribution Licensee may classify or reclassify a consumer into various Commission approved tariff categories based on the purpose of usage of supply by such consumer:

Provided that the Distribution Licensee shall not create any tariff category other than those approved by the Commission."

- (ix) The Commission is of the view that the submissions made by the Petitioner need to be tested against the requirements and the settled principles of review proceedings. The EA 2003 gives the power to the Commission to review its decisions, directions and orders, as under:-
 - "94. (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -
 - (f) reviewing its decisions, directions and orders;"



The proceedings before the Commission are held in accordance with the MERC (Conduct of Business) Regulations, 2004. Regulation 85(a) has been inserted therein keeping in view the provisions of Section 94(1) above. Regulation 85(a) provides as under:-

"85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission."

In light of the above provisions, the submissions as made must satisfy the requirements laid down above and only then could the review as sought be granted. Also, it is well settled that there are definitive limits to the exercise of the power of review. However, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power, which may enable an appellate court to correct all manner of errors committed by the subordinate court. In view of the position in law explained in the above paragraphs, the Commission holds that the submissions as made by the Petitioner do not satisfy the requirements laid down above with regard to grant of review.

In view of the above, the review petition accordingly stands dismissed.

Sd/-(S.B. Kulkarni) Member Sd/(A. Velayutham)
Member

(P.B. Patil) Secretary, MERC