

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 34 of 2009

In the matter of
Petition of University of Pune seeking re-categorisation from HT II Commercial to
HT I Industrial (Non-Continuous), in view of the Appellate Tribunal's Judgment
dated May 21, 2009 in Appeal No. 48 of 2009

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

ORDER

Dated: May 11, 2010

The Registrar, University of Pune (Varsity) had preferred an appeal being Appeal No. 48 of 2009 before the Hon'ble Appellate Tribunal for Electricity (ATE) challenging the Commission's Order dated 20.06.2008 in Case No.72 of 2007, in the matter of Petition filed by Maharashtra State Electricity Distribution Company Limited (MSEDCL) for approval of APR for FY 2007-08 and determination of tariff for FY 2008-09, and Order dated December 10, 2008 in Case No. 42 of 2008 in the matter of Review of the APR Order dated 20.06.2008, with respect to the re-categorisation of the appellant from HT Non-continuous category to HT-II Commercial category. The Hon'ble Tribunal delivered its Judgment on the Appeal on May 21, 2009 and remanded the matter back to the Commission.

2. The relevant portions from the Hon'ble Tribunal's Judgment in Appeal No.48 of 2009 dated May 21, 2009 are reproduced below:

“

4. In this case, it is noticed that the recategorisation has been done without giving notice to the Appellant and due to that he was made to pay revised tariff under the Commercial category.



...

8. *In view of the said undertaking and also in order to give adequate opportunity to the Appellants to present their case before the Commission on the above points, we think it fit to set aside the impugned order dated 20.06.2008 in regard to the aspect of recategorization for a fresh consideration on the basis of the materials to be placed before the State Commission by the Appellant. We must make it clear that we are not disturbing the finding in the Order dated 10.12.2008.*

9. *Accordingly, the impugned Order dated 20.06.2008 alone is set aside. The State Commission is directed to allow the Appellant to place its materials to substantiate its plea and to give a fresh consideration to the issue relating to recategorisation and decide the same on the basis of the said materials produced by the Appellant before the Commission in accordance with law. This exercise may be completed within 8 weeks from the date of the receipt of this Order. It is made clear that this judgment would apply to the Appellant only.”*

3. However, the Varsity did not file any application before the Commission as directed by the Hon’ble Appellate Tribunal. The Commission issued a suo-motu Notice dated July 7, 2009, and scheduled a hearing in the matter on July 14, 2009 in the Commission’s office and directed the Varsity to submit the material to substantiate its plea as per ATE’s aforesaid Judgment and to serve a copy of the same on the Respondent (MSEDCL) and to the four Consumer Representatives authorised on a standing basis under Section 94 of the Electricity Act, 2003 (EA 2003). MSEDCL was also directed to submit its comments, if any, to Commission with a copy served on the Varsity and to the four authorised Consumer Representatives before the date of hearing.

4. The Varsity sent a letter dated July 11, 2009 requesting the Commission to re-schedule the hearing. The Commission re-scheduled the hearing to July 22, 2009.

5. The Varsity, in its Petition dated July 15, 2009, submitted as under:

(a) **Historical Background**

The Petitioner secured high tension voltage connection from the erstwhile Maharashtra State Electricity Board (MSEB) on March 14, 1968 and for the purpose of tariff application, the Varsity was categorised as ‘HT I Industrial (Non



- continuous)' and such categorisation continued up to the month of April 2008 (to be read as May 2008).
- (b) After this date, for the first time, the Varsity was classified under 'HT II Commercial'. Up to 2007-2008, the Varsity was classified as 'HT I Industrial (non continuous)' and was subjected to a tariff of Rs.2.85/kWh, whereas, under the new category the Varsity was subjected to the new tariff of Rs.7/kWh. Also, for the original category, the tariff for FY 2008-09 remained at Rs.5/kWh. In case the Varsity had been continued in the original category, the tariff would have been lower by Rs.2/kWh. The net result of such change in the categorisation is a severe tariff shock and consequently, there is an enhancement in the electricity dues for the Varsity by 40% every month. The Commission may kindly appreciate that an institution like Varsity suffers a real tariff shock in view of the nature of the activities of the Varsity. There is no method available by which such shock can be absorbed and such shock can be absorbed either by increasing the income or by reducing the activities. However, both these methods are not open to the Varsity, unlike the commercial sector, where both the above mentioned shock absorption methods can be easily adopted without any inconvenience to the society. However, in case of Varsity, resorting to any of the above two methods would be against the public interest. Thus, the tariff shock to the Varsity is clear and is without any shock absorption method.
- (c) **Long Standing Classification**
- It is a settled principle of law that the Courts are extremely reluctant to disturb the long standing legal position, obviously with an object that such change would create confusion in the mind of the society and would also create a chaotic situation for those who have to take decisions on the basis of certain factual or legal premise. Issuance of Tariff Order is an exercise in the nature of delegated legislation and therefore, the long standing categorisation should not have been changed without extremely compelling reasons and in any case, subject to the settled legal position as regards classification.
- (d) The absence of any compelling reasons is conspicuous, as the only compelling reason could have been the change in the nature of activities of the Varsity, however, undisputedly, this is not so. No other compelling reason would be termed as reasonable in the given facts and circumstances of the case.
- (e) **Guidance in the Statute**



The Tariff Order dated June 20, 2008 has been issued in accordance with the Electricity Act, 2003 (EA 2003). Section 62(3) of the specifically provides as below:

"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."

Section 62(3) seems to have been overlooked and thus, erroneously categorisation has been made without reference to the 'purpose' of the user, which is clearly unsustainable. The categorisation of the Varsity under commercial category is wholly unsustainable, as categorisation will have to be of the consumers where the nature and the objects of the users are comparable. The Varsity has been grouped in 'HT II Commercial' with shopping malls, which are activities that are entirely different in nature as well as with different objects.

(f) Guidance available from Judicial Pronouncements

Section 62(3) itself talks about the purpose of the user as a relevant factor for determining tariff, meaning thereby that the nature and the object of the activities will have to be considered while performing an exercise of categorisation and in this regard, the judicial pronouncements guiding the classification of various consumers can be of decisive nature and in view of Section 62(3), any deviation from the judicial interpretation will not be permissible.

In the context of the Industrial Disputes Act, the Hon'ble Supreme Court had an occasion to consider the nature of activities performed by the Varsity, which is reported as (1978) 2 SCC213. The Hon'ble Supreme Court inter alia observed that-

"The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry".

This decision of the Hon'ble Supreme Court has been followed in subsequent decisions of the Hon'ble Supreme Court and thus, as regards the nature of the activity, the judicial pronouncement classifying Varsity as industry is final, settled and is binding on all the authorities and citizens. The observation of the Hon'ble Supreme Court in the said decision has clearly taken into account the activities



carried on by the Varsity generally and therefore, the classification of the Varsity as an industry is for the general purpose and not for the purpose of a particular statute only. In any case, by way of analogy, such decision can be relied upon for the purpose of classification.

Section 62(3) read with the judicial pronouncement of the Hon'ble Supreme Court would only indicate that while categorising the Varsity, the most relevant aspect remained to be considered and if such relevant and decisive aspects are considered in the proper perspective, then in that case the categorisation of the varsity under 'HT II Commercial' is clearly unsustainable.

(g) Constitutional Mandate

Article 14 of the Constitution of India has been commented upon by the Hon'ble Supreme Court on various occasions and the following statements of law laid down by the Hon'ble Supreme Court in earlier decisions is still valid. The Hon'ble Supreme Court in Budhan Choudhary and Ors. Vs. The State of Bihar, AIR 1955 SC 191 laid down as follows:

"In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely,

(i) That the classification must be founded on the intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and

(ii) That the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of the classification and the object of the Act under consideration. It is established by the decisions of this court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

The quoted legal position interpreting Article 14 has been followed in various decisions of the Supreme Court as well as by different High Courts. The categorisation of the Varsity under Commercial category is impermissible and the rationale to achieve the object of the statute particularly under Section 62 (3) of the EA 2003 is wholly defeated. If the activity groups having entirely different nature and object are classified in the one group, then constitutionally, such classification



can be easily termed as arbitrary and unreasonable classification and thus unsustainable.

(h) Statutory scheme vis-a-vis modification in the Tariff Order:

The Varsity submitted that as per the EA 2003, before a Tariff Order is framed, the Distribution Licensee will make an application under Section 62 of the EA 2003 and the Commission, under the power vested under Section 64(3) (a) of the EA, 2003, is empowered to issue the Tariff Order accepting the Application with such modifications or conditions as the Commission may deem fit or otherwise.

(i) The Varsity is not aware of the contents of the Application made by MSEDCL in the present case and the Varsity craves leave of this Commission to make further submissions as and when such an Application is made available to the Varsity. However, the fact remains that while the Commission is considering such an Application, apart from such an Application, the Commission has to also consider its earlier Tariff Orders.

(j) There was consistent legislative policy to classify the Varsity under Industrial category, up to Tariff Order of June 20, 2008. However, suddenly and by overlooking a relevant and decisive aspect, the Varsity has been classified under Commercial category, where classification goes much beyond the statutory mandate. The Hon'ble Supreme Court, in its decision reported in AIR 1951 SC 332 observed as below

“The word ‘modification does not, in any opinion, mean or involve any change of policy, but is confined to alteration of such a character which keeps the policy of the Act intact and introduces such a change as are appropriate to the local conditions of which the executive Government is made a judge.”

(k) The Operative Order dated May 31, 2008 is itself a detailed Order and the Operative Order dated May 31, 2008 has not only prescribed the categories but also indicated the consumers who fall into various categories.

(l) The Institutions like Varsity are conspicuous by their absence in the Operative Order, clearly meaning thereby that the Operative Order did not contemplate the inclusion of the Varsity in ‘HT II Commercial’ category. However, inclusion of Varsity in the decision dated June 20, 2008 leads to the inference that the inclusion of the Varsity under HT II Commercial category is unsustainable. When the descriptive Operative Order excludes the Varsity under HT II Commercial category, inclusion of the same in the Tariff Order dated June 20, 2008, is contradictory and in such circumstances, for the purpose of implementation, the



Operative Order would prevail over the descriptive decision, particularly when Operative Order itself is descriptive.

(m) Discrimination between Educational Institutions

Educational institutions requiring less than 50 kW electricity supply are classified in LT I Domestic category, whereas other educational institutions are classified under HT II Commercial with much higher electricity tariff per unit. For the purpose of categorisation, the most relevant factors are the nature and the object of the activity and not the method of supply of electricity.

The High Tension (HT) electricity supply is contemplated so as to save the loss of electricity in transmission and there is no qualitative difference between HT and Low Tension (LT) supply of electricity. Thus, in LT supply of electricity, there is more transmission loss than HT, and hence, the per unit tariff should have been higher.

As against the average tariff increase of 6.76 % over the existing tariff of Rs.3.40/kWh, the revised tariff for Public Trust Institutions in the Order is Rs.7/kWh, which is excessive, exorbitant and arbitrary. It gives a tariff shock and violates the National Electricity Policy and Section 61(g) of the EA 2003.

- (n) There are many instances in other States, wherein the educational institutions have been given different and liberal treatment, which they obviously deserve in accordance with Section 62(3) of the EA 2003. For instance, Kerala State Electricity Regulatory Commission issued Tariff Order dated December 31, 2007 valid from January 1, 2008, wherein educational institutions are classified under HT II Non Industrial - Commercial category with tariff of Rs.3/kWh, which is much lower than the tariff applicable in the State of Maharashtra and thus, the treatment given to the educational institutions in the State of Maharashtra is not only discriminatory but is also against national and social interest.

(o) Consumers Interest

Section 61 (d) of the EA 2003 stipulates-

“The appropriate Commission shall, subject to the provisions of this Act, specify the terms and the conditions for the determination of the tariff, and in doing so, shall be guided by the following, namely;

(d) Safeguarding of the consumers interest and at the same time, recovery of the cost of the electricity in a reasonable manner.”

Thus, while framing the tariff regulations, the guideline of safeguarding the interest of the consumer when read with Section 62(3) of the EA 2003, clearly mandates



that the categorisation of the Varsity under Commercial category is highly unsustainable.

Based on the above reasons and submissions, it is clear that a Varsity cannot be classified under the HT II category Commercial and such categorisation being contrary to the constitutional mandate, judicial pronouncements and the legal principles, may be reconsidered and the Varsity re-classified in the category of Non Continuous Industrial, retrospectively with effect from April 1, 2008 and may be given the consequential benefit either by way of refund or by way of adjustment in the future bills.

6. During the hearing held on July 22, 2009, Shri. M.D. Adkar, Advocate and Shri. S. Gunbawle, Advocate, appeared on behalf of the Varsity. Shri. Ravi Prakash, Advocate and Shri. M.M. Digraskar, EE (TRC), appeared on behalf of the respondent, MSEDCL.

7. After hearing the Parties, the Commission directed the Petitioner and the Respondent to file detailed written submissions within two weeks from the date of hearing, and serve a copy to the other Party and also directed the Parties to file their detailed written rejoinders to each other's submissions within one week from the receipt of copy of the detailed written submissions by the other Party.

8. The Varsity, in its written submission dated August 20, 2009, submitted as under:
- (a) The Appellant is aggrieved by the ex-parte decision of the Commission and MSEDCL to re-categorise the Varsity from the HT-I (Non-Continuous) category to the newly created HT-II Commercial category wherein the Varsity will be charged at par with the shopping malls and multiplexes and other similarly situated commercial establishments. The Varsity further submitted that it is a statutory University and provides instruction, extension, teaching and training and in such branches of learning and course of study as the University may determine from time to time. The Varsity also makes provision for research and for the advancement and dissemination of knowledge and technology. The Varsity provides programmes and services that benefit the public. Further, assets are typically provided by sources that do not expect repayment or economic return and there are restrictions on the resources obtained. Thus, it is evident that the Varsity is not a profit making enterprise.
 - (b) The Varsity further submitted that the Commission is supposed to consider all suggestions and objections received from the Public before issuing a Tariff Order.



It is pertinent to note that before issuing the Tariff Order dated December 10, 2008 in Case No.42 of 2008, no public hearing was held as required under Section 64(3) of the EA 2003. The Impugned Order has been passed without notifying the proposed re-categorisation of Public Charitable educational institutions from HT-I (Non-Continuous) category to a newly created HT-II Commercial category wherein the educational institutions like University have been clubbed and equated with shopping malls and multiplexes, which are basically high profit generating establishments. Hence, the unilateral re-categorisation of the Varsity to pay the revised tariff under commercial category for the electricity consumed exclusively for the purpose of imparting education and providing research facilities to the Public at large is neither justifiable nor sustainable.

- (c) The Appellant submitted that the profit making industries are classified in HT-I (Non-Continuous) category, where tariff is Rs.3.95 per kWh, which is much lesser than that made applicable to HT-II (Commercial) category. The Varsity further submitted that the industries manufacturing and distributing alcoholic beverages are being classified in HT- I Industrial category and are charged at the lower rate whereas non-profit making establishments like the Varsity are classified under HT-II commercial category and are charged at higher rate.
- (d) The Appellant further reiterated the arguments submitted in the Petition on July 15, 2009.

9. MSEDCL, in its Written Submission dated September 15, 2009, submitted as under:

- (a) The Public Notice in the matter of Petition filed by MSEDCL for approval of APR and determination of tariff was given in leading English and Marathi Newspapers. Ignorance of the Public notice cannot be a reason for review of the Commission's Order. Earlier, the Varsity were charged under the HT-1 Industries category and MSEDCL had proposed a tariff of Rs.450 per kVA per month as Fixed Charge and Rs.5/kWh as Energy Charge for Express feeder and Rs. 4.60/kWh as Energy Charge for Non Express feeder in HT-1 Industries Category. The Varsity did not comment on this proposal in the Public Hearing, hence, it is not correct to state that the opportunity to raise its viewpoint was not given to the said consumer.
- (b) The Commission, while categorising the Varsity from HT-I Industrial (Non-Continuous) to HT-II Commercial Category, has determined the tariff as it was empowered to do so under the provisions of Section 62(3) of EA 2003. The tariff so determined for HT-II Commercial categories has been differentiated in



- accordance with the load factor of the consumer category read with total consumption of electricity and the nature and purpose for which supply is required. MSEDCL further submitted that the Commission has the jurisdiction to so differentiate and determine tariff for this category of consumers.
- (c) MSEDCL submitted that it has strictly followed the procedure as laid down in the MERC (Terms and Conditions of Tariff) Regulations, 2005 while submitting the Petition for Annual Performance Review (APR) for FY 2007-08 and Aggregate Revenue Requirement (ARR) for FY 2008-09. MSEDCL, in its Tariff Petition, had not specifically requested the Commission to prescribe a separate tariff for the Petitioners or such other similarly placed consumers. However, MSEDCL in its Petition, had proposed revision in tariff as applicable to each specific consumer category. It should be noted that it is neither mandatory on the MSEDCL to propose revision in specific consumer category-wise tariff nor is it binding on the Commission to restrict its scope within the limited periphery of the Petition for APR and ARR submitted to the Commission from time to time. MSEDCL further submitted that the decision of the Commission to carve out a separate consumer category as High Tension (HT) II – Commercial in its Tariff Order in Case No.72 of 2007 dated June 20, 2008 is not an exclusive case, however, the Commission has from time to time modified the structure of electricity tariff as applicable to different consumer categories, either by the way of merger of some consumer categories or providing a separate category for certain specific consumers.
- (d) The tariff was determined by the Commission after considering the ARR of MSEDCL, which had gone up substantially during the relevant year, inter alia, by reason of the increase in the approved power purchase expenses due to increase in quantum of expensive power purchase.
- (e) The provisions of Section 61 (g) are not the only guiding principles for fixation of tariff. The other guiding principles such as factors which result in, inter-alia, economic use of resources, safeguarding of consumers interest and recovery of cost of electricity in a reasonable manner are also required to be followed by the Commission. While the National Electricity Policy as well as the Tariff Policy are also guiding principles, the legislature in its wisdom has provided in Sections 61 and 86(4) that the principles set out therein are guiding principles especially in view of the power situation in the Country and the EA 2003, and has done away with the earlier legislations, viz., The Indian Electricity Act, 1910 and The Electricity (Supply) Act, 1948.



- (f) The power purchase costs have gone up and as a result the cost of service has also increased. The consumers connected at HT voltages are subjected to lesser load shedding as compared to consumers connected at lower voltage. Clause 8.2.1 (1) of the Tariff Policy also mentions that all power purchase costs need to be considered legitimate and recovered from the consumers.
- (g) MSEDCL submitted that there is nothing unconstitutional in the re-categorisation of consumers as per Section 62 (3) of EA 2003. The Commission has, after taking cognizance of the provisions of the EA 2003, categorised the consumers and determined the tariffs applicable for them for FY 2008-09.
- (h) The provisions of Section 61(g) and Clause 5.5.3 and 8.3.2 of the Tariff Policy ought to be read and interpreted accordingly. In the circumstances, it is submitted that the aforesaid provisions cannot be followed without considering the glaring fact of shortage of power as well as the need to procure expensive power and the need to curb consumption in view of the shortage situation.
- (i) MSEDCL further submitted that an appeal was filed before the ATE bearing Appeal No. 107 of 2009 titled as “Spencer Retails Ltd. Vs MERC and Anr.” wherein same issues were raised regarding re-categorisation of certain consumers. The Hon’ble ATE was pleased to allow the said appeal vide Order dated July 1, 2009. The relevant portion from the said Judgment is being reproduced as under:

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

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

18) No order as to costs.”

- (j) MSEDCL preferred an appeal before the Hon’ble Supreme Court of India impugning the Order dated July 1, 2009 passed by ATE in the above mentioned Appeal No.107 of 2008. The said appeal has been registered as Civil Appeal No. 4303 of 2009 titled as “ MSEDCL Vs Spencer’s Retail Ltd.” and came up before



the Hon'ble Supreme Court on July 17, 2009 whereby the Hon'ble Supreme Court was pleased to stay the operation of Impugned Order passed by ATE and has further admitted the appeal. The relevant portion from the said Order has been reproduced as under:

“The civil appeals are admitted.

Until furthers orders, operation of the impugned order shall remain stayed.

It is directed that in case the appellants fails in the appeals, they will have to adjust the amount with interest at the rate of nine per cent.

Hearing expedited.”

- (k) In these circumstances, it is submitted that the broad principles involved in the present matter are more or less the same as those which are under consideration before the Hon'ble Supreme Court.
 - (l) MSEDCL added that if the amount collected from the Varsity is to be refunded, then the same would have to be borne by the other consumers of the MSEDCL.
 - (m) The present petition may be kept pending till the final outcome of the Appeal pending before Supreme Court.
10. The Varsity, in its Rejoinder dated December 15, 2009, submitted as under:
- (a) MSEDCL had not proposed recategorisation of the Varsity from HT-I Industrial (Non-Continuous) to HT- II Commercial category. Hence, the Varsity was unable to submit its viewpoints during the Public Hearing.
 - (b) The Varsity provides educational programmes and services that benefit the Public. The Varsity is not a commercial establishment and the aim and object of the Varsity is not profit making.
 - (c) Section 64 (3) (b) of the EA 2003 does not confer any power to the Commission to create a new category, which is not mentioned in the Application of the MSEDCL, and modification should be confined to alteration of such a character, which keeps the policy intact and does not mean or involve any change in policy. The making of the Tariff Order is a statutory legislative function of subordinate type and the categorisation of the consumer is necessarily a legislative policy, and therefore, creation of the new HT-II Commercial category under the guise of modification is without any authority and hence, bad in law.
 - (d) The ATE's Judgment dated July 1, 2009 in “Spencer Retail Ltd. Vs MERC and Anr.”, specifically mentions that the said Judgment squarely applies to the facts of that appeal only. Further, the canvas of the grievances of the Varsity is different



and wider than that of the Appeal decided by the ATE and the observations made in that Judgment are not relevant in the peculiar facts of the present case. The Varsity added that there is no embargo on the Commission for deciding the present case.

11. The Commission, vide its Notice dated January 12, 2009, scheduled a further hearing in the matter on February 22, 2010, in the presence of four authorised Consumer Representatives. During the hearing held on February 22, 2010, the Varsity reiterated the above arguments

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

13. The issues for consideration of the Commission are:

- a. Has the requirement of Section 62(3) been over-looked in the present categorisation?
- b. Should the Petitioner be classified under the 'Industrial' category or is 'Commercial' category the more appropriate categorisation?
- c. Whether the Commission has the power to create a new category, which has not been proposed in the application of MSEDCL?
- d. Is the categorisation by the State/Central Government under any other statute/law, binding on the Commission while determining tariff under the Electricity Act, 2003?
- e. Has the Varsity been subjected to a tariff shock requiring its tariff to be reviewed?

14. The Petitioner has contended that Section 62(3) seems to have been overlooked and thus, erroneously categorisation has been made without reference to the 'purpose' of the user, which is clearly unsustainable. The Commission is of the view that certain factors need to be kept in view while understanding the process of determination of tariffs. This will help in understanding the need to re-categorise consumers. The National Electricity Policy notified under Section 3 of the Electricity Act, 2003 provides that “5.5.1 *There is an urgent need for ensuring recovery of cost of service from consumers to make the power sector sustainable.*” While designing tariffs the Commission requires to keep various factors in mind including *inter alia* recovery of cost of service / cost of supply; bridging



the revenue gap in the annual revenue requirement; correction of cross-subsidies, correction of imbalance of cross-subsidies without giving tariff shock to consumers; increase in tariffs for some consumers due to reduction progressively and gradually of cross subsidy. For balancing the above aspects, the Commission has to design tariffs for different consumers. Section 62(3) allows the Commission to differentiate in tariffs for different consumers on one or more of the criteria mentioned in the second part of the Section. Any differentiation shown between Consumers must be undertaken only with the utmost care and the greatest circumspection and based on one or more of the criteria mentioned in the second part of the Section. Even where Section 62(3) provides the criteria for such differentiation between Consumers, each of the criteria mentioned in the section is an option available to the Commission depending upon what would be the appropriate criteria to be applied to a specific consumer or consumer category. The criteria that would be appropriate would be as deemed fit by the Commission in its wisdom as an expert body. All of the criterion mentioned in Section 62(3) upon which differentiation in tariffs could be done, cannot at the same time apply as a whole to a consumer or consumer category. In other words, if tariff has to be determined for Low Tension category, such a tariff while being different from High Tension category, is not to be determined based on applicability of all the following criterion for the Low Tension category and the set of criterion that could be applied would be as under:-

- (a) load factor, power factor, voltage, total consumption of electricity during any specified period or
- (b) the time at which the supply is required or
- (c) the geographical position of any area, the nature of supply and the purpose for which the supply is required.

It is not for the Commission to utilize each and every criterion aforementioned appearing in the said section to differentiate in the tariffs of Consumers. It will be clear from the subsequent paragraphs that in the impugned order the Commission has clubbed all colleges, universities, hospitals, shopping malls, etc., under the Commercial Category, using the criteria of purpose for which the electricity is being utilised, since all these are commercial activities, and cannot be clubbed under the industrial category.

15. As regards whether the Varsity should be classified under the 'Industrial' category or 'Commercial' category, the Commission is of the view that it is appropriate to classify the Varsity under the HT Commercial category, since the purpose of use is clearly not



‘industrial’, as explained subsequently in this Order, wherein the Commission has explained as to what exactly is industrial consumption.

16. As regards the Varsity's contention that the long-standing categorisation under 'Industry' should not be changed, it is clarified that the Commission has been attempting to correct historical anomalies in the tariff categorization in a gradual manner.

17. 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)*

18. The Commission’s views on how the criterion mentioned in the aforesaid Section 62(3) are to be used to categorise different types of consumers, are as follows:

- 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.

19. 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. These establishments cannot be termed as residential or industrial. The categorisation of 'Industry' is applicable to such activities which entail 'manufacture'.

20. Section 62(3) of the Act does not state that the nature or character of ownership of a particular consumer could be or should be taken into account by the Commission for differentiating in tariffs. Illustratively, the statute does not require the Commission to differentiate in tariffs based on the issue as to whether a large industrial house owns a hospital or a small trust owns a hospital. These are not matters which could be dealt upon under Section 62(3) of the Act. Under Section 62(3) of the Act, "paying capacity" of consumers can never be a criterion for the creation of a tariff category. To differentiate in tariffs on the basis of ownership or whether the consumer is loss making or profitable or running on a 'no-loss no-profit' basis, and such other factors analogous to the foregoing, would be not only to read words into Section 62(3) but would also defeat the purposes for which the Electricity Act, 2003 has been enacted inter alia viz., that the generation, transmission, distribution and supply of electricity are conducted on commercial principles, and recovery of the cost of electricity in a reasonable manner. If the contentions raised by the Petitioner were to be accepted then all commercial establishments that are not earning any profit or have been established with socially beneficial objectives and are undertaking such activities without any monetary gain, would require to be given some special tariff. In the view of the Commission this would clearly not be within the scope of Section 62 (3) of the EA 2003 and thus not permissible in law. If a certain section or category of consumers require special tariffs then the statute provides under Section 65 that the State Government may give advance subsidy to the extent they consider appropriate in which case necessary budget provision would be required to be made in advance so that the utility does not suffer financial problems that may affect its operations.

21. Further, the Hon'ble Tribunal has upheld the 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 in the Appeal No. 106 of 2008 of “Mumbai International Airport Pvt. Ltd.” Vs Maharashtra Electricity Regulatory Commission & Others 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...”

22. The above quoted judgment of the Hon’ble Tribunal answers several issues raised by the Petitioner in the present matter.

23. The Varsity has contended that the Operative Order dated May 31, 2008 has not only prescribed the categories but also indicated the consumers who fall into various categories, and that the Operative Order did not contemplate the inclusion of the Varsity under HT II Commercial category. There is no merit in this contention, as clearly revealed by the relevant part of the Operative Order as reproduced below:

*“38. **The Commission has created a new category, viz., HT-II Commercial, to cater to all commercial category consumers availing supply at HT voltages, and currently classified under the existing HT-I Industrial or LT-IX (multiplexes and shopping malls). This category will include Hospitals getting supply at HT voltages, irrespective of whether they are charitable, trust, Government owned and***



operated, etc. The tariff for such HT-II commercial category consumers has been determined higher than the tariff applicable for HT-I industrial, in line with the philosophy adopted for LT commercial consumers. Such categorisation already exists in other licence areas in the State, and is hence, being extended to MSEDCL licence area also."(emphasis added)

24. As regards whether the categorisation by the State/Central Government under any other statute/law, is binding on the Commission while determining tariff under the Electricity Act, 2003, the Commission is of the view that the State Government's/Central Government's Policies are with reference to matters within their respective jurisdiction that may be relevant under that policy or Act, 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. The Policies and Rules made by the State/Central Government could either be favourable or unfavourable to the Petitioner's contentions, and the Commission may take an independent view of the matter.

25. Similarly, the categorisation adopted in other States is also not binding on the Commission, and can only be used as a reference, with due regard to the peculiarities prevailing in the respective State. Further, the illustration of consumer categorisation prevalent in Kerala, which has been quoted by the Varsity, is also supportive of the Commission's decision to categorise the Varsity under Commercial category. In Kerala too, the University has been categorised as 'non-industrial commercial' category, which is precisely the same category applicable in Maharashtra. The tariff differential is dependent on several factors such as cost of supply, consumer mix, consumption mix, etc. and cannot be compared from one State to another.

26. Moreover, though the Varsity has argued that their categorisation under HT II Commercial is inappropriate and they should not be clubbed with other profit making and commercial entities, on the other hand, the Varsity is agreeable to being classified under the Industrial category, which also includes entities which are primarily setup for making profit as much as any commercial entities. Thus, there is no consistency in the Petitioners' arguments in this regard, and the issue is only of applicable tariff, and the issue of classification or otherwise is the route adopted by the Petitioners only in an effort to get the tariff reduced.



27. As regards whether the Varsity has been subjected to a tariff shock, 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 cause a tariff shock. Moreover, in any exercise where the consumer categories are rationalised, which was attempted by the Commission through the impugned Order as well as earlier Tariff Orders, the tariff impact on some categories will be higher than that on other categories, depending on the relationship of previously existing tariff with the revised tariff of the rationalised category.

28. In view of the rationale explained above, the categorisation for tariff purposes as in the Order dated 20.6.2008 would continue to apply as it is not possible to re-classify the Petitioners on the ground of their being an University. This ground does not find a mention in Section 62(3) of the EA 2003 whereunder tariff categories can be created for consumers in accordance with the factors laid down in the said Section. The Commission is not satisfied with the nexus being attempted by the Petitioners as that with multiplexes and shopping malls. Clubbing non-profit making organisations along with multiplexes and shopping malls is purely incidental and has nothing to do with the nature of business of the said consumers. The creation of a new category, viz., HT-II Commercial, was to cater to all commercial category consumers availing supply at HT voltages, and currently classified under the existing HT-I Industrial. The basis was not whether the consumer would be charitable, trust, Government owned or for profit motive, etc. The argument that imposing a tariff structure on the Petitioner which is same as that applicable to Malls and Multiplexes and clubbing them together for the purpose of tariff determination would be violative of Article 14 of the Constitution since unequals have been treated as equals, is also not convincing for the reasons as follows. Article 14 ensures equality before law, which means that only persons who are in like circumstances should be treated equally. To treat equally those who are not equal would itself be violative of Article 14 which embodies a rule against arbitrariness. Thus classification is permissible if it satisfies the twin test of its being founded on intelligible differentia, which in turn has a rational nexus with the object sought to be achieved. The settled law are the twin tests on the anvil of which the reasonability of classification for the purpose of legislation has to be tested, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such differentia must have a rational relation to the object sought to be achieved by the statute in question. Applying the twin tests to the facts of the present case,



differential tariff can be fixed under Section 62(3) of the EA 2003 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**. Hence, the Commission has clubbed all colleges, universities, hospitals, shopping malls, etc., under the Commercial Category, using the criteria of **purpose for which the electricity is being utilised**, a commercial activities, since all these cannot be termed “industrial” and therefore cannot be clubbed under the industrial category. Thus, the elements of intelligible differentia as contained in Section 62(3) of the EA 2003 do permit differentiation in tariffs but at the same time do not permit any differentiation in tariffs on the ground of any consumer being a non-profit making organisation rendering education and research to the public at large, i.e., neither the ownership pattern nor the criteria of profit making/not for profit organisations, can be used as a criteria for differentiating between consumers for the purpose of tariff determination. The next requirement is that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The statute in question is the EA 2003. The object sought to be achieved by the said statute is contained in Section 62(3), and this aspect has been explained above. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The basis of classification of the Petitioners in the category, viz., HT-II Commercial along with all commercial category consumers availing supply at HT voltages is based on the requirement of differentiating tariffs under Section 62(3) of the EA 2003 based on the purpose for which the supply is required. There is therefore a direct nexus between the classification of the Petitioners in the category, viz., HT-II Commercial and the requirement and the object sought to be achieved by Section 62(3) of the EA 2003. There is, therefore, no violation of Article 14. Once a criterion or rationale is specified in a statutory provision, and such criterion has been adopted, there can be no violation of Article 14 unless the statutory provision itself is challenged and struck down. If the implementation of Section 62(3) could be supported on any of the considerations of the criteria mentioned in the said section, such implementation can not be challenged on the ground of Article 14. The objection therefore under Article 14 cannot, therefore, prevail, and accordingly in no unmistakable terms, is hereby, turned down.

29. Also, the criterion applied is that of “*availing supply at HT voltages*”. This is common to the Petitioner and Malls and Multiplexes. Thus, there is no question of treating unequals as equals. Both are “*availing supply at HT voltages*”. On this ground also, the



30. Petitions are wholly without any merit and are liable to be dismissed. Further, there appears to be a trend amongst consumer categories to claim that they are unfairly being categorized along with malls and multiplexes under commercial category. It needs to be noted that based on data submitted by MSEDCL for FY 2008-09, the total number of consumers in HT II Commercial category is 2052, and it is obvious that malls and multiplexes would only form a small part of this category. Hence, the contention that the Petitioners are being categorized along with malls and multiplexes ignores the fact that the Petitioners are also categorized along with many more consumers, who are not malls and multiplexes. Hence, merely because the Petitioners feel that some consumers in this category are not comparable; it does not mean that the Commission's approach in this regard can be faulted. Moreover, a few years ago, the Commission had created a separate category for malls and multiplexes, however, this categorization was set aside by the Honourable ATE, and these consumers were directed to be reverted to the Commercial category. Hence, the HT II Commercial category includes all such HT consumers, who cannot be classified under industrial or residential category.

31. In view of the rationale explained above, the Commission is of the view that there is neither any need nor any justification to change the categorisation of the Petitioner from HT-II Commercial to HT I Industrial (Non-Continuous) 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 the Petition filed by University of Pune in Case No. 34 of 2009.

Sd/-
(V. L. Sonavane)
Member

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(V. P. Raja)
Chairman



(K. N. Khawarey)
Secretary, MERC