Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 29 of 2009

In the matter of

Petition of M/s Mumbai International Airport Ltd. seeking re-determination of the tariff, in view of the Appellate Tribunal's Judgment dated 26.02.2009 in Appeal No. 106 of 2008

Shri V.P. Raja, Chairman
Shri S. B. Kulkarni, Member

ORDER

Dated: November 23, 2009

M/s. Mumbai International Airport Ltd. (MIAL) submitted a Petition under affidavit before the Commission on March 17, 2009, seeking re-determination of the tariff of the Appellant, in view of the Appellate Tribunal's Judgment dated February 26, 2009, in Appeal No. 106 of 2008.

2. The relevant paragraphs of the Commission's Order in Case No. 66 of 2007 dated June 4, 2008 are reproduced below:

> *"The existing HT-II Industrial category has been renamed as HT-I Industrial category, in order to ensure consistency with the nomenclature applicable for other licensees. The existing HT-I Group Housing Society category has also been renamed as HT-III Group Housing Society category, in order to ensure consistency with the nomenclature applicable for other licensees.*
>
> *The Commission has created a new category, viz., HT-II Commercial, to cater to all commercial category consumers availing supply at HT voltages, and currently classified under the existing HT-II Industrial or LT-IX (multiplexes and shopping malls). This category will include Hospitals getting supply at HT voltages,*

irrespective of whether they are charitable, trust, Government owned and operated, etc. The tariff for such HT-II commercial category consumers has been determined higher than the tariff applicable for HT-I industrial, in line with the philosophy adopted for LT commercial consumers. Such categorisation already exists in other licence areas in the State, and is hence, being extended to REL licence area also."

3. The relevant paragraphs of the Hon'ble Appellate Tribunal's ("ATE") Judgment in Appeal No. 106 of 2008 dated February 26, 2009 are reproduced below:

"24) It has been submitted before us that airport being public utility service should be given special consideration and should not be exposed to commercial tariff. ***Whereas there is some substance in the arguments of the appellant, it cannot be denied that airports, apart from having the essential services pertaining to the aviation services, also have variety of non-aviation commercial activities such as shops, restaurants, bars, retail stores, duty free shops etc. While fixing tariff for the appellant, the Commission may like to have differential tariff for the electricity consumption pertaining to purely aviation services such as runway, lighting, control towers, checking and baggage handling areas, waiting lounges, air conditioning etc. and the pure commercial activities such as duty free shops, restaurants, commercial advertisement areas etc. because one cannot distinguish between a retail store inside the airport and outside airport. It cannot be the case that similar commercial establishments outside the airports are subjected to commercial tariffs and inside the airports are subjected to lower tariff particularly when inside the airport passengers are required to pay exorbitant prices at the airport premises.***

25) The Commission will now have to re-determine the tariff for the appellant keeping in view the monetary implications for the two sides, the nature of the consumption of the appellant, as also the observations made by us in this judgment. It will be appropriate that the Commission affords the appellant an opportunity of being heard on all relevant aspects before the tariff is re-fixed. On such re-determination amounts found to have been paid in excess by the appellant to the respondent No.2 will have to be refunded. We have to keep in view that sudden refund of this amount will cause a resource crunch for the respondent No.2. At the same time we have to remember that it may not be possible for the

appellant to recover the excess amount already paid to be passed on to its own consumers.

26) In view of the above considerations, we allow the appeal and set aside the impugned tariff order to the extent of placing the appellant in the newly created category of HT-III for the purpose of higher tariff for the appellant. We also direct the Commission to re-determine the tariff payable by the appellant after affording the appellant an opportunity of hearing on all relevant aspects and keeping in view the monetary implications for the appellant and the respondent No.2, the nature of consumption of the appellant and the observations made in this judgment, within the next eight weeks. The excess amount recovered from the appellant will be adjusted in the future electricity bills of the appellant at the rate of not more than Rs. 1 Crore per month."

4. MIAL, in its Petition, submitted as under:

a) The Government of India, as part of its policy to encourage private sector participation in the development, modernization and up-gradation of airports in India decided to undertake the modernisation and upgradation of key airports in India, including the Chhatrapati Shivaji International Airport, Mumbai, through private parties through the process of competitive bidding. MIAL was awarded the contract for the operation, maintenance, development, design, construction, up-gradation, modernisation, finance and management of the Mumbai Airport and Airport Authority of India (AAI), vide Operational Management and Development Agreement (OMDA) dated April 4, 2006 granted MIAL inter alia, the exclusive right and authority to undertake the above mentioned activities with terms and conditions of OMDA.

b) MIAL, as the operator of the Mumbai Airport, is providing various aeronautical services and facilities to the airlines and the passengers such as runway for takeoff and landing of aircrafts, provisions of light operation assistance and crew support systems, movement and parking of aircraft and control facilities, aerodrome control facilities, airfield lighting systems, terminal building check in and collection of baggage for departing and arriving passengers, flight information display screens and public address systems, lifts, heating ventilation, air conditioning, escalator and passengers conveyors, toilets and nursing mother rooms, x-ray services for carry on checking baggage, infrastructure for ground support equipment, aero bridge facilities for embarkation and disembarkation of passengers, airline lounges, cargo

terminals, ground handing services, etc.. MIAL requires 24 hours uninterrupted power supply for these activities. Electricity constitutes approximately 25 % of the operational expenses of MIAL for carrying out various aeronautical and other services of the airport. RInfra-D is supplying electricity to MIAL and till FY 2007-08, MIAL was covered under the category HT-II Industrial.

c) RInfra-D filed its Petition for Annual Performance Review (APR) for FY 2008-09, and the Commission issued the Tariff Order dated June 4, 2008 revising the tariffs for RInfra-D for FY 2008-09. The Commission created a new category of HT consumers, namely, HT- II Commercial, on the ground that the consumption of this category was increasing very rapidly, which resulted in increased procurement of the costly power. MIAL was included under this new category of HT-II Commercial by RInfra-D for the purpose of monthly billing. The Tariff applied to MIAL under this category was as under:

Demand Changes:	Rs. 150/kVA/month
Energy Charges:	Rs. 6/kWh
Reliability Charges:	(i) Standby Charges – Rs. 0.27/kWh
	(ii) Expensive power – Rs. 2.50/kWh

The inclusion of MIAL in the newly created HT- II Commercial category led to increase in tariff by 43.88% for FY 2008-09 as compared to the tariff in FY 2007-08.

d) Aggrieved by the increase in tariff, MIAL filed an Appeal before the Appellate Tribunal for Electricity (ATE) against the Order date June 4, 2008 (Appeal No. 106 of 2008). The Hon'ble Tribunal vide its Judgment dated February 26, 2009 set aside the Commission's Order date June 4, 2008 to the extent it placed MIAL in the newly created category of HT-II Commercial. The Hon'ble Tribunal further directed the Commission to re-determine the tariff payable by MIAL keeping in view the monetary implications, the nature of consumption, loading of marginal cost of power purchase, loading of high cross-subsidy, etc. The said Judgment further required the Commission to afford MIAL an opportunity of being heard before re-determining the tariff payable by MIAL

e) MIAL, in pursuance of the said Judgment passed by the Tribunal, has sought re-determination of tariff by the Commission on the basis of the following facts and submissions:

(i) MIAL constitutes an essential service, and has to be therefore distinguished and differentiated from other commercial activities. MIAL is an airport operator, who inter-alia provides the requisite aviation infrastructure in terms of various aeronautical and non-

aeronautical services and facilities to the airlines and the passengers. MIAL requires 24 hours uninterrupted power supply to efficiently and safely run these services.

(ii) MIAL is not a commercial establishment like other establishments that have been classified under such category. The operations of MIAL need to be distinguished from the operation of entities providing commercial services to the customers at large. A restaurant or a hotel or a shopping mall or a retail shopkeeper provides products/services to the individual users for a price, which is received directly from such users on purely commercial considerations. The infrastructure industry such as airports does not involve purely commercial transactions. MIAL is part of the infrastructure sector of the State, and is primarily responsible for facilitating domestic and international air travel from the State of Maharashtra. MIAL constitutes an essential service, and therefore, has to be differentiated from commercial outlets for the purpose of tariff determination, since the purpose of supply to MIAL is for essential services and not commercial services.

(iii) It is necessary for the Commission to consider that by the very nature of the services provided by MIAL, the consumption of electricity is very high. Moreover, because of the very nature of the services provided by MIAL, it is very difficult for MIAL to reduce its electricity bill without affecting the quality, efficiency and safety of the services provided by it. The load factor of MIAL is about 90% for the entire period of the day, making it a base load consumer. There are no noticeable spikes in MIAL's consumption and therefore, MIAL does not contribute to the requirement of short-term expensive power.

(iv) Under the terms of OMDA entered into with the Government of India, MIAL is allowed to levy aeronautical charges for the provision of the above aeronautical services at the Mumbai Airport. The said aeronautical charges are determined according to the relevant provisions of the State Support Agreement (SSA) dated April 26, 2006 executed between the Union of India and MIAL. The SSA provides for nominal annual increase of 10% only in the charges from 2008. The Business Plan submitted to AAI and Financial Institutions is based on the premise that there would be increase, though nominal, in charges as per contractual agreement with Government of India. Loans have been extended by lenders presuming increase as per the Agreement.

Therefore, MIAL is not entitled to increase its charges to offset the increase in electricity tariff. As a result, it has to bear the brunt of any abnormal increase in electricity tariff, which would ultimately affect its operations.

(v) The development and modernisation activities carried on by MIAL under the modernisation project, and the repayment of loan liabilities incurred in relation to such project are dependent on the revenue earnings of MIAL. The Mumbai Airport is a land constrained airport with limited scope to expand capacity, as out of total land area of 1976 acres, about 300 acres of land is under encroachment and about 300 acres of land is in possession of various agencies such as NACIL, CPWD, MET, Health and AAI. MIAL is hence, burdened with huge exceptional expenditure towards relocating various facilitates belonging to such agencies. The economical viability and operational efficiency of MIAL would be affected on account of higher electricity tariff since the charges realisable by MIAL and the resultant revenue for meeting all the developmental activities is regulated by the Government of India and AAI under OMDA and SSA.

(vi) MIAL is rendering essential services as compared to commercial establishments that are carrying out purely commercial activities. The Commission, through its communication dated July 2, 2008, has issued clarification to RInfra-D that IT and ITES consumers taking supply at HT voltage are to be classified under HT-I industry category having regard to the importance of the IT and ITES sector for the economy of the State. Similar classification should also be provided to MIAL, which is rendering infrastructure services for the public benefit.

(vii) In fact, MIAL has been recognised as an industrial establishment by various authorities. The Government of Maharashtra (GoM) under the Industrial, Investment & Infrastructure Policy, 2006 has identified airports as the key thrust area under infrastructure, which would be accorded priority status for its potential in contributing to the socio-economic development of the State. Further, the management of aerodrome is an essential service under the Essential Services Maintenance Act, 1968.

(viii) Further, the importance of MIAL as an essential service is widely accepted and forms one of the core areas of development for the Indian economy. The Commission, in its Order dated October 3, 2006 in Case

Nos. 25 and 53 of 2005, while applying Load Management Charges and Load Management Rebates on various categories of consumers for the purpose of incentivizing reduction in consumption of electricity, has treated the airport as an essential service along with ports and harbours, etc.

(ix) MIAL has made a representation to the Central Government regarding the unprecedented increase in the electricity tariff due to categorisation as HT-II Commercial, pursuant to the Tariff Order dated June 4, 2008. Pursuant to such representation, Ministry of Civil Aviation, Government of India, has written a letter dated August 20, 2008 to the Principal Secretary, Industries, Energy and Labour Department, GoM recommending the supply of power to MIAL at HT-I Industrial Tariff. Pursuant to such letter of the Ministry of Civil Aviation, MIAL approached GoM for inclusion under the HT-I Industrial category.

(x) The Hon'ble ATE has, while recognising the distinct nature of MIAL's operations as essential services, observed that the commercial establishments, e.g., shops and restaurants situated within the airport, may be charged at commercial rates. Such distinction may be given effect to while re-determining MIAL's tariff.

(xi) MIAL's placement in HT-II Commercial category for FY 2008-09, which has been set aside by the ATE, had the effect of recovering the marginal cost of procurement of RInfra-D substantially from MIAL.

(xii) The following facts also have to be considered by the Commission while re-determining the tariff:

a. The average tariff under HT-II Commercial for MIAL worked out to approximately Rs. 10.94/kWh. The per Unit increase in tariff for MIAL was nearly Rs. 3.31/kWh from the erstwhile tariff of Rs.7.63/kWh, which was an increase of about 43.38%. This tariff increase resulted in grave tariff shock to MIAL, which has been exposed to an additional expenditure of about Rs. 2.67 Crore/month due to its re-categorisation under HT-II Commercial category.

b. RInfra-D had proposed a tariff increase of 4.19% for FY 2008-09 over existing tariff levels. The Commission approved average tariff increase of 10.22% with respect to existing tariffs. Against this, MIAL's tariff was increased by 43.38% due to re-

categorisation. This increase could not have been recovered by MIAL from the service-users, since the charges leviable by MIAL are subject to control of the Government of India with very little scope for revision.

c. The average cost of supply had been worked out by the Commission at Rs. 5.90/kWh. The cross-subsidy element for MIAL, with an effective tariff of Rs.10.94/kWh, works out to Rs. 5/kWh, i.e., nearly 85%, which is excessive, unwarranted and unreasonable and beyond the limit of 20% of the average cost of supply envisaged under the Tariff Policy.

(xiii) The Commission, while re-determining the tariff, has to be guided by the principle that no single consumer category can be charged with higher tariff on account of purchase of expensive power on the ground that such category is responsible for excess power, which has also been reiterated by the Hon'ble Appellate Tribunal.

f) MIAL has been treated as part of HT-I Industrial category at all relevant times. The re-categorisation of MIAL as HT-II Commercial consumer has been set aside by the ATE. Keeping in mind the activities undertaken by MIAL, it ought to be classified as an industry as distinguished from commercial activity, which consists largely of sale/resale of good and commodities. Therefore, MIAL should be treated as a HT- Industrial consumer.

5. MIAL, under their Petition, prayed for the following relief:

"Having regard to the submissions made herein above, the Applicant calls for appropriate re-determination of tariff applicable to the Applicant."

6. The Commission, vide its letter dated June 23, 2009, directed RInfra-D to submit a fresh proposal, in view of the Judgment dated February 26, 2009 passed by the Hon'ble ATE in Appeal. No. 106 of 2008.

7. RInfra-D, vide its letter dated July 10, 2009, submitted its proposal for re-determination of tariff for MIAL. In its Proposal, RInfra-D submitted as under:

a) In the ARR and Tariff Petition submitted to the Commission for FY 2009-10, RInfra-D has requested the Commission to create a new consumer category called 'HT- Public and Government' and had proposed to classify MIAL under such category based on the rationale provided in the ARR Petition.

b) Accordingly, RInfra-D proposed that energy sold to MIAL during the period from June 2008 to May 2009 be charged at the rate proposed for HT- Public and Government in the above referred petition., i.e., energy charge of Rs. 5.70/kWh (inclusive of reliability charges) and demand charge of Rs. 150/kVA/month.

c) RInfra-D, however, requested that while re-determining the tariff for MIAL and consequently any refund that may be required to be given by RInfra-D to MIAL, the Commission may take due cognizance of the direction of the Hon'ble ATE in its Judgment dated February 26, 2009 in Appeal No. 106 of 2008, which states as under;

"The excess amount recovered from the appellant will be adjusted in the future electricity bills of the appellant at the rate of not more than Rs. 1 crore per month"

d) On applying the proposed tariff as compared to the HT- Commercial tariff applicable for FY 2008-09, on energy sold from June 2008 to May 2009, RInfra-D would face a shortfall of around Rs. 26 Crore.

e) RInfra-D requested that the shortfall due to above may be considered by the Commission as part of the revenue gap during the APR exercise for FY 2009-10.

f) Further, RInfra-D highlighted an extract from the Tariff Order passed by the Delhi Electricity Regulatory Commission (DERC) for BRPL on May 28, 2009. In the said Order, special status has been given to Delhi International Airport, as reproduced below:

"5.20 The Commission has considered the submissions made by Delhi International Airport Limited (DIAL) regarding a new slab be created for the DIAL, which should be charged at a lower tariff than the existing non domestic tariff rate applicable to them. But, the Commission also acknowledges that the airport operations carry a mix of activities which are commercial in nature and it can not be denied that airports apart from having the essential services pertaining to the aviation services also have a variety of non-aviation commercial activities such as shops, restaurants, bars, retail stores, duty free shops, etc."

8. Subsequently, the ATE, vide its Order dated May 19, 2009 in IA Nos. 182 and 183 of 2009 in Appeal No. 106 of 2008 clarified as under:

"In our judgment we have referred to the category as HT- III. In order to avoid any misunderstanding all reference to HT-III category in our judgment may be read as HT-II (commercial)"

9. The Commission, vide its Notice dated July 20, 2009, scheduled a hearing in the matter on July 28, 2009, and directed the Petitioners to serve a copy of their Petition along with accompaniments to RInfra(D), the Respondent and four authorised Consumer Representatives.

10. During the hearing held on July 28, 2009, Shri. Sitesh Mukherjee, Advocate, appeared on behalf of MIAL and Smt. Anjali Chandurkar, Advocate, appeared on behalf of RInfra-D.

11. Shri. Sitesh Mukherjee submitted that the ATE has set aside the categorisation of HT-II Commercial for MIAL. Since, MIAL was earlier classified under HT I Industrial category, the effect of the ATE Judgment is that MIAL is classified under HT I Industrial category. Hence, the excess amount that has been paid in relation to the period before the ATE Judgment vis-à-vis the tariff to be determined by the Commission has to be recovered at a rate not exceeding Rs. 1 crore per month. Smt. Anjali Chandurkar submitted that the last few sentences of Para 26 of the ATE Judgment states that the tariff has to be re-determined first, and then the future bills have to be adjusted.

12. Shri. Sitesh Mukherjee reiterated that since the classification of MIAL under HT II Commercial has been set aside, till the tariff is determined by the Commission, MIAL should be allowed to pay at the rate existing earlier for HT I Industrial category. The Commission observed that the tariff fixed earlier is no more in existence, since the tariffs for all categories has been revised with effect from the date of the Order dated June 4, 2008 in Case No. 66 of 2007.

13. The Commission observed that RInfra-D has proposed a different categorisation for MIAL, which is neither HT I Industrial nor HT II Commercial. Moreover, the ATE has ruled that the Commission has to re-determine the tariff, and the difference, if any between the newly determined tariff and the tariff charged earlier under HT II Commercial, has to be refunded to MIAL at a rate not exceeding Rs. 1 crore per month. Thus, it is incorrect to state that the ATE has held that the Appellant should be classified under the HT I Industrial category for any period of time. Had this been the case, then there would have been no need to re-determine the tariff for the Appellant, since the tariff for the HT

Industrial category was well known. In fact, the ATE has observed that MIAL's premises include several commercial activities, which charge their consumers exorbitantly, and that this aspect needs to be kept in mind while re-determining the tariff for MIAL. Thus, it is clear that MIAL continues to be classified under HT II Commercial category till such time the Commission re-determines the tariff, if at all, after giving due opportunity to MIAL.

14. The Commission observed that RInfra-D had proposed to classify MIAL under a new category of 'HT-Public and Government' for FY 2008-09, in line with its proposal in this regard for FY 2009-10. However, RInfra-D's proposal for creation of this new category has been rejected by the Commission in its Order for FY 2009-10 dated June 15, 2009 in Case No. 121 of 2008. The Commission advised MIAL to make its points, and the Commission would take a considered view on the categorisation and tariff for MIAL for FY 2008-09.

15. The Commission enquired of MIAL as to whether MIAL was sub-distributing electricity in its premises, without any legal authorisation, and as to whether MIAL has been appointed as a distribution franchisee by RInfra-D to sub-distribute electricity. The Commission observed that it was illegal to distribute electricity without either having a distribution licence or becoming a franchisee of the distribution licensee.

16. MIAL submitted that the Appellate Tribunal has observed that the consumption of the commercial establishments can be proportionately recovered on the basis of the commercial rate.

17. MIAL further submitted that it is concerned with the cross subsidy element in the tariff, which has to be reduced by the Commission as per the Tariff Policy, whereas the cross-subsidy has been increased from 22% to 85% as a result of the Commission's Order.

18. The Petitioner further submitted that in Uttaranchal, there was an increase in the marginal cost of power purchase of the distribution licensee due to sudden increase in the number of large industrial units due to tax incentives offered by the State Government, as a result of which, the distribution licensee was required to purchase additional power at marginal rate. The Appellate Tribunal for Electricity held that even though the marginal cost of power purchase has increased because of increase in number of energy intensive industries, the entire marginal cost of power purchase could not be attributed to industries, and the marginal cost of power purchase has to be distributed amongst all categories of

consumers and no single consumer category should be held responsible for the increase in marginal cost of power purchase.

19. The Petitioner submitted that the Commission has to classify MIAL under industrial category akin to manufacturing and services, as clarified by the Commission in the subsequent Tariff Order. Further, the Ministry of Civil Aviation, Government of India, in its letter sent to the Commission in this context has stated as under:

> Para 3 - ***"This Ministry is of the view that there should be uniformity amongst all airports and like any other major airports, power supply to CSI airport should be based on HT industrial tariff. This would not only optimize the input costs but also benefit the users of the airport.***
> Para 4 – ***In view of the above it is recommended that the proposal of MIAL made to MERC may be accepted and power supply to CSI Airport made available on HT industrial basis".***

20. The Petitioner submitted that MIAL operated under the OMDA and MIAL cannot increase charges by more than 10% every year, as reproduced below: Page 26 – ***"1. The existing AAI airport charges will continue for a period of two (2) years from the Effective Date and in the event the JVC duly completes and commissions the Mandatory Capital Projects required to be completed during the first two (2) years from the Effective Date, a nominal increase of ten (10) percent over the Base Airport Charges shall be allowed for the purposes of calculating Aeronautical Charges for the duration of the third (3rd) Year after the Effective Date ("incentive")".*** MIAL submitted that electricity charges accounted for 25% of the operational expenses, which was around 19% in FY 2007-08. MIAL submitted that any increase in tariff would therefore, have a significant impact on its business. In a similar matter, the Delhi Electricity Regulatory Commission classified Airport separately, as reproduced below:

> Page 9 of the Tariff Order for FY 09-10 – **Delhi International Airport Limited (DIAL) – *"DIAL has submitted that the commercial tariff rate should not be applicable to it as it does not undertake any commercial activity. The airport operators are facilitator of economic activities and do not themselves indulge in any of the business directly – they are core infrastructure service provider and are essential for economic development of the Country and hence should attract a lower tariff rate. DIAL requested that a new slab should be created for them***

which should be lower than the existing tariff and that DIAL should not be considered to bear the cross subsidy charges".

Page 10 – ***" The Commission understands that airports play an important role in the economic development of the country. The Commission is in the process of reducing the cross subsidy to the levels proposed by the Government of India over a period of time. The Commission also acknowledges that the airport operations carry a mix of activities however, the metering in the existing system is integrated and it will be difficult to segregate the commercial operations from purely aviation services. Hence, till the time the commercial activities within the airport are separately metered, the Commission proposes that an average tariff be charges from DIAL, which shall be lower than the existing non domestic charges applicable to them".***

Page 12 – Para 5.20 – ***"The Commission has considered the submissions made by Delhi International Airport Limited (DIAL) regarding a new slab be created for the DIAL, which should be charged at a lower tariff than the existing non domestic tariff rate applicable to them. But, the Commission also acknowledges that the airport operations carry a mix of activities which are commercial in nature and it cannot be denied that airports apart from having the essential services pertaining to the aviation services also have a variety of non-aviation commercial activities such as shops, restaurants, bar, retail stores, duty free shops etc.***

Para 5.21 – ***"The Commission understands that in the existing system, metering is integrated and it will be difficult to segregate the commercial operations from the purely aviation services. Hence, till the time commercial activities within the airport are separately metered, DIAL would be charged at an average tariff of 470 paise per unit, which is lower than the existing non domestic charges applicable to them".***

21. The Petitioner submitted that the purpose for which electricity is given is important and it may not be feasible for the malls and industries to be clubbed in the same category. The Petitioner added that just as it is unfair to treat equals unequally, treating unequals as equal is also not fair. The Petitioner added further that in the Tariff Order for 2006, when the Commission directed levy of Load Management Charges, the Commission had ruled that for essential services including airports, the Load Management Charges would not apply if they are unable to reduce their consumption vis-a-vis their current consumption. The Petitioner submitted that the Commission has to consider other factors with regard to the purpose for which electricity was being used. The Petitioner quoted from Page 77 of

the DERC Order dated 31st March, 2006, which states – ***"Whether the tariff for industry must be equated with Railways and DMRC tariff".*** Para 11 – ***"In order to examine the question whether tariff for industry should be equated with railways and DMRC tariff, we need to refer to sub-section (3) of Section 62 of the Act, which reads as under: "The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required". The word "purpose" used in the above mentioned sub-clause, as per Black's Law Dictionary means: "An objective, goal or end; specify, the business activity that a corporation is chartered to engage in"*** Para 12 – ***"Thus, the Commission cannot accord any preferential treatment to any consumer of electricity in the determination of tariff. But different tariffs can be fixed for different consumers on the basis of their load factor, power factor, voltage, total consumption of electricity during any specified period of time or the time at which the supply is required or the geographical position of any area and the nature of supply and the purpose for which supply is required. The appropriate commission is also empowered to fix different tariffs on the basis of reasons for which electricity supply is required. The tariff for the Railway Traction and DMRC stand on different footing than other classes of consumers. The railways and the Delhi Metro Rail Corporation draw power with the objective to satisfy the transportation needs of the masses.*** Para 14 – ***"In this view of the matter, the Appellant's plea to equate their tariff with that of DMRC or Railways is not justified".*** The Petitioner submitted that while in accordance with the above extract, it may not be possible to equate Airports with Railways or Industries, but at the same time, Airports should not be equated with malls, because the function of airport is different from that of malls. The Petitioner added that the Airport supports the economy of the area where it is located and is identified as a thrust area, and hence, requires certain amount of indulgence from the Commission.

22. Smt.Anjali Chandurkar submitted that RInfra has made a proposal pursuant to the directions of the Commission and proposed tariffs of Rs.5.70/kWh as energy charge and demand charge of Rs.150/kVA/month in line with the categorization proposed in the Tariff Petition for FY 2009-10.

23. Having heard the Parties and after considering the material placed on record, the Commission is of the view as under:

24. The broad issues for consideration of the Commission are summarised below:

a. What is the impact of setting aside of the impugned Order as regards consumer categorisation of the Petitioner for the year in question?
b. In view of the suggestion of the ATE that the Commission may like to have differential tariff for electricity consumption pertaining to purely aviation services and the pure commercial activities, can differential tariffs be implemented for different activities undertaken by MIAL?
c. Can the Petitioner be classified under the 'Industrial' category, in the present form? Or is 'Commercial' category the more appropriate categorisation? Does a separate category have to be created for the Petitioner? Can the category and tariff proposed by RInfra in this regard be considered?
d. Is the purported inability of the Petitioner to pass on the increase in expenses to the air passengers, a justified reason for determining a lower tariff for the Petitioner?
e. Is the categorisation by the State/Central Government under any other statute/law, binding on the Commission in the process of consumer categorisation and tariff determination by the Commission?
f. Has the cross-subsidy been increased for the Petitioner in the impugned Order? Should the tariff be re-determined for the year in question, such that the cross-subsidy is reduced? What is the quantum of refund due to the Petitioner and what should be the time-frame for the refund?

25. As regards the impact of the ATE Judgment in setting aside the consumer categorisation of the Petitioner for the year in question, the Commission has already clarified during the hearing that the ATE has ruled that the Commission has to re-determine the tariff, and the difference, if any between the newly determined tariff and the tariff charged earlier under HT II Commercial, has to be refunded to MIAL at a rate not exceeding Rs. 1 crore per month. Thus, it is incorrect on the part of the Petitioner to state that the ATE has held that the Appellant should be classified under the HT I Industrial category for any period of time. Had this been the case, then there would have been no need to re-determine the tariff for the Appellant, since the tariff for the HT Industrial category was well known. In fact, the ATE has observed that MIAL's premises include several commercial activities, which charge their consumers exorbitantly, and that this aspect needs to be kept in mind while re-determining the tariff for MIAL. Thus, it is clear that MIAL continues to be classified under HT II Commercial category for the period in

question till such time the Commission re-determines the tariff, if at all, after giving due opportunity to MIAL.

26. As regards ATE's suggestion on levying differential tariff for electricity consumption pertaining to purely aviation services and pure commercial activities, the issue is of appropriateness of such a step as well as the practical limitations for undertaking the same, as discussed below. The classification of each consumer within a specific category approved by the Commission is within the purview of the distribution licensee in accordance with the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, where the distribution licensee classifies the consumers in line with the definition of tariff applicability specified by the Commission under the approved Tariff Schedule. In the present case, RInfra, the distribution licensee concerned, could have classified the Petitioner only under the Commercial category, since the Petitioner clearly does not fall under Industrial category. As regards the practicality of levying differential tariff, the distribution licensee records the electricity consumption by the Petitioner through specific meter(s) at the input points, and there is no separate metering done by the distribution licensee for the actual consumption by the individual commercial establishments within the Petitioner's premises or the actual consumption by the pure aeronautical services provided by the Petitioner. In the absence of this metering data, the distribution licensee will not be able to charge differential tariff for the pure aeronautical services and the pure commercial services.

As regards whether the Petitioner should be classified under the 'Industrial' category or 'Commercial' category in the present form, the Commission is of the view that in the absence of separate metering being done by the distribution licensee for the aeronautical consumption and the commercial consumption, as well as the fact that other comparable services like ports, etc., have also been classified under Commercial category, it is appropriate to classify MIAL under the HT Commercial category.

27. As regards RInfra-D's proposal to categorise MIAL under 'Government and Public' category, in line with its proposal in Case No. 121 of 2008, the Commission has rejected this prayer giving specific reasons, as reproduced below:

> *"Further, the suggestion to create a new 'HT: Public and Government' category has been rejected, since Section 62(3) does not permit differentiation between consumer categories on the basis of ownership, i.e., public or private, as elaborated above. Moreover, even if MIAL were operating on a no-loss, no-profit basis, it would not provide a basis for determining preferential tariffs for MIAL, since Section 62(3) of the EA 2003 does not provide for differentiation between*

consumers on the basis of whether the consumer is profit making, loss making or operating on no-loss, no profit basis."

28. Further, it is understood that MIAL has recently migrated from RInfra-D to The Tata Power Company Ltd. (TPC). Since the rationale adopted by the Commission is the same for all distribution licensees in the State, MIAL would have been classified under HT II Commercial by TPC for tariff purposes. Thus, MIAL does not have any basis for contending that it should not be classified under HT II Commercial in case it is getting supply from RInfra-D. Thus, the issue is only of applicable tariff and the issue of classification or otherwise is only the route adopted by MIAL in an effort to get the tariff reduced.

29. As regards the purported inability of the Petitioner to pass on the increase in expenses to the air passengers as a reason for determining a lower tariff for the Petitioner, in the objection filed before the Commission as a part of the regulatory process on RInfra-D's APR and Tariff Petition for FY 2009-10, the Petitioner had mentioned that it was operating on a no-loss no–profit basis, and hence, the tariff for the Petitioner needed to be reduced. However, in this Petition, the Petitioner has claimed that it is unable to pass through the increased costs of electricity. It is obvious that if the Petitioner was operating on a no-loss basis, then all the expenses would be passed on to the consumers; else, the Petitioner would incur a loss. Moreover, Section 62(3) of the EA 2003 does not permit differentiation between consumers on the basis of the ownership or whether they are loss making or profitable or running on a no-loss no profit basis. If these contentions were to be accepted, it would tantamount to saying that all commercial establishments that are not earning any profit, should be categorised separately, as compared to commercial establishments that are earning some profit, and that the tariff should be different for these categories. This is clearly not within the scope of Section 62(3) of the EA 2003.

30. Further, the Hon'ble Tribunal has upheld the Respondent Commission's powers to create a new category as long as it is in accordance with Section 62(3) of the EA 2003, and held that there is no requirement for the Commission to publicly announce the tariff before issuing the actual order. The relevant part of the Judgment dated 26.02.2009 is reproduced below:

"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****…"*

31. While undertaking the rationalisation of tariff categories, the Commission has borne in mind the provisions of Section 62(3) of the Electricity Act, 2003, which stipulates as under:

"The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but ***may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required****."(****emphasis added****)*

32. It should be noted that it is not possible to apply all the above specified criteria at the same time for designing the tariff categories; else, with many permutations and combinations, there will be too many categories. Perhaps, that is also not the intention behind the provision, which merely enables the Regulators to work within the criteria. Thus, it will be seen from the elucidation given below, as to how different criteria have been used to categorise different types of consumers:

- The 'load factor' and 'power factor' criteria have been used to provide rebates and disincentives, such as load factor incentive for load factor above certain specified levels, and power factor rebates and disincentives are provided to consumers who are able to maintain their power factor above specified levels.

- The consumer categories are broadly classified under High Tension (HT) and Low Tension (LT) categories, in accordance with the 'voltage' criteria under Section 62(3) reproduced above.
- The 'time of supply' criteria has been used to specify time of day (ToD) tariffs, so that the consumers are incentivised to shift their consumption to off-peak periods and thus, reduce the burden on the system during peak hours.
- The 'nature' of supply criteria has been used to specify differential tariff for continuous (non-interruptible) and non-continuous supply (interruptible)
- The criteria of 'purpose' of supply has been used extensively to differentiate between consumer categories, with categories such as residential, non-residential/commercial purposes, industrial purpose, agricultural purpose, street lighting purpose, etc.

33. It is further clarified that the 'commercial' category actually refers to all 'non-residential, non-industrial' purpose, or which has not been classified under any other specific category. For instance, all office establishments (whether Government or private), hospitals, educational institutions, airports, bus-stands, multiplexes, shopping malls, small and big stores, automobile showrooms, etc., are all covered under this categorisation. Clearly, they cannot be termed as residential or industrial.

34. As regards whether the categorisation by the State/Central Government under any other statute/law, is binding on the Commission in the process of consumer categorisation and tariff determination, the Commission is of the view that the State Government's/Central Government's Policies are with reference to matters within their respective jurisdiction, and while they may be considered, they are not binding on the Commission while deciding on the consumer categorisation and tariffs for different consumer categories under the EA 2003. In this context, on a Review Petition filed by the same Petitioner (Case No. 50 of 2008) before the Commission against the Tariff Order for RInfra-dated June 4, 2008 in Case No. 66 of 2007, RInfra-D submitted that the Petitioner was classified under the Commercial category for the purpose of levy of Electricity Duty. Hence, Policies and Rules made by the State/Central Government could either be favourable or unfavourable to the Petitioner's contentions, and the Commission has the jurisdiction to take an independent view of the matter.

35. As regards whether the cross-subsidy has been increased for the Petitioner in the impugned Order, it is clarified that the tariff increase for the Petitioner in the impugned Order has occurred due to the re-categorisation into the more appropriate category, on

account of the creation of the new category, viz., HT II Commercial, rather than any attempt to increase the cross-subsidy. The Commission is committed to reducing the cross-subsidy for all consumer categories, including HT-II Commercial, as evident from the Commission's actions in the subsequent Tariff Order for RInfra-D, wherein the Average Billing Rate of HT-II Commercial category was reduced by Rs. 1.50 per kWh, and the cross-subsidy was reduced from 179% to 127% of Average Cost of Supply, which is well within the trajectory stipulated in the Tariff Policy notified by the Ministry of Power, Government of India.

36. In view of the rationale explained above, the Commission is of the view that there is neither any need nor justification to create a separate category for the Petitioner, as also no need to change the categorisation from HT-II Commercial to HT I Industrial category. Since there is no change in the categorisation and tariff, there is no question of any refund becoming due to the Petitioner.

With the above observations and ruling, the Commission disposes of MIAL's Petition in Case No. 29 of 2009.

Sd/-	Sd/-
(S.B. Kulkarni)	(V.P.Raja)
Member	Chairman

(Sanjay Sethi)
Secretary, MERC