Before the

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

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Case No. 82 of 2011 and Case No. 101 of 2011

In the matter of

Petition of M/s Mumbai International Airport Pvt Ltd. seeking re-classification of its tariff category and re-determination of tariff for FY 2008-09 and FY 2009-10, in view of the ATE Judgment dated May 31, 2011 in Appeal No. 195 of 2009 and ATE Judgment dated July 18, 2011 in Appeal No.144 of 2009, respectively

Shri. V.P. Raja, Chairman
Shri. Vijay L. Sonavane, Member

Mumbai International Airport Pvt Ltd.
Chhatrapati Shivaji International Airport,
1st Floor, Terminal IB,
Santa Cruz (East),
Mumbai-400 099. **.....Petitioner(s)**

1. **Reliance Infrastructure Ltd.**
   Reliance Energy Centre,
   Santa Cruz (East),
   Mumbai-400 055.
2. **The Tata Power Company Ltd**
   Bombay House, Homi Mody Street,
   Fort, Mumbai-400 001. **.....Respondent(s)**

ORDER

Dated: August 05, 2012

The Mumbai International Airport Private Limited (hereinafter referred as MIAL), is a Company incorporated under the Companies Act, 1956. In view of the Judgment of the Hon'ble Appellate Tribunal for Electricity (ATE) dated May 31, 2011 in Appeal No. 195 of

2009 and subsequent to the Commission's Notice initiating suo-motu hearing in the matter, MIAL submitted a Petition under affidavit before the Commission on July 11, 2011, for reclassification of its tariff category and consequential re-determination of tariff for FY 2008-09 with the following prayer:

> *"*
>
> *In the light of the submissions made herein above, Applicant respectfully prays this Hon'ble Commission to appropriately re-classify the tariff category of the Applicant and accordingly, re-determine the applicable composite tariff for FY 2008-09 which should be at least comparable to Industry HT-I tariff for the concerned period."*

Subsequently, in view of the Judgment of the Hon'ble ATE dated July 18, 2011 in Appeal No. 144 of 2009, MIAL submitted a Petition under affidavit before the Commission on August 23, 2011, for reclassification of its Tariff category and consequential re-determination of tariff for FY 2009-10 with the following prayers:

> *"*
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> *(a) In light of the submissions made herein above, Applicant respectfully prays this Hon'ble Commission to appropriately re-classify the tariff category of the Applicant and accordingly re-determine the applicable composite tariff for FY 2009-10;*
>
> *(b) Applicant reserves its rights and craves leave of this Hon'ble Commission to make claim for suitable adjustment of the excess amount, if any, that has been paid in relation to the period of FY 2009-10 vis-a-vis the tariff to be determined by this Hon'ble Commission at the appropriate stage."*

BACKGROUND

2. MIAL, in its Petition, submitted that 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, awarded the contract for the operation, maintenance, development, design, construction, up-gradation, modernisation, finance and management of the Mumbai Airport to MIAL, and consequently the Operation Management and Development Agreement (OMDA) was executed between MIAL and the Airport Authority of India (AAI), on April 4, 2006.

3. MIAL, in its capacity as the operator of the Mumbai Airport, is carrying out various aeronautical services and providing facilities which are essentially public utility services to the airlines and the passengers. As per the terms of Agreement with the AAI, MIAL is obliged to provide the utility services and facilities at Mumbai Airport at reasonable cost and at par with the International Standards to the travelling passengers for which it requires twenty-four hours uninterrupted power supplies, with electricity constituting approximately 25% of the operational expenses of MIAL.

4. In FY 2008-09 and FY 2009-10, MIAL was a registered consumer of Reliance Infrastructure Ltd. (RInfra) till October 31, 2009 and subsequently, w.e.f. November 1, 2009, MIAL is receiving supply from Tata Power-Distribution (TPC-D) after the Commission's Order dated October 15, 2009 in Case No. 50 of 2009.

5. In the MYT Order dated April 24, 2007 for FY 2007-08 to FY 2009-10 for RInfra-D, MIAL was included in the HT I Industrial category. Further, the Commission, in its Order dated June 4, 2008 in Case No. 66 of 2007 determined the tariff for RInfra-D for FY 2008-09, wherein the Commission created a new category of HT consumers namely, HT-II Commercial category, for consumers availing commercial supply at high voltage. As per this Order, MIAL was shifted from its earlier tariff category of HT-I Industrial to this new category of HT-II Commercial category. The tariff prescribed for the new HT-II Commercial category was significantly higher than the HT-I Industrial category, which resulted in a tariff increase by 43.88% for FY 2008-09 as compared to the tariff in FY 2007-08. The Tariff applied to MIAL under this category was as under:

Demand Charges: 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

Aggrieved by the inclusion in the HT-II Commercial category and resultant increase in tariff, MIAL filed an Appeal (Appeal No. 106 of 2008) before the Hon'ble ATE challenging the Commission's Order dated June 4, 2008. The Hon'ble ATE, vide its Judgment dated February 26, 2009, set aside the Commission's Order to the extent it had placed MIAL in the newly created HT-II Commercial category and remanded the matter to the Commission with the direction to re-determine its tariff by taking note of the nature of functions carried out by MIAL, which required special consideration. The relevant extract of the ATE Judgment dated February 26, 2009 in Appeal No. 106 of 2008 is as under:

"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****."(****emphasis added****)*

6. In accordance with the above ATE Judgment, MIAL filed a Petition (Case No. 29 of 2009) before the Commission on March 17, 2009, for re-determination of its tariff. Around the same time, RInfra-D also filed the ARR and Tariff Petition for FY 2009-10 before the Commission wherein, RInfra-D had proposed to place MIAL in the newly created HT-Public and Government Category. As RInfra-D had proposed significant high tariff for this category, MIAL had filed its objections against the same.

7. On June 15, 2009, the Commission issued its Order on tariff determination for RInfra-D for FY 2009-10, wherein the Commission continued to include MIAL under HT-II Commercial at par with other commercial establishments, based on certain rationale that was explained in the Order. Aggrieved by the Commission's decision, MIAL challenged the Commission's Order dated June 15, 2009 before the Hon'ble ATE in Appeal No. 144 of 2009.

8. The Commission, vide its Order dated November 23, 2009, disposed off MIAL's Petition in Case No. 29 of 2009, for re-determination of tariff on the following grounds:

> *"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 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.

...

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****...*

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:

...

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****...*

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." (emphasis added)

9. MIAL aggrieved by the above Order dated November 23, 2009, challenged the same before the Hon'ble ATE in Appeal No. 195 of 2009. The Hon'ble ATE, vide its Judgment dated May 31, 2011 allowed Appeal No. 195 of 2009 and set aside the Commission's Order dated November 23, 2009. The Hon'ble ATE, in its Judgment, ruled as under:

"86. Our findings are summarized below.

(i) The ***judgment dated 26.02.2009 of the Tribunal*** *specifically directing the State Commission not to put the Appellant in Commercial Category but to put it in a different special category,* ***was a limited Remand and not an open Remand****.*

(ii) The State Commission is bound to act within the scope of the Remand. It is not open to the State Commission to do anything but to carry out the terms of the Remand in letter and spirit.

(iii) The State Commission should re-determine the tariff for the Appellant strictly in view of the findings and observations made by the Tribunal.

*(iv)****The State Commission could have differential tariff for the aviation as well as for the purely commercial activities, such as shops, restaurant, etc., at the airport. However, if it is not feasible to have separate metering arrangements for the aviation activities and purely commercial activities, then the State Commission could re-categorize the Appellant in a separate category other than HT Commercial II and determine the composite tariff for aviation and the commercial activities of the Appellant****."(emphasis added)***

10. The Commission, vide its Notice dated June 17, 2011, scheduled a suo-motu hearing in the matter on July 20, 2011, and directed MIAL to serve a copy of the ATE Judgment dated May 31, 2011 in Appeal No. 195 of 2009 to (i) Reliance Infrastructure Ltd., (ii) The Tata Power Co Ltd, and (iii) four authorised Consumer Representatives.

11. In view of the above referred Judgments of the Hon'ble ATE dated May 31, 2011 and February 26, 2009 and subsequent to the Notice issued by the Commission for suo-motu hearing, MIAL filed its Petition in Case No. 82 of 2011, seeking re-classification of its Tariff category and consequent re-determination of tariff for FY 2008-09 on the following grounds:

a) MIAL is an aiport operator, and provides various aeronautical and non-aeronautical services and facilities to the airlines and passengers. Further, management of aerodrome is an essential service under the Essential Services Maintenance Act, 1968, and has to therefore, be treated differently and benevolently.

b) MIAL is not a commercial establishment like other establishments that have been classified under HT-II Commercial category. The operations of MIAL need to be distinguished from the operations 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, whereas, activities of an infrastructure service provider such as airport operator do not involve purely commercial transactions. MIAL is a 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 of MIAL is for essential services and not commercial services.

c) By virtue of the nature and services offered and activities undertaken by MIAL as the airport operator, it requires uninterrupted and continuous power supply. The efficiency of its services and operations cannot be compromised under any circumstance. MIAL's load curve is also almost flat for the entire period of the day making it a base load consumer and there are no noticeable spikes in the consumption and hence, it does not contribute to the requirement of short-term expensive power of the distribution licensee.

d) MIAL has not been able to and is not in a position to increase its charges to off-set the increase in electricity tariff. As a result, MIAL has to bear the brunt of any abnormal increase in electricity tariff, which would ultimately affect its operations. The economical viability and operational efficiency of MIAL would be affected on account of higher tariff since the charges realisable by MIAL and the resultant revenue for meeting all the developmental activities is regulated by Airport Economic Regulatory Authority (AERA) under the AERA Act, Operation Management and Development Agreement (OMDA) and State Support Agreement (SSA).

e) The Commission through its communication dated July 2, 2008, had 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.

f) MIAL quoted from the Hon'ble ATE's Judgment dated May 31, 2011 in Appeal No. 195 of 2009 as under:

"48. The above findings and directions indicate 3 mandates:

(I) ***There should not be any increase in the cross subsidy level and consequent tariff shock****;*

*(II) Since the **airport being a public utility service, it should be given a special consideration and it should not be exposed to commercial tariff. The aviation activities which are essential services should not be put under the Commercial category**. However, there are few commercial activities, such as duty-free shops, restaurant, etc. inside the airport. Hence **the State Commission may determine the different tariff for these commercial activities and impose the same on them**. Therefore, the impugned tariff order to the extent placing the Appellant under newly created category of HT-II Commercial is set aside; and*

(iii) Consequently, the State Commission is directed to re-determine the tariff payable by the Appellant by keeping in view the findings and observations made in this judgment."

g) Referring to the Hon'ble ATE's Judgment dated February 26, 2009 which has been reiterated in the Judgment dated May 31, 2011, MIAL submitted the following:

i. There should not be any increase in cross subsidy and consequent tariff shock. There shall be no increase in cross subsidy from FY 2007-08 to FY 2008-09, if the percentage increase in its tariff is equal to or less than the percentage increase in Cost of Supply (CoS) from FY 2007-08 to FY 2008-09. The Cost of Supply (CoS) for FY 2007-08 determined by the Commission in its Tariff Order dated April 2, 2007 is Rs. 4.98/kWh and for FY 2008-09 in Order dated June 4, 2008, the CoS is Rs. 5.90/kWh, i.e., an increase of about 18% (Rs. 0.92/kWh). However, the Commission, to avoid tariff shock, had moderated the average tariff hike to all consumers by 10.22% (Rs. 0.52/kWh) thereby deferring recovery of balance gap of Rs. 356 Crore (Rs. 0.40kWh) to next two years. Thus, in order to comply with the above mandate of the Hon'ble ATE, the Commission may consider keeping the increase in tariff for MIAL below 10.22% in line with approach adopted by the Commission for all consumers. MIAL was billed under HT-I Industry category till May 2008 and considering the fact that increase in HT-I Industry tariff for FY 2008-09 has been less than 10% and the fact that Applicant needs to be given special consideration being provider of essential public utility services, the tariff applicable for the airport activities of MIAL is proposed to be less than HT-I Industry tariff applicable for FY 2008-09.

ii. The present underground system of supply for commercial activities was laid long back without segregating such supply from aviation related supply from main metering point of the licensee, and to provide separate metering at the point of supply would not be feasible. MIAL submitted that the proportion of usage of electricity for commercial activities is small (approximately 6%-7% for FY 2008-09) as compared to the overall usage and also considering the present constraint of not having separate meters for commercial activities, composite tariff for the new

category would be the only feasible solution as has also been directed by the Hon'ble ATE. Further, considering the fact that proportion of such activities is small, the composite tariff, which is the weighted average for aviation activities and commercial activities, shall be close to HT-I Industrial tariff. MIAL thus, submitted that it would be appropriate to re-determine the composite tariff of MIAL in a separate category and the tariff for FY 2008-09 should be atleast comparable to HT-I Industry category.

12. The Hon'ble ATE, vide its Judgment dated July 18, 2011 allowed Appeal No. 144 of 2009, wherein it held that the findings of the Order dated May 31, 2011 in the matter of Appeal No. 195 of 2009 would also apply to Appeal No. 144 as well in so far that MIAL must be put in a separate category and different tariff should be determined for it. The relevant extracts of this Judgment are as follows:

"11. The question which relates to putting the Appellant into HT-II Commercial Category had been elaborately dealt with in that judgement. Finally, this Tribunal in that judgement held that Appellant should not be put in the Commercial Category; and on the other hand, the ***Appellant must be put in a separate category and different tariff shall be determined.*** *The observations with the findings and directions given by this Tribunal in the said judgement dated 31.5.2011 in Appeal No.195 of 2009 are as follows:*

"As mentioned above, once the categorization of the Appellant under the HT-II commercial category is set aside by this Tribunal, it is not proper for the State Commission to put the Appellant in the same category by charging the commercial tariff from the Appellant. ***The scope for differential tariff was made in the Remand Order dated 26.2.2009 to allow the distribution licensee to charge commercial rate from establishments in the airport carrying out purely commercial activities****. As discussed above,* ***the absence of metering cannot be the reason to equate the airport services with the purely commercial activities and not re-determining the tariff of the Appellant****."" (****emphasis added****)*

13. During the hearing in Case No. 82 of 2011 on July 20, 2011, Shri. Sitesh Mukherjee, Advocate, appeared on behalf of MIAL, Ms. Anjali Chandurkar, Advocate, appeared on behalf of RInfra-D, Shri. Karthik Krishnan appeared on behalf of TPC, and Shri. Ponrathnam appeared as an Intervener in the matter.

14. Shri. Sitesh Mukherjee submitted that MIAL offers both aeronautical and non-aeronautical services. The non-aeronautical services like shops, hotels, travel agency and vehicle parking, etc., are purely facilities provided to the passengers. Shri. Mukherjee further submitted that the tariff for aeronautical services is regulated as per the Airport Economic Regulatory Authority (AERA) Act.

15. Ms. Anjali Chandurkar submitted that the issue is not related to consumer categorisation as the Petitioner has not challenged the categorisation.

16. The Intervener, Shri. Ponrathnam, referred to Section 62(3) of the Electricity Act, 2003 related to differentiation of consumer categories, and submitted that further categorisation should not be done.

17. After hearing the parties, the Commission directed MIAL to submit the primary information on the following:

(a) Copy of the AERA Act
(b) Current Orders given by the AERA
(c) Issues relevant to tariff fixation raised before AERA
(d) Schemes for Demand Side Management (DSM) implemented by the Petitioner and details of the savings achieved by implementation of such activities
(e) Data on consumption of electricity utilisation by the operational and commercial services.

18. Further, the Commission also directed MIAL to prepare a brief, which should be submitted in the next hearing and also make a presentation including the above mentioned points. The Commission also directed MIAL and the Respondents, RInfra and TPC-D, to submit the requisite documents and information within three weeks time.

19. Further on July 20, 2011, MIAL submitted its additional submission in Case No. 82 of 2011 as under:

a) The additional submission is for re-determination of composite tariff under a separate category, chiefly on the following directions given by the Hon'ble ATE in its Judgment dated May 31, 2011 in Appeal No. 195 of 2009:
   i. The applicable tariff for MIAL has to be lower than the Commercial category considering essential services provided by it.

ii. The cross-subsidy should not increase. As per direction of the Hon'ble ATE and the mandate under the Electricity Act, 2003 and Tariff Policy, the cross subsidy has to be gradually reduced and brought within the range of 20% by FY 2011-12.

b) MIAL submitted that in its Tariff Order for FY 2007-08, the Commission had placed MIAL under HT-I Industry category and the average tariff charged from it during the period was Rs. 6.46/kWh, thus, the cross subsidy vis-a-vis the CoS of Rs. 4.98 per kWh worked out to 30%. MIAL further submitted that accordingly its tariff has to be determined with reference of Cos of Rs. 5.48/kWh for FY 2008-09 with reduced cross-subsidy of say 25% or at the most 30%, which was the existing cross subsidy level, and hence, the maximum average composite tariff that can be determined as per above principles would be Rs. 6.85/kWh (25% cross-subsidy) or Rs. 7.12/kWh (30% cross-subsidy) for the period when the Tariff Order for FY 2008-09 was applicable. MIAL submitted that thus, the re-determined tariff for MIAL has to be reduced by Rs. 2.67/kWh to Rs. 2.94/kWh, which may be done partly by reducing the base energy charges and partly by reducing the reliability (standby and expensive power) charges for the period when the Tariff Order for FY 2008-09 was applicable.

20. The Commission, vide its Notice dated July 25, 2011, scheduled the next hearing in the matter on August 23, 2011.

21. As regards the Commission's queries raised during the hearing dated July 20, 2011, MIAL submitted the following reply on August 23, 2011:

a) MIAL submitted a copy of the AERA Act, 2008, and briefly described the various Orders passed by AERA as well as the approach followed by AERA for determination of tariff for aeronautical services.
b) MIAL clarified that in the Order and Guidelines issued by AERA, it had been clearly stated that for Delhi and Mumbai airports, AERA will separately determine the extent to which the general framework would need modification in terms of the State Support Agreement.
c) In terms of the OMDA, MIAL is required to pay an Annual Fee of 38.7% of its Aeronautical as well as Non-aeronautical revenues to the Airports Authority of India. MIAL added that although any increase in cost of electricity for MIAL will entail a corresponding increase in Aeronautical revenue, 38.7% of such increased revenue would have to be given to AAI as Annual Fee.
d) MIAL submitted the details of airport related operational consumption and commercial consumption for FY 2008-09, FY 2009-10, and FY 2010-11, under following heads:

i). Pure commercial, i.e., advertising, ATM, car park, food and beverages, shops and establishments, etc., which comprised 6.7% and 6.64% of the total consumption in FY 2008-09 and FY 2009-10, respectively

ii). Airport related operational consumption

a. Airport related consumption by others, i.e., airline, cargo, PSU, Govt/Customs/Security etc., which comprised 16.94% and 16.67% of the total consumption in FY 2008-09 and FY 2009-10, respectively

b. Airport related consumption by MIAL., which comprised the balance 76.35% and 76.69% of the total consumption in FY 2008-09 and FY 2009-10, respectively

e) The consumption by concessionaires (pure commercial and others) was based on actual meter readings as consumption by each concessionaire was separately metered and there was no estimation of the consumption.

f) The recovery rate from pure commercial and other concessionaires was Rs. 9.50 per kWh for electricity utilisation.

g) As regards recovery of electricity related expenses from MIAL's operations, MIAL submitted that the electricity related expenses, including increases therein, for consumption by concessionaires has been recovered from them. However, as far as consumption by MIAL for airport related services provided by it is concerned, MIAL submitted that there has not been any revision in aeronautical tariff on the basis of actual/increased expenses towards electricity. Thus, the aeronautical tariffs do not include increase in electricity charges for MIAL's airport operations, and the increase in electricity charges for MIAL's own consumption have not been recovered by MIAL either from airline users or passengers and have been borne entirely by MIAL.

h) As regards the proposed method to pass through the refund to the concerned persons, from whom MIAL has recovered the earlier approved electricity related expenses, in case of refund due from the distribution licensee, MIAL submitted that since, the commercial usage should fall under the same category even after re-determination of its tariff, no refund shall be due to such concessionaires engaged in commercial activities. MIAL submitted that refund shall be due to other concessionaires providing airport related services as the same are considered as aviation related essential services. Since, the consumption of these concessionaires is precisely known; refund equivalent to relief granted by the Commission shall be passed on to them upon receipt by MIAL. MIAL submitted that since it has borne the increase in electricity charges for airport related consumption, no refund would be payable to anyone, except if AERA determines the

tariff for previous years considering actual cost of power and in that case refund would be required to be suitably adjusted in future tariff for passengers/airlines.

22. In view of the ATE Judgment dated July 18, 2011 in Appeal No. 144 of 2009 and as the Commission had already initiated suo motu proceedings in Case No. 101 of 2011, MIAL submitted its Petition seeking re-classification of its tariff category and consequential re-determination of tariff for FY 2009-10 in Case No. 101 of 2011, on August 23, 2011. MIAL's additional submissions in its Petition dated August 23, 2011 vis-a-vis the Petition dated July 20, 2011 in Case No. 82 of 2011, are as follows:

a) As per the ATE Judgment dated May 31, 2011, there should not be any increase in cross subsidy and consequent tariff shock. There shall not be any increase in cross-subsidy from FY 2008-09 to FY 2009-10, if the percentage increase in tariff for the applicant is equal to or less than the percentage increase in Cost of Supply from FY 2008-09 to FY 2009-10.
b) Since, the reclassification of tariff category and re-determination of tariff for MIAL for FY 2008-09 is presently pending before the Commission in Case No. 82 of 2011, per force, the reclassification of tariff category and re-determination of tariff for MIAL for FY 2009-10 has to be with reference to and in consonance with the Commission's decision in Case No. 82 of 2011.
c) As per the directions given by the Hon'ble ATE in Judgment dated July 18, 2011 read with the Judgment dated May 31, 2011, (a) the tariff for MIAL has to be lower than that applicable for the commercial category, considering the essential nature of services provided by the applicant, and (b) the cross subsidy should not increase. Accordingly, as per the mandate under the Electricity Act 2003 and Tariff Policy, the cross subsidy has to be gradually reduced and brought to within $\pm$20% by 2010-11.
d) For FY 2009-10, the Commission had moderated the average tariff increase for all consumers to 2%, and accordingly the tariffs for various categories were fixed with reference to average cost of supply (CoS) of Rs. 7.06/kWh. MIAL was a consumer of RInfra-D till October 31, 2009 and switched over to TPC-D w.e.f. November 1, 2009, hence, the applicability period of the Order dated June 15, 2009 for MIAL was June 2009 to October 2009, during which MIAL was charged at an average tariff of Rs. 9.12/kWh and the cross subsidy paid by MIAL during that period works out to 29.20%, vis-a-vis the CoS of Rs. 7.06/kWh. Since, the tariff for MIAL has to be lower than that for Commercial category, its cross subsidy has to be lower than the 29.20% applicable at the Commercial category tariffs. Further, the cross subsidy should not increase w.r.t the cross-subsidy prevalent in the previous year, i.e., FY 2008-09 and in fact needs to be

brought down gradually as per the provisions of EA 2003 and the Tariff Policy. The cross subsidy may be brought down to either 20% or 25% and accordingly the maximum average tariff of MIAL would either be Rs. 8.47/kWh (20% cross-subsidy) or Rs. 8.83/kWh (25% cross-subsidy) for the period when the Tariff Order of RInfra was applicable to MIAL. As MIAL had paid an average tariff of Rs. 9.12/kWh, the re-determined composite tariff of MIAL has to be reduced by Rs. 0.30/kWh to Rs. 0.65/kWh, which may be granted by reducing the base energy charge.

e) The Hon'ble ATE in its Judgment dated May 31, 2011 and July 18, 2011 had noted that the aviation activities of the airport must be put in separate category, while the commercial establishments, e.g., shops and restaurants situated within the airport may be charged at commercial rates. The present underground system of supply for commercial activities, (the proportion of whose usage is approximately only 6%-7% for FY 2009-10 as compared to overall usage) is not segregated from aviation related supply from main metering point of licensee; hence, it is not presently feasible to provide separate metering at the point of supply. Considering the present constraint of not having separate metering, the only feasible solution is to have a composite tariff for the new category.

f) The Commission, in its Order dated October 15, 2009 in Case No. 50 of 2009, has specifically held that a consumer changing over supply from one distribution licensee to another distribution licensee within the same area of supply shall not be permitted to change his/her name or the purpose or the classification of the category at the time of changeover. Accordingly, the appropriate tariff category/classification for MIAL determined by the Commission in the present proceedings in Case No. 101 of 2011 will also be applicable when MIAL became the registered consumer of TPC-D.

g) Since the issues raised in the proceedings for Case No. 82 of 2011, are similar to the issues in Case No. 101 of 2011, therefore, in order to avoid repetition, MIAL would not be filing a separate submission in Case No. 101 of 2011 and MIAL requested the Commission to consider the information furnished and submissions made earlier in Case No. 82 of 2011 except those which specifically relate to FY 2008-09, for Case No. 101 of 2011 also.

23. During the hearing on August 23, 2011, Shri. Sitesh Mukherjee, Advocate, and Shri. Pankaj Prakash, GM (Regulatory Affairs), appeared on behalf of MIAL, while Ms. Anjali Chandurkar, Advocate appeared on behalf of RInfra-D, and Shri. Ponrathnam appeared as an Intervener in the matter.

24. During the hearing, the Commission directed MIAL to submit the following:

(a) Detailed list of the usage considered under Commercial and non-Commercial consumption

(b) Disaggregated consumption of pure commercial purpose, Airport related consumption by MIAL and Airport related consumption by others, provided in the submissions dated August 23, 2011

(c) Details of the hourly consumption of the Airport during a typical day.

(d) Suggest possible options/solutions

(e) Energy Audit statement for the last three years.

The Commission also directed RInfra-D and TPC-D to submit the possible options/solutions in this regard.

25. The Commission, vide its Notice dated August 23, 2011, scheduled the next hearing in the matter on September 21, 2011.

26. On September 21, 2011, MIAL submitted the replies to the queries asked by the Commission in the hearing held on August 23, 2011, as under:

a) As regards the de-segregation of pure commercial consumption and airport related consumption, MIAL submitted that the consumption by each of the concessionaires is metered and hence, accurately known, but the de-segregation of Airport related consumption by MIAL could not be provided to the Commission as no metering is available for measuring consumption by each equipment at airport except for the Variable Frequency Drives (VFDs) installed for various motor loads. However, MIAL has provided the detailed list of loads with their connected load. MIAL also submitted that apart from its HT connections, there are few other connections taken by other agencies/persons for aviation related activities, and small LT connections of MIAL, status of which has been provided to the Commission by MIAL.

b) As regards the details of hourly consumption of the Airport, MIAL submitted that it has this data only for the period from June 22, 2011 to July 26, 2011, which has been submitted along with representative load curve. MIAL submitted that the representative load curve shows that CSIA has almost flat load profile with small dip in the morning and small peak in the evening hours, where it is already paying higher ToD tariff. However, since this data was for the month of June/July, 2011, it does not capture the seasonal variations. MIAL submitted that the load requirement of CSIA is dependent on the schedule of flights fixed by a Slot Allocation Co-ordination comprising of representatives of Director General of Civil Aviation (DGCA), Airports Authority of

India (AAI), Airlines and Airport Operators (like MIAL). The schedules are fixed twice in a year, i.e., for summer and winter, and MIAL is required to adhere to the same, and hence, it is not possible for it to shift its load requirement except for reduction by energy conservation measures, which it has already taken. MIAL submitted that while creating the new category, the relief may be granted in terms of existing ToD tariff, by suitably reducing the base energy charges and peak hour surcharge along with increase in off peak rebate.

c) As regards various possible options/solutions, MIAL submitted the following four options:
   A. Reduction in ToD base tariff and peak hour surcharge and increase in off peak rebate.
   B. Applying Commercial tariff for sub-group Pure Commercial, and HT Industrial tariff for airport related consumption under sub-groups (a) Airport related consumption for services provided by others and (b) Airport related consumption for services provided by MIAL, with tariff being suitably adjusted for desired level of cross-subsidy.
   C. Applying Commercial tariff for sub-group Pure Commercial, and HT Industrial tariff for airport related consumption provided by MIAL, and tariff in between these two for Airport related consumption for services provided by others.
   D&E. Considering tariff equal to cost of supply for Airport related consumption for services provided by MIAL, and for sub groups – Pure Commercial and Airport related consumption for services provided by others tariff based on options B and C as mentioned above.

d) MIAL submitted that it has got the Energy Audit done by M/s The Energy Research Institute in the year 2008, detailed report of which has been submitted as Annexure along with the submission.

27. During the hearing on September 21, 2011, Shri. Sitesh Mukherjee, Advocate, and Shri. Pankaj Prakash, GM (Regulatory Affairs), appeared on behalf of MIAL, Shri. J.J Bhatt, Advocate, and Ms. Anjali Chandurkar, Advocate, appeared on behalf of RInfra, Shri. P.V. Joshi appeared on behalf of TPC, and Shri. Ponrathnam appeared as an Intervener in the matter.

28. After hearing the Parties, the Commission directed MIAL to submit the details of Aeronautical and Non-Aeronautical consumption of electricity based on classification of (a) OMDA, and (b) The Airports Economic Regulatory Authority of India Act, 2008.

29. The Commission, vide its Notice dated September 21, 2011, scheduled the next hearing in the matter on November 8, 2011.

30. MIAL, through its Affidavit dated November 4, 2011 along with the Annexures, submitted the details of Aeronautical and Non-Aeronautical consumption based on classification under (a) OMDA and (b) The Airports Economic Regulatory Authority of India Act, 2008 as under:

a. The classification based on OMDA has been done as per the detailed list of services/facilities given in Schedule 5 (for Aeronautical Services) and Schedule 6 (for Non-aeronautical Services) given in OMDA.

b. The classification based on AERA Act has been done in line with the definition of Aeronautical Service given in Section 2(a) of the said Act, as reproduced below, and any consumption not covered by this definition has been treated as Non-Aeronautical:

""aeronautical service" means any service provided:

(i) for navigation, surveillance and supportive communication thereto for air traffic management;

(ii) for the landing, housing or parking of an aircraft or any other ground facility offered in connection with aircraft operations at an airport;

(iii) for ground safety services at an airport;

(iv) for ground handling services relating to aircraft, passengers and cargo at an airport;

(v) for the cargo facility at an airport;

(vi) for supplying fuel to the aircraft at an airport; and

(vii) for a stake-holder at an airport, for which the charges, in the opinion of the Central Government for the reasons to be recorded in writing, may be determined by the Authority."

c. Broadly, the difference between the two classifications is in treatment of Cargo and Ground Handling Consumption. As per OMDA, these are treated as Non-Aeronautical, whereas as per AERA Act, they are specifically covered in the definition of aeronautical service and hence, treated as aeronautical.

d. Since, the consumption by MIAL for different airport related activities is not separately metered, for the purpose of segregation of MIAL's consumption into aeronautical and non-aeronautical consumption, the load segregation based on HVAC, lighting and mechanical load proportions have been used assuming that load proportions represent consumption proportions (i.e., the load factor for each broad category of load is same). The HVAC load used for the Terminal Air-

conditioning has been allocated between aeronautical and non- aeronautical based on proportion of volume occupied for non-aeronautical services/activities in the total Terminal volume. Cargo load has been treated as 100% non-aeronautical as per OMDA and 100% aeronautical as per AERA Act. Lighting load, mechanical load and constant current regulator (for runway lighting) at the airport have been treated as 100% aeronautical in both OMDA and AERA classifications.

e. The summary of ratio of aeronautical and non-aeronautical consumption as per OMDA and as per AERA Act for FY 2008-09, FY 2009-10 and FY 2010-11 is as under:

Table: Percentage Consumption

Year	Option 1			Option 2		
	As per OMDA			As per AERA Act		
	Aero	Non-aero	Total	Aero	Non-aero	Total
2008-09	82.39%	17.61%	100%	88.76%	11.24%	100%
2009-10	82.47%	17.53%	100%	88.81%	11.19%	100%
2010-11*	81.70%	18.30%	100%	88.52%	11.48%	100%

Note: * Percentage consumption for FY 2010-11 corrected vide subsequent submission

f. MIAL requested the Commission to decide on the ratio for computing the weighted average tariff for MIAL considering respective weights of aviation related and other consumption along with respective applicable tariff, which MIAL proposes as Industrial Tariff for aviation related consumption and Commercial Tariff for other consumption for the respective periods, i.e.,

Composite tariff = (% of aeronautical consumption x industrial tariff) +
(% of non-aeronautical consumption x commercial tariff)

31. During the hearing on November 8, 2011, Shri Sitesh Mukherjee, Advocate, appeared on behalf of MIAL. Ms. Anjali Chandurkar, Advocate, appeared on behalf of RInfra.

32. During the hearing, the Counsel for MIAL made oral submission that in the Affidavit filed by the Petitioner on November 4, 2011, there were certain typographical errors in Para 5 of the Affidavit. The corrected version as submitted by the Counsel is as under:

Year	Option 1			Option 2		
	As per OMDA			As per AERA Act		
	Aero	Non-Aero	Total	Aero	Non-Aero	Total
2010-11	79.97%	20.03%	100.00%	86.64%	13.36%	100.00%

33. The Counsel for Respondent No.1 RInfra submitted that it has filed a Civil Appeal No. 7525 of 2011 before the Hon'ble Supreme Court of India against the Judgments dated May 31, 2011 and July 18, 2011 passed by the Hon'ble ATE and the said Civil Appeal has been admitted. The Commission directed RInfra to submit the full set of paper book of Civil Appeal No. 7525 of 2011 before the next hearing.

34. The Commission, vide its Notice dated November 8, 2011, scheduled the next hearing in the matter on November 25, 2011.

35. During the hearing on November 25, 2011, Shri. Avijeet Kumar Lala, Advocate, appeared on behalf of MIAL, and Ms. Anjali Chandurkar, Advocate, appeared on behalf of RInfra. After hearing the Parties, the Commission directed MIAL to suggest various options for balancing the revenue loss and give suggestions on whether the revenue loss should be recovered from the other consumers of Respondent No. 1, i.e., RInfra, or from the consumers undertaking commercial activity within MIAL.

36. The Commission, vide its Notice dated November 25, 2011, scheduled the next hearing in the matter on December 15, 2011.

37. MIAL, through its Written Submission dated December 15, 2011, submitted that implementation of the Hon'ble ATE's Judgments would result in refunds to MIAL for which the Hon'ble ATE has specified the procedure in its Judgment dated February 26, 2009, which provides that the excess amount recovered by RInfra from MIAL should be adjusted in the future electricity bills of MIAL at the rate of not more than Rs. 1 crore per month. However, since MIAL is no longer a consumer of RInfra, therefore, this procedure for getting refund from RInfra may need modification to the extent that refunds may either be directly paid to MIAL or may be routed through TPC-D, which shall give credit in corresponding bills.

38. In its Written Submission dated December 15, 2011, MIAL added that the Commission has been mandated by the Hon'ble ATE to give preferential tariff (as compared to commercial tariff) only to aviation related consumption of MIAL, and purely commercial consumption of MIAL can therefore, be charged at commercial tariff. In other words, while aviation related consumption should have lower cross-subsidy, the commercial consumption would still have cross-subsidy equal to the commercial tariff, and the differential between the two cross-subsidies is to be so determined that the overall cross-subsidy for the composite tariff of MIAL should not exceed the existing level of cross-subsidy as ruled by the Hon'ble ATE. MIAL further added as under:

a) MIAL submitted that Time of Day metering would not be able to provide a viable solution while determining tariff of MIAL since, it would not be possible for MIAL to shift its load requirement as the same is decided on a pre-decided schedule of flights, except for reduction by energy conversation. While creating the new category, the Commission may grant relief in the existing ToD tariff by suitably reducing the base energy charge and peak hour surcharge along with the increase in off peak rebate.

b) MIAL proposed that the composite tariffs for FY 2008-09 and FY 2009-10 may be re-determined as under:

   i) For FY 2008-09, the cross subsidy might be retained at the previous year level of 30% (Scenario 1) or brought down to 25% (Scenario 2).

   ii) For FY 2009-10, the cross subsidy might be reduced by 5%, i.e., 25%, if 30% cross subsidy is considered for FY 2008-09 (Scenario 1) and to 20%, if 25% cross subsidy is considered for FY 2008-09 (Scenario 2).

c) The total amount of refund for FY 2008-09 and FY 2009-10 under Scenario 1 and Scenario 2 works out to Rs. 23.77 Crore and Rs. 27.41 Crore, respectively, without any carrying cost. However, assuming that refund would be made in FY 2012-13, the corresponding refund with carrying cost at the rate of 12% p.a. (which is close to the SBI PLR in the respective years) works out to Rs. 37.22 Crore and Rs. 42.72 Crore, respectively, under the above two scenarios.

d) The weighted average formula proposed by MIAL earlier may be applied for all components of tariff, i.e., Demand Charge, Energy Charge, etc.

e) Since, MIAL has already been charged at Commercial tariff, the Non-Aeronautical consumption can be taken at the average tariff paid by MIAL. The Average Industrial Tariff applicable for Aeronautical consumption has been computed by subtracting the difference in the various Tariff Components for the two categories from the Average Tariff (Commercial) paid by MIAL, based on which the difference in Commercial and Industrial Tariff works out to Rs. 2.45/kWh and Rs. 0.85/kWh, hence, the refund with consumption proportions as per OMDA works out to Rs. 19.77 Crore without carrying cost and Rs. 30.67 Crore with carrying cost. With the consumption proportions as per AERA Act, the refund without carrying cost works out to Rs. 22.21 Crore and with carrying cost at the rate of 12% p.a. it works out to Rs. 34.32 Crore. The summary of refunds under various Scenarios and Options as submitted by MIAL is as follows:

Table: Refund required under various Scenarios and Options (in Rs. Crore)

	Scenario 1	**Scenario 2**	**Option 1**	**Option 2**
Without carrying cost	23.77	27.42	19.77	22.21
With carrying cost	37.22	42.72	30.67	34.32

f) MIAL has worked five options for recovering the refund amount under two broad choices namely:

a) Recovery from the rest of the consumers of RInfra

(1) Recovery from all consumers of RInfra

(2) Recovery only from HT consumers of RInfra

(3) Recovery from all consumers of RInfra except Residential category consumers to protect them from the increase.

b) Recovery from other consumers within Mumbai Airport, i.e., from Consumers classified under Non-Aero consumption

(4) With Aeronautical and Non- Aeronautical proportions as per OMDA

(5) With Aeronautical and Non- Aeronautical proportions as per AERA Act.

g) To gauge the impact of refund in FY 2012-13, MIAL has used FY 2010-11 consumption figures for all the above options and concluded that the per unit impact would be nominal if the refund is to be recovered from other consumers of RInfra and if based on Option 1, the impact would be minimal at Rs. 0.04 per unit. Further, the Commission would have two sub-options within Option 1, i.e., increase the tariff for all categories of consumers of RInfra by (a) same percentage (0.7%) or (b) same amount in Rs/ unit (Rs. 0.04/unit). The first sub-option would result in a meagre increase of 0 to 3 paise/unit, and also the cross subsidy hike would remain same. The second sub-option would result in a higher percentage hike in tariff of 8% for BPL consumers and 5% for agriculture consumers, and the cross subsidy hike would reduce marginally.

h) MIAL has also worked out implications for Options 4 and 5, as Rs. 17.33 per unit and Rs. 25.99 per unit, respectively, however, the same would not be in accordance with the directions of the Hon'ble ATE as contained in the Judgments dated May 31, 2011 and July 18, 2011, because as per Option 4 and Option 5, the tariff would become manifolds the already charged Commercial tariff, whereas the Hon'ble ATE has held that the aviation-related consumption should not be exposed to commercial tariff.

i) Moreover, recovery of entire refund amount for Aeronautical consumption from Non-Aeronautical consumers would mean that the refund has been adjusted internally within MIAL without any implication on RInfra, i.e., the tariff charged by RInfra would remain the same and cross subsidy would remain at the increased levels as in the impugned Orders. Since, these two options are not in consonance with the Hon'ble ATE's Judgment, hence, they cannot be implemented.

j) MIAL added that it has filed detailed affidavits and additional submissions on three separate occasions in order to assist the Commission, however, Respondent No. 1, RInfra, has been vehemently opposing the tariff re-determination procedure without filing any reply or submission in writing till date.

39. During the hearing on December 15, 2011, Shri. Avijeet Kumar Lala, Advocate, appeared on behalf of MIAL and Ms. Anjali Chandurkar, Advocate, appeared on behalf of RInfra.

40. After hearing the Parties, the Commission directed MIAL to provide all primary and secondary back-up data to justify the assumptions that have been used by MIAL in its earlier submissions on Affidavit dated November 4, 2011, in a week's time, i.e., by December 22, 2011, to the Respondent with a copy to the Commission.

Further, the Commission directed MIAL to work out the percentage impact on the consumers for each of the Options suggested by the Petitioner in its Affidavit dated December 15, 2011.

41. The Commission, vide its Notice dated December 19, 2011, scheduled the next hearing in the matter on January 2, 2012.

42. MIAL submitted its reply on December 28, 2011 on the directions of the Commission dated December 15, 2011. MIAL submitted that the Commission directed MIAL to carry out similar tariff impact analysis as done by MIAL w.r.t Option 1 on the Consumers of RInfra with respect to the other two Options as suggested in its Affidavit dated December 15, 2011. MIAL accordingly worked out the impact on tariff payable by RInfra's consumers in the event amount refundable to MIAL (i.e., Rs. 30.67 Crore) is allowed to be recovered either through Option 2 (i.e., recovery only from HT consumers of RInfra, having per unit impact of Rs. 0.60) or Option 3 (i.e., recovery from all consumers of RInfra except Residential category consumers, having per unit impact of Rs. 0.10).

43. The hearing scheduled on January 2, 2012, was postponed at the request of MIAL, vide its letter dated December 29, 2011.The hearing in the matter was re-scheduled to January 18, 2012.

44. RInfra-D filed its Written Submission on January 18, 2012, wherein it made the following submissions:

a) The Petitions relate to implementation of the Judgments dated May 31, 2011 and July 18, 2011, passed by the Hon'ble ATE in Appeal No. 195 of 2009 and 144 of 2009, which are the subject matter of challenge before the Hon'ble Supreme Court of India in Civil Appeal No. 7525 of 2011 and 9351 of 2011. RInfra added that the Hon'ble Supreme Court of India, in its Order dated October 10, 2011, has ruled that "*The proceedings on remand may continue and final order may be passed, but the same shall not be given effect to, without the leave of this Court*".

b) The ATE remand dated February 26, 2009 was not a limited remand but an open remand. Moreover, the above Judgment relied upon ATE's Judgment passed in Appeal No. 98 of 2008 in Spencer's Case, which has been specifically stayed by the Hon'ble Supreme Court in Civil Appeal No. 1603 of 2009.

c) Implementation in Case No. 82 of 2011 and Case No. 101 of 2011 relate to the period in the past, i.e., FY 2008-09 and part of FY 2009-10. In the circumstances it is clearly not possible to have separate metering arrangements, and determining a composite tariff for aviation and commercial activities in the absence of any metering arrangement brought forward by MIAL is not possible, since any such determination would be on the basis of conjectures and surmises.

d) Any Order passed on the basis of the findings in the ATE Judgment dated May 31, 2011, could only work prospectively. MIAL has already recovered the electricity charges from Non-Aeronautical business and such charges are admittedly a pass through. There is not a single document on record, which could assist the Commission in determining any tariff much less composite tariff for aviation and commercial activities of MIAL. Having recovered the entire amount of electricity charges, any relief towards the same would result in unjust enrichment to MIAL at the cost of other subsidising consumers of RInfra, who would ultimately bear the burden.

e) MIAL has submitted voluminous documents most of which are figures relating to its internal consumption of electricity and the veracity of the said data cannot be authenticated in absence of supporting / back up data. Moreover, there is no provision in the EA 2003 that requires a Regulatory Commission to look into either the accounts or the data of a consumer of electricity in the distribution licensee's area of supply.

f) Despite due follow up, MIAL has not provided relevant primary and secondary data to justify its assumptions, hence, RInfra is not in a position to make its submissions on the affidavit based on which MIAL has arrived at a purported percentage consumption.

g) From the analysis of Annexure –P/1 submitted along with the affidavit dated November 4, 2011, the metered consumption shows that the Airport related consumption by MIAL is 656.07 lakh units (571.95 lakh units Aero and 84.12 lakh units Non-Aero). RInfra further submitted that out of the total consumption, the percentage of metered

consumption is only 24% as compared to the unmetered consumption of 76%. Further, Annexure-P/2 show that out of the total metered consumption of 136.03 lakh units of others relating to aero activities, 105.61 lakh units have been allocated towards consumption by airlines.

h) Perusal of the arrangement between MIAL and airlines would reveal the manner of recovery of electricity charges and also the treatment of the revenue earned from the respective airlines by MIAL insofar as its regulatory tariff filing is concerned. The Tariff Petition before AERA would admittedly relate to Aeronautical charges, User Development Fees and Airport Development Fees and the treatment of amounts received from the airlines would have a bearing on the present proceedings.

i) MIAL has purported to treat consumption of Government and PSUs, as well as consumption of tourism activities, BSNL, Canara Bank, ONGC, etc. under aeronautical related consumption. Hence, the break-up of aeronautical and non-aeronautical consumption submitted by MIAL cannot be relied upon by the Commission.

j) The monthly meter-wise consumption data for verification on site as well as background calculations were not given by MIAL. If MIAL had given meter wise data, a physical verification thereof would have been possible.

k) Further, even the metered consumption cannot be considered as authentic in as much as MIAL has installed electromechanical meters, which are of 1992 vintage and since, there is no testing activity, such data is not authentic and can be termed as unreliable, specifically for the purpose of present proceedings.

l) MIAL has determined the Non-Aero and Aero air conditioning consumption on the basis of volume and not on the basis of square metres as in the general practice followed internationally. As per the International Civil Aviation Guidelines, all area before Security Check is treated as Non-Aero and even after Security Check all commercial activities inter alia are considered as Non-Aero and hence, it is practically impossible to assume that the Non-Aeronautical activities constitute only 10% as compared to the aeronautical activities without prejudice to RInfra's submission that the determination on the basis of volume is without any basis and not prescribed by any method.

m) In the view of the above, the Commission ought to ignore the calculations submitted by MIAL and if so deemed fit, appoint its own officers and/or independent, competent authority to look into the consumption of MIAL.

n) Without prejudice to its submission in the Civil Appeal, as submitted above, there can be no re-determination of a composite tariff for the past period in absence of any recordings being produced by MIAL and any assumptions taken by the Commission would not be accurate determination of tariff. RInfra submitted that if any tariff, which is lower than the tariff determined by the Commission in its earlier Tariff Orders, is determined, it

would be a burden on the other consumers of RInfra, especially when there is a sizeable Regulatory Assets as well as cross subsidy in RInfra's tariff.

45. During the hearing on January 18, 2012, Shri. Pallav Shukla, Advocate, appeared on behalf of MIAL and Ms. Anjali Chandurkar, Advocate, appeared on behalf of RInfra. During the hearing, the Commission asked MIAL to clarify the following points:

a) MIAL has raised its tariff for its individual consumers within MIAL premises to Rs. 15.25 per unit w.e.f. June 1, 2008, which was higher than the tariff approved by the Commission for MIAL as well as the commercial category for RInfra, i.e., Fixed Charge of Rs. 150 per kVA per month and Energy Charge of Rs.8.77/kWh.
b) The tariff for MIAL was reduced through the Commission's Order for RInfra dated June 15, 2009 (the tariff revision for HT commercial category was not stayed, since there was a tariff reduction). However, MIAL did not pass on the same to its consumers.
c) After migrating to TPC-D w.e.f. from November 1, 2009, MIAL reduced the tariff for individual consumers within MIAL premises to Rs. 9.50 per unit from Rs. 15.25 per unit, which was still higher than the Tariff approved by the Commission for TPC, i.e., Fixed Charge of Rs. 150 per kVA per month and Energy Charge of Rs.4.35/kWh for MIAL as well as commercial category of TPC-D.
d) The basis for charging such tariff higher than the tariff approved by the Commission for that category of consumer.
e) The Commission also asked MIAL to submit the proposed methodology for refund of the difference in amount to the individual consumers within the Airport complex, in case the tariffs applicable to MIAL were reduced.
f) The Commission further directed MIAL to submit the primary and secondary back up data, which have been shared with RInfra to the Commission, and further directed Respondent No. 1, RInfra to send requirement for the primary and secondary back-up data along with reasons to the Petitioner, by January 19, 2012, and directed MIAL to provide all such primary and secondary back-up data, latest by January 25, 2012.

46. The Commission, vide its Notice dated, January 19, 2012, scheduled the next hearing in the matter on February 10, 2012.

47. Following the directions of the Commission dated January 18, 2012, MIAL vide its letter dated February 7, 2012 submitted certain information to Respondent 1 RInfra. MIAL submitted that it has however, not shared the following data sought by RInfra, under the following justification:

a) The details of connected load of Non-Aero Consumers is neither relevant nor has this information been relied upon by MIAL, since the consumption of concessionaires is fully metered (both aero and non-aero) for which data has been provided. Also, the connected load data as on date is not available, and only sanctioned load at the time of connecting supply to the concessionaires is available in individual records. Further, the load factor for Non-Aero consumption of concessionaires is not required when actual consumption is available.
b) The Terminal Allocation Plan as approved by MCGM is neither relevant nor has this information been relied upon by MIAL, and also has security implications, since Mumbai airport is categorised as a hyper-sensitive airport from the point of security threat perception.
c) MIAL has already submitted the standard Agreement, which it enters with its concessionaires, and since the Contract with airline Offices is private and confidential, it cannot be shared.
d) The basis of classification of Aero and Non-Aero area is as per OMDA and AERA Act 2008, which have already been submitted by MIAL.
e) The Tariff Petition filed by MIAL for Aeronautical Charge/UDF/ADF is neither relevant nor has this information been relied upon by MIAL, and therefore, not necessary to be shared with RInfra-D. Also, since the tariff application is subjudice before the Airport Economic Regulatory Authority, it may not be appropriate to share the same with an unrelated third party.

48. During the hearing on February 10, 2012, Shri. Sitesh Mukherjee, Advocate, appeared on behalf of MIAL and Ms. Anjali Chandurkar, Advocate, appeared on behalf of Reliance Infrastructure Ltd. (RInfra).

49. During the hearing, the Commission observed as under:
a) It was admitted by MIAL that they are charging a 37% mark-up on the tariff fixed by the Commission. This is being levied as Service Charges for the electrical infrastructure at the Airport, which they are entitled to under the provisions of Section 12(A) (4) read with Section 22 of the Airport Authority of India Act, 1994. When asked as to why the 37% mark-up is being charged on electricity tariffs rather than showing it as separately as Service Charges, MIAL replied that it was just a basis.
b) Clearly, billing consumers of electricity at rates higher than that determined by the Commission for various categories of consumers violates the Electricity Act, 2003. As per the recent Case Laws on the subject, including the ATE, Bulk Users of electricity are entitled to take supply at Single Point as a Bulk Consumer. However, sub-distribution of

electricity is not permissible under the Electricity Act, 2003. The Bulk User is expected to become a Franchisee of the Utility, which supplies them electricity. The other alternative is for all individual consumers to take separate meters, which is impracticable for an organisation like the Airport.

c) MIAL justified the mark-up of 37% as Service Charges being levied. Whether this practice, which clearly violates the Electricity Act, 2003, can be allowed to continue needs to be resolved by looking at the relevant Rules, standing Orders, Notifications issued under the Airport Authority of India Act, 1994 relevant to the matter and the possibility of harmonious construction between these and the provisions of the EA 2003, Rules and Regulations made there under. The provisions of Sections 173, 174 and 175 of the EA 2003 needs to be kept in mind while trying to resolve this issue.

d) MIAL is before the Commission on the basis of a limited remand from ATE under which the Commission, inter alia, has been directed to re-categorise the tariff for aeronautical and non-aeronautical activities. On being specifically asked by the Commission that in view of the 37% mark-up, there is no assurance that the tariffs determined or re-determined by the Commission will be passed on to the consumers, MIAL stated that they have given an assurance on affidavit that the benefits of the lower tariff will be passed on to the consumers, save the Service Charges.

e) It was stated by MIAL that all the activities under which, providing electricity is one, are being carried out under the overall mandate, which they have under the AAI Act, 1994.

50. The Commission directed MIAL to respond to the specific queries raised in the hearing dated January 18, 2012, on affidavit, with a copy served on the Respondent RInfra and the Intervenor Shri N. Ponrathnam and submit their written submissions within four weeks, i.e., latest by March 10, 2012.

51. The Commission, vide its Notice dated, February 10, 2012, scheduled the next hearing in the matter on March 21, 2012.

52. MIAL, in its Written Submission dated March 12, 2012, submitted as under:

a) In the hearing held on February 10, 2012, the Commission had framed an issue regarding the practice being followed by MIAL, of charging a mark-up (service charge) on the electricity tariff fixed by the Commission, which as per the Commission was not in line with the Electricity Act, 2003 and there was an incompatibility between the provisions of Electricity Act, 2003 and the Airport Authority of India Act, 1994 (AAI Act) in so far as MIAL is levying a mark up by way of Service charge on the electricity charges. the Commission noted that the issue whether such a practice should be allowed to continue

needs to be resolved, keeping in view all the relevant Rules, standing Orders, notifications issued under the AAI act and the possibility of harmonious construction between these and the provisions of Electricity Act, 2003, and the rules and regulations made there under.

b) MIAL is a consumer with mixed electricity consumption pattern, i.e., electricity is used for both essential aviation activities and commercial purposes, on account of various activities that MIAL is obliged to carry out as the operator of the Mumbai Airport in terms of the OMDA. The Mumbai Airport is thus, an integrated unit/premise and is essentially a conglomerate of various functions, which are intertwined.

c) MIAL, in its capacity as a consumer, receives supply from the area distribution licensee for meeting its power requirements for the integrated whole of Mumbai Airport, at a single point. MIAL has provided the required electrical infrastructure within the airport premises such as transformers, power houses, switch rooms, LT panels, cables, etc., using which, MIAL makes electricity available to different sub-concessionaires, who carry out various activities and services within the Mumbai Airport on behalf of MIAL on principal-to principal basis. In accordance with Clause 8.5.1 of the OMDA, which has been entered into between MIAL and AAI in accordance with Section 12A of the AAI Act, MIAL is obliged to provide certain services and perform certain activities at the Mumbai Airport at all times, which are classified under the head of Aeronautical Services (Schedule 5 of OMDA), Non-Aeronautical Services (Schedule 6 of OMDA), and Essential Services (Schedule 16 of OMDA).

d) Under Clause 2.1.2 (iv) read with Clause 8.5.7 (i)(a) of the OMDA, MIAL is allowed to carry out any of the above activities by appointing third-party sub-concessionaires to act on its behalf on an arms-length basis, however, this does not diminish MIAL's overall responsibility under the OMDA. Thus, Mumbai airport is an integrated single premise and MIAL is a single consumer in terms of Section 2(15) of the Electricity Act, 2003.

e) MIAL is supplied with electricity at Mumbai airport for its own use by the area distribution licensee, and 'own use' of electricity is that of MIAL as per the terms of OMDA. Therefore, there is a basic difference between MIAL and other commercial establishments like malls and multiplexes, who also receive supply at single point, since, such malls and multiplexes do not have any exclusive obligation resting with the single point consumer to provide all services and perform all the activities within its premises for which electricity supply is availed.

f) Perforce, the various sub-concessionaires providing various services and facilities at Mumbai Airport on behalf of MIAL cannot be held to be a 'consumer' as defined and understood under the Electricity Act, 2003, as they do not satisfy either of the two criteria stipulated in Section 2(15) of the Electricity Act, 2003, namely, neither does a

sub-concessionaire receive supply directly from a distribution licensee for its own use, nor is a sub-concessionaire connected to the works of the distribution licensee for the purposes of receiving supply.

g) Further, MIAL is operating a public utility service and the operations and management of an airport needs to be distinguished from the operations of malls and multiplexes, which are purely commercial pursuits.

h) The sub-concessionaires of MIAL are connected to the electrical infrastructure created by MIAL for receiving electrical supply, which is an integral part of the airport infrastructure whose operation, maintenance and development is the exclusive responsibility and liability of MIAL as per OMDA. As per Section 22(ii) of the AAI Act, in its capacity as a lessee/ concessionaire of the Mumbai Airport, MIAL is entitled to charge fees or rent from persons who are given any facility by MIAL at the airport for carrying out any trade or business, as reproduced below:

"22. Power of the Authority to charge fees, rent, etc. –The Authority may,-
(i).....
(ii) With due regard to the instructions that the Central Government may give to the Authority, from time to time, charge fees or rent from persons who are given by the authority any facility for carrying on any trade or business at any airport, heliport or airstrip."

i) Further, the right of the airport developer has also been recognised by the Hon'ble Supreme Court in the case of Consumer Online Foundation & Ors. v Union of India & Ors. reported at (2011) 5 SCC 360, as reproduced below:

"Charges, fees and rent collected by the Airports Authority under Section 22 are for the services and facilities provided by the Airports Authority to the airlines, passengers, visitors and traders doing business at the airport. Therefore, when the Airports Authority makes a lease of the premises of the airport (including buildings and structures thereon and appertaining thereto) in favour of a lessee to carry out some of its functions under Section 12, the lessee, who has been assigned such functions, will have the powers of the Airports Authority under Section 22 of the Act to collect charges, fees or rent from the third parties for the different facilities and services provided to them in terms of the lease agreement. The legal basis of such charges, fees or rent enumerated in Section 22 of the 2008 Act is the contract between the Airports Authority or the lessee to whom the airport has been leased out and the third party, such as the airlines, passengers, visitors and traders doing business at the airport"

j) Thus, MIAL is permitted under law to collect from its sub-concessionaires, a charge towards providing the required electricity infrastructure for availing electricity supply, over and above the applicable electricity tariff fixed by the Commission.

k) The imposition of the Service Charge is in line with the Circular dated August 27, 2001 issued by AAI, and is meant to cover the costs and expenses incurred by MIAL in providing electricity supply to the sub-concessionaires situated within the airport premises, such as capital cost of electric installations, operation and maintenance of electric lines and installations, areas occupied by power supply installations, insurance cost of such installations, etc.

l) This Service Charge, which is collected by way of mark up to the electricity tariff determined by the Commission from the sub-concessionaires who are the end-users of electricity, is only a basis to account for the expenses incurred by MIAL for providing the necessary electricity infrastructure within the airport premises.

m) Since, this Service Charge is related to the recovery of expenses made towards providing the electricity infrastructure; it is fair and equitable to recover the Service Charge on the basis of per unit consumption, instead of spreading this cost across the entire user base including travelling passengers who use the airport.

n) Even otherwise, the legality of the said AAI Circular dated August 27, 2001, followed by MIAL for continuing the practice of collecting Service Charge by way of mark-up to the applicable tariff, and the entitlement of MIAL to collect Service Charge is not within the jurisdiction of the Commission under the Electricity Act 2003 because neither does it relate to charges for an activity relating to generation, transmission, distribution or trading of electricity, nor is such a charge covered under Sections 45, 46 or 62 of the Electricity Act 2003. Recovery of Service Charge relates to the operation and management of affairs of the Airport and this activity is in pursuance of the terms of OMDA and provisions of the AAI Act.

o) As per the definition of 'Revenue' as contained in the OMDA, the amount by way of Service Charge, which remains in the hands of MIAL after paying the electricity charges to the distribution licensee as per the tariff applicable to MIAL's category, forms part of its gross revenue and goes towards reducing the aeronautical tariff. Hence, there is no unjust enrichment much less any profit being derived by MIAL on account of the Service Charge.

p) The Electricity Act, 2003 and the AAI Act operate in completely distinct spheres and therefore, there is no conflict or repugnancy between the two statues, if both the legislations are read harmoniously in light of the above propositions.

q) AAI Act is a special Act dealing with a special subject, i.e., administration and management of airports and the AAI Act is a complete code with respect to all the issues relating to the operation and management of affairs of an airport.

r) Incompatibility, if any, between the AAI Act and the Electricity Act, 2003 has, therefore, to be examined in light of the above perspective. On the issue of general vs. special statutes, the Hon'ble Supreme Court spelt out as under in the case of LIC of India vs. DJ Bahadur & Ors., AIR 1980 SC 2181:

"In determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law"

"What is special or general is wholly a creature of the subject and context and may vary with situation, circumstances and angle of vision. Law is no abstraction but realises itself in the living setting of actualities. Which is a special provision and which general, depends on the specific problem, the topic for decision, not the broad rubric nor any rule of thumb. The peaceful co-existence of both legislations is best achieved, if that be feasible, by allowing to each its allotted field for play."

s) Therefore, the provision of supply of electricity by MIAL to its sub-concessionaires within the airport premises, and levying of and collecting a Service Charge in lieu of electricity infrastructure to meet its obligations under OMDA, which is a subject matter of present dispute, are indeed issues directly related to the management and operation of airport affairs and are not issues falling within the scope of Electricity Act, 2003. MIAL further submitted that the Electricity Act, 2003 may be a special statute for all aspects relating to electricity, but when the issues in question pertain to the operation and management of affairs of an airport, then the AAI Act is the governing statute which prevails over all other statutes. Further, unlike the EA 2003, which extends to the whole of India, the AAI Act is specific to its scope and application and applies exclusively only to airports, civil enclaves, aeronautical communication stations and all training stations, establishments and workshops relating to air transport services. It is an admitted position in law that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. In the Judgment of the Hon'ble Supreme Court in case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh, AIR 1961 SC 1170, the Hon'ble Court held as follows:

"The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect."

t) Considering the above explained position and various activities which MIAL undertakes as the operator of Mumbai airport, the Hon'ble ATE in its Judgments dated May 31, 2011 and July 18, 2011 had directed the Commission to re-categorise MIAL in a separate category other than HT Commercial II and in case it is not feasible to have separate metering arrangements for aviation activities and purely commercial activities, determine the composite tariff for aviation and commercial activities of MIAL.

u) Further, it is important to note that in its Judgments, the Hon'ble ATE categorically talked about and considered the 'activities' in the airport which MIAL is engaged in as the airport operator and not about the 'users'.

53. In reply to the queries raised by the Commission about the basis for electricity charges and proposed methodology for refund during the hearing held on January 18, 2012, MIAL submitted the following reply dated March 12, 2012:

a) **Basis for charging electricity charges to consumers situated within the airport premises**:

MIAL submitted that the 'Electricity Utilization Charge' collected by MIAL from consumers situated in MIAL's premises is computed in the following manner:

Step 1: Based upon the tariff applicable to MIAL as approved by the Commission, the 'Effective Unit Rate' is worked out as the average of applicable Energy Charge, Demand Charge, Fuel Adjustment charge, Wheeling Charge, Reliability Charges, etc., as well as the applicable Electricity Duty, Tax on Sale of Electricity, etc.

Step 2: Service Charge is added to the Effective Unit Rate so as to arrive at the Electricity Utilization Charge payable by individual consumers operating within MIAL's premises.

b) MIAL submitted that the Service Charge is being charged by MIAL in accordance with the AAI Circular dated August 27, 2001, and is meant to recover the costs and expenses incurred by MIAL in providing electricity supply to concessionaires situated within its premises such as, capital cost of electric installations, operation and maintenance of electric lines and installations, areas occupied by power supply installations, insurance cost of such installations, etc.

c) MIAL submitted that after paying the electricity charges to the distribution licensee as per the tariff applicable to MIAL's category out of the Electricity Utilization Charges collected from individual concessionaires, whatever remains in the hands of MIAL goes towards reducing the aeronautical tariff as per the terms of OMDA.

54. Respondent No. 1, RInfra-D gave its Written Submission on March19, 2012, wherein it has made the following additions to the submissions made by it on January 18, 2012:

a) In view of the fact that the Hon'ble ATE's Judgments relate to the period from FY 2008-09, and April 2009 to October 30, 2009, and in view of the fact that there was no provision for any separate metering arrangement and admittedly no application was made in this regard either by MIAL or by the occupants who are termed by MIAL as 'licensees/concessionaires', there is no question of having any differential tariff as ruled by the Hon'ble ATE.

b) Assuming that MIAL is entitled to a refund, there is no mechanism to ensure that such refund reaches the concessionaires from whom the amounts have been recovered. The recovery is not restricted only to the electricity tariff but includes certain charges which also cover a 37% mark-up relating to the provision of infrastructure. A major portion of consumption of MIAL is unmetered and entire unmetered consumption cannot be attributable to aero activities and such portion which is utilised for non-aero activities by MIAL is required to be identified. RInfra further submitted that in the absence of any metering with regard to such unmetered consumption, which is as high as 76% of the total supply to MIAL, any determination of composite tariff would be inaccurate.

c) RInfra submitted that several issues which have come up before the Commission during the course of hearing on remand were not the subject matter of the Appeal before the Hon'ble ATE, till the Commission raised a query regarding the charges recovered from various concessionaires.

d) The salient features of the Licence Agreement submitted by MIAL does not in any manner mention anything in relation to electricity charges payable by such a concessionaire of MIAL, and hence, RInfra is not aware of the manner in which electricity charges are recovered from the concessionaires.

e) The data provided by MIAL is random and there are no means by which RInfra is able to collate the figures in photocopies of ledgers with the Annexures to the affidavit dated November 4, 2011. The data is completely unreliable and it is not possible for a third party to check the veracity of the data submitted by MIAL as the summary of monthly consumption of each of the concessionaires. Moreover, following points also need to be considered:

   i. Several billings are assessment billings and not on the basis of actual meter reading.

   ii. Assessment billing is for a period more than two years in some cases, which suggests that although the meters have been faulty, no steps have been taken for their replacement.

   iii. From the ledgers, it is clear that certain commercial concessionaires like Air Corporation, Employer Bank, and APEDA, whose premises have been leased by MIAL do not appear in the earlier list submitted by MIAL, which had break up of consumption with the name of parties.

   iv. Variation in the metered consumption for a month ranging up to 3719%, i.e., 37 fold in the alternate monthly consumption in the case of Indian Oil Consumption.

f) The submissions made by MIAL with regard to cross-subsidy and tariff shock cannot be gone into by the Commission in view of the stay granted by the Hon'ble Supreme Court in Appeal No. 1603 of 2009.

g) Option 2 (allocation under two broad heads of aeronautical and non-aeronautical consumption based on AERA Act) as suggested by MIAL is of no relevance since the Regulatory Authority thereunder was established only on May 12, 2009 and there was no determination of tariff by the said authority, and MIAL was operating under OMDA dated April 4, 2006, which related to the lease of Mumbai International Airport under Section 12A of AAI Act, 1994. Moreover, the bifurcation of consumption between aero and non-aero has been given without any substantiating data/documents and the correctness of such data is unauthenticated for various reasons and is liable to be rejected on the basis of adverse inference.

h) From Section 22(ii) of the AAI Act, which MIAL has referred to in its submission, it is clear that if what is charged is fees, it has to be commensurate with the services rendered by the Authority and cannot be a fanciful and arbitrary charge. RInfra submitted that the letter dated August 27, 2001, referred by MIAL, can by no means be treated as any instructions by the Central Government. The term "Central Government" has been defined in Section 3(8) of the General Clauses Act, 1897, and the Authority or MIAL can, by no stretch of imagination be called "Central Government". In fact, in Section 40

of the AAI Act, the Central Government has been given a right to give direction to the Authority.

i) There is nothing on record to show that any services are rendered by MIAL to the persons from whom the said fees are recovered. MIAL is recovering the said Service Charge/fee over and above any rent/license fee/occupancy charges, which is clearly an add-on profiteering to the electricity charges.

j) Section 22(ii) clearly points out that the charges being recovered are from persons carrying on 'trade or business', and hence, the reasoning of MIAL that the electricity is purportedly for their 'own use' is incorrect.

k) The service charges include the power supply installations throughout the International Airport division, and the same is notwithstanding the fact that the consumption by the licensee/concessionaire as per the submission made by MIAL is only 24% of the total consumption. This indicate that MIAL is subsidising itself by recovering the cost of the entire installation from the said licensee/concessionaires.

l) Section 174 of the EA 2003 stipulates that the provisions of the EA 2003 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than EA 2003.

m) Section 173 of the EA 2003 provides that the provisions of the Consumer Protection Act, 1986, Atomic Energy Act, 1962, and the Railways Act 1989 shall prevail over the Electricity Act 2003, in so far as the EA 2003 is inconsistent with these three Acts. Since, there are no corresponding provisions in the AAI Act, the provisions of the Electricity Act 2003 have overriding effect.

n) The basis on which "electricity charges" are being recovered from various licensee/ concessionaires by MIAL is not permissible and any such instructions issued under AAI Act requiring MIAL to recover charges which are in contravention of the Electricity Act 2003 are not saved by any provision either under the AAI Act or the Electricity Act 2003.

o) Section 2(15) of the EA 2003 define a 'consumer' to mean any person who is supplied with electricity for his 'own use' by a licensee. There are License Agreements between MIAL and the licensees to whom premises are licensed, which presupposes licence to use electricity on payment thereby making it distinct from self use. The provision of separate meters makes it further clear that electricity is not for 'self use'.

55. Having heard the Parties and after considering the material placed on record, the following issues arise before the Commission:

a. How should the share of aeronautical consumption (aviation related activities) and non-aeronautical consumption (commercial activities) be identified out of the total consumption of MIAL?
b. Should a differential tariff be determined for the aviation (aeronautical) consumption and for the purely commercial consumption or should MIAL be categorized in a separate tariff category other than HT Commercial and a composite tariff for aviation and commercial consumption should be determined for this separate category?
c. How should the prevalent cross-subsidy and cross-subsidy reduction trajectory be factored in while re-determining the tariffs applicable to MIAL?
d. What should be the revised tariff applicable for aeronautical consumption and non-aeronautical/commercial consumption of MIAL for FY 2008-09 (June 2008 to May 2009) and FY 2009-10 (June 2009 to October 2009) or alternatively, what should be the composite tariff applicable for MIAL for FY 2008-09 (June 2008 to May 2009) and FY 2009-10 (June 2009 to October 2009)?
e. Computation of refund due to MIAL on account of the revised tariff applicable for FY 2008-09 and FY 2009-10, and the manner in which the refund has to be passed on to MIAL by RInfra?
f. Should the revised tariff category for MIAL, if any, determined by the Commission in this Order also be made applicable when MIAL became the registered consumer of TPC (with effect from November 1, 2010) as sought by MIAL?
g. Can MIAL charge electricity tariff (by marking it up for services) to its concessionaires, etc., at a rate higher than that determined by this Commission or for that matter can MIAL sub-distribute electricity by receiving it at single point?

56. The Commission now proceeds to give its analysis and ruling on each of the issues, keeping in view the specific directions of the ATE while remanding the matter to the Commission, and the extant Laws, Regulations, and submissions of the Parties, and the Commission's judgement, as under:

57. As regards the issue (a) on identification of the share of aeronautical consumption and non-aeronautical/commercial consumption out of the total consumption of MIAL, several submissions have been made by MIAL as recorded in earlier paragraphs of the Order, which

have been countered by the first Respondent RInfra. The summary of the submissions made by MIAL in this regard are:

i) Broadly, the difference between the classification of MIAL's consumption between aeronautical and non-aeronautical/commercial consumption, as per the OMDA and as per the AERA Act, is in treatment of Cargo and Ground Handling Consumption. As per OMDA, these are treated as Non-Aeronautical, whereas as per AERA Act, they are specifically covered in the definition of aeronautical service and hence, treated as aeronautical

ii) The share of aeronautical and non-aeronautical consumption as per OMDA and as per AERA Act for FY 2008-09 and FY 2009-10 is as under:

Table: Percentage Consumption

Year	Option 1			Option 2		
	As per OMDA			As per AERA Act		
	Aero	Non-aero	Total	Aero	Non-aero	Total
2008-09	82.39%	17.61%	100%	88.76%	11.24%	100%
2009-10	82.47%	17.53%	100%	88.81%	11.19%	100%

58. On the contrary, the first Respondent RInfra, has submitted that:

i) Out of the total consumption, the percentage of metered consumption is only 24% as compared to the unmetered consumption of 76%.

ii) MIAL has purported to treat consumption of Government and PSUs, as well as consumption of tourism activities, BSNL, Canara Bank, ONGC, etc., under aeronautical related consumption. Hence, the break-up of aeronautical and non-aeronautical consumption submitted by MIAL cannot be relied upon by the Commission.

iii) MIAL has determined the Non-Aero and Aero air conditioning consumption on the basis of volume and not on the basis of square metres as in the general practice followed internationally.

iv) In view of the above, the Commission ought to ignore the calculations submitted by MIAL and if so deemed fit, appoint its own officers and/or independent, competent authority to look into the consumption of MIAL.

v) Option 2 (allocation based on AERA Act) as suggested by MIAL is of no relevance since the Regulatory Authority thereunder was established only on May 12, 2009 and there has been no determination of tariff by the said authority, and MIAL was operating under OMDA dated April 4, 2006. Moreover, the bifurcation of consumption between aero and non-aero has been given without any substantiating

data/documents and the correctness of such data is unauthenticated for various reasons and is liable to be rejected on the basis of adverse inference.

59. In view of the above submissions and considering the specific mandate of the ATE in the limited remand, the Commission is of the view that the ATE has given its ruling being well aware of the data limitations in this regard, which had been highlighted by RInfra as well as the Commission itself in its Order dated November 23, 2009 in Case No. 29 of 2009, as reproduced below:

> *"26. ...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."*

60. Hence, the Commission is constrained to accept the data regarding the share of aeronautical and non-aeronautical/commercial consumption, as submitted by MIAL, for the purpose of implementing the directions of the ATE in the limited remand. Further, the Commission is of the view that it would be more appropriate to consider the share of aeronautical and non-aeronautical/commercial consumption as per OMDA, rather than as per the AERA Act, since the Airport Economic Regulatory Authority (AERA) came into existence only in FY 2009-10, whereas the majority of the period under consideration in this Order is in FY 2008-09 and also includes some months of FY 2009-10. Moreover, as highlighted by RInfra, the AERA has not determined tariffs based on aeronautical and non-aeronautical charges recovered by MIAL for the period under consideration.

61. Accordingly, the share of aeronautical and non-aeronautical/commercial consumption for the concerned months of FY 2008-09 and FY 2009-10, have been considered by the Commission as per MIAL's submissions, for the purposes of implementing the ATE's directions, as given in the Table below:

Table: Share of Consumption (Lakh Units)

Year	% Share			Consumption in Lakh Units		
	Aero	Non-aero	Total	Aero	Non-aero	Total
2008-09	82.39%	17.61%	100%	707.98	151.34	859.32

2009-10	82.47%	17.53%	100%	702.74	149.35	852.08

62. As regards the issue (b) on whether differential tariff should be determined for the aviation (aeronautical) consumption and for the purely commercial consumption or MIAL should be categorized in a separate tariff category other than HT Commercial and a composite tariff for aviation and commercial consumption should be determined for this separate category, the submissions made by MIAL in this regard are summarised below:

i) The present underground system of supply for commercial activities has been laid long back without segregating such supply from aviation related supply at the main metering point of the Licensee, and to provide separate metering at the point of supply would not be feasible.

ii) The proportion of usage of electricity for commercial activities is small as compared to the overall usage and hence, composite tariff for the new category would be the only feasible solution as has also been directed by the ATE.

63. On the contrary, RInfra has submitted as under:

i) Implementation in Case No. 82 of 2011 and Case No. 101 of 2011 relate to the past periods, i.e., FY 2008-09 and part of FY 2009-10. In the circumstances, it is clearly not possible to have separate metering arrangements, and determining a composite tariff for aviation and commercial activities in the absence of any metering arrangement brought forward by MIAL is not possible, since any such determination would be on the basis of conjectures and surmises.

ii) Any Order passed on the basis of the findings in the ATE Judgment dated May 31, 2011, could only work prospectively. There is not a single document on record, which could assist the Commission in determining any tariff much less composite tariff for aviation and commercial activities of MIAL. Having recovered the entire amount of electricity charges, any relief towards the same would result in unjust enrichment to MIAL at the cost of other subsidising consumers of RInfra, who would ultimately bear the burden.

iii) In view of the fact that the Hon'ble ATE's Judgments relate to the period from FY 2008-09, and April 2009 to October 30, 2009, and in view of the fact that there was no provision for any separate metering arrangement and admittedly no application was made in this regard either by MIAL or by the occupants who are

termed by MIAL as 'licensees/concessionaires', there is no question of having any differential tariff as ruled by the Hon'ble ATE.

64. Thus, RInfra has submitted that neither differential tariff nor composite tariff can be determined for MIAL in accordance with the ATE's Judgment and any tariff re-determination can be done only prospectively. However, the ATE has categorically reiterated its earlier Judgment in its Judgment dated May 31, 2011 and has directed the Commission to either determine differential tariff for the aviation as well as for the purely commercial activities or re-categorize MIAL in a separate category other than HT II Commercial and determine the composite tariff for aviation and the commercial activities of the Appellant, in case it is not feasible to have separate metering arrangements for the aviation activities and purely commercial activities. Further, the ATE has also ruled as under in its various Judgments in this matter:

"48. The above findings and directions indicate 3 mandates:

...

(II) ... The aviation activities which are essential services should not be put under the Commercial category. However, there are few commercial activities, such as duty-free shops, restaurant, etc. inside the airport. Hence the State Commission may determine the different tariff for these commercial activities and impose the same on them..." (refer ATE Judgment dated May 31, 2011 in Appeal No. 195 of 2009)

"85...The scope for differential tariff was made in the Remand Order dated 26.2.2009 to allow the distribution licensee to charge commercial rate from establishments in the airport carrying out purely commercial activities". (refer ATE Judgment dated May 31, 2011 in Appeal No. 195 of 2009)

65. Thus, the ATE has ruled that while determining differential tariff for MIAL, the commercial establishments inside the airport should pay the commercial tariff, and hence, there is no need to determine a separate commercial tariff for these commercial establishments, and the tariff applicable for LT II Commercial category under RInfra's approved Tariff Schedule for the respective periods will have to be applied to the corresponding non-aeronautical/commercial consumption, as determined by the Commission based on its analysis under Issue (a) above. However, as regards the ATE's ruling that the scope for differential tariff was made in the Remand Order to allow the Distribution Licensee to charge commercial tariff from the commercial establishments, MIAL has claimed before

the Commission that these are not separate consumers either of RInfra or of MIAL themselves, and all this consumption should be considered as the own consumption of MIAL. The Commission has further elaborated on this issue, while discussing the Issue (g) in subsequent paragraphs of this Order.

66. For the purpose of implementing the ATE's directions regarding re-determination of tariff for MIAL, since separate metering does not exist and these commercial establishments are not directly connected to RInfra's distribution system, the Commission is of the view that the only option is to create a separate category for MIAL and determine the composite tariff for this separate category, by considering the share of aeronautical and non-aeronautical/commercial consumption, as determined by the Commission under Issue (a) above.

67. As regards the issue (c) on how the prevalent cross-subsidy and cross-subsidy reduction trajectory should be factored in while re-determining the tariffs applicable to MIAL, the submissions made by MIAL in this regard are summarised below:

i) MIAL submitted that in its Tariff Order for RInfra for FY 2007-08, the Commission had placed MIAL under HT-I Industrial category and the average tariff charged from MIAL during the period was Rs. 6.46/kWh, thus, the cross subsidy vis-a-vis the Average Cost of Supply (ACoS) of Rs. 4.98 per kWh, was 30%.

ii) As per the ATE Judgment dated May 31, 2011, there should not be any increase in cross subsidy and consequent tariff shock, which shall be the case, if the percentage increase in tariff for the applicant is equal to or less than the percentage increase in Cost of Supply from FY 2008-09 to FY 2009-10.

iii) MIAL proposed that the composite tariffs for MIAL for FY 2008-09 and FY 2009-10 may be re-determined as under:

   a. For FY 2008-09, the cross subsidy may be retained at the previous year level of 30% (Scenario 1) or brought down to 25% (Scenario 2) with reference to the ACOS of Rs. 5.48/kWh for FY 2008-09.

   b. For FY 2009-10, the cross subsidy may be reduced by 5%, i.e., 25%, if 30% cross subsidy is considered for FY 2008-09 (Scenario 1) and to 20%, if 25% cross subsidy is considered for FY 2008-09 (Scenario 2) with reference to the ACOS of Rs. 7.06/kWh for FY 2008-09.

68. On the contrary, RInfra has submitted that

i) The ATE Judgment dated May 31, 2011 has relied upon the ATE Judgment in Appeal No. 98 of 2008 in Spencer's Case, which has been specifically stayed by the Hon'ble Supreme Court of India in Civil Appeal No. 1603 of 2009, and hence, by implication, the direction of ATE as regards cross-subsidy should not be implemented.

ii) Having recovered the entire amount of electricity charges, any relief towards the same would result in unjust enrichment to MIAL at the cost of other subsidising consumers of RInfra, who would ultimately bear the burden.

69. The Commission is of the view that the Hon'ble Supreme Court has, in its order dated 10th October 2011 in CA No. 7525 of 2011 and 9351 of 2011, directed that "*The proceedings on remand may continue and final order may be passed but the same shall not be given effect to, without the leave of the court.".* Hence, the Commission needs to proceed on the matter of remand. Further, as regards RInfra's submission that any reduction in tariff for MIAL will have to be passed on to the other consumers of RInfra, the ATE has given a clear direction regarding the refund to be given to MIAL, and any refund given by RInfra to MIAL will eventually have to be passed on to the other consumers of RInfra, since the revenue gap on account of the refund to MIAL would have to be recovered from the other consumers of RInfra. Hence, this objection of RInfra also cannot be sustained.

70. As regards MIAL's contention that there shall not be any increase in cross subsidy and consequent tariff shock, if the percentage increase in tariff for the applicant is equal to or less than the percentage increase in Average Cost of Supply, the Commission clarifies that the above contention is misplaced, as percentage tariff increases can be misleading, since the percentage of increase depends on the existing tariff. For instance, if the average existing tariff for the residential category is say, around Rs. 3 per kWh, and that for the commercial category is say, around Rs. 8 per kWh, and the average cost of supply is say Rs. 5 per kWh, with an average tariff increase requirement of say, 10%. The cross-subsidy provided by commercial category in this illustration is thus, Rs. 3 per kWh, while residential category is being subsidised by Rs. 2 per kWh, and the tariff differential is Rs. 5 per kWh. The revised average cost of supply is say, Rs. 5.50 per kWh. In this illustration, a 10% increase across the board will give the desired revenue requirement, but will amount to 30 paise per kWh increase for the residential category, as compared to 80 paise per kWh increase for the commercial category. Thus, a 10% increase across the board will result in increasing the cross-subsidy contribution of commercial category from Rs. 3 per kWh to Rs. 3.30 per kWh (Rs. 8.80 - Rs. 5.50), while subsidy provided to residential category will increase from Rs. 2

per kWh to Rs. 2.20 per kWh (Rs. 5.50 - Rs. 3.30). Since the average tariff increase required is 10%, the cross-subsidy can be reduced, only if the tariff of the residential category is increased by say 20% (increase of 60 paise/kWh), and the tariff of commercial category is increased by less than 10%, say 5% (increase of 40 paise/kWh). If this is done, then the tariff differential will reduce by 20 paise/kWh, to Rs. 4.80 per kWh. Thus, as can be seen, even though the tariff has been increased quite steeply for residential category in this illustration, the cross-subsidy has not reduced significantly.

71. As regards cross-subsidy, the ATE has ruled in its May 31, 2011 Order that there should not be any increase in the cross-subsidy level and consequent tariff shock. In compliance with the ATE's said Order, the cross-subsidy has been retained at the same levels as prevalent in FY 2007-08 but not increased so that the directions of the ATE are complied with. The prevalent cross-subsidy in FY 2007-08 works out to 30% based on the average tariff of Rs. 6.33 per kWh paid by MIAL in FY 2007-08 and the ACOS in FY 2007-08, as submitted by MIAL. Accordingly, in its analysis against the subsequent Issue (d), the Commission has attempted to re-determine the tariff applicable to MIAL in such a manner that the cross-subsidy does not increase from the level of 30%, while at the same time ensuring that the other directions of the ATE regarding determination of composite tariff, with commercial tariff being applicable for the commercial consumption, are also complied with. Further, MIAL has incorrectly considered the ACOS for FY 2008-09 as Rs. 5.48 per kWh while proposing the revised tariffs, and the correct ACOS for FY 2008-09 is Rs. 5.90 per kWh, as per the Tariff Order for FY 2008-09. If the ACOS had been correctly considered by MIAL as Rs. Rs. 5.90 per kWh, then the effective tariff for FY 2008-09, as per MIAL's own formulation, would work out to Rs. 7.67 per kWh and Rs. 7.38 per kWh, at 30% and 25% cross-subsidy, respectively.

72. As regards the issue (d) on what should be either the revised tariff applicable for aeronautical consumption and non-aeronautical/commercial consumption of MIAL or the composite tariff applicable for MIAL for the applicable period in FY 2008-09 and FY 2009-10, the submissions made by MIAL are summarised below:

i) In its Petition in Case No. 82 of 2011, MIAL prayed that the Commission should re-determine the applicable composite tariff for FY 2008-09 which should be at least comparable to Industry HT-I tariff for the concerned period.

ii) Considering the fact that increase in HT-I Industry tariff for FY 2008-09 has been less than 10% and the fact that MIAL needs to be given special consideration being provider of essential public utility services, the tariff applicable for the

airport activities of MIAL should be less than HT-I Industry tariff applicable for FY 2008-09.

iii) For FY 2008-09, the maximum average composite tariff that can be determined by reducing cross-subsidy would be Rs. 6.85/kWh (25% cross-subsidy) or Rs. 7.12/kWh (30% cross-subsidy) for the period when the Tariff Order for FY 2008-09 was applicable.

iv) For FY 2009-10, the maximum average tariff of MIAL would either be Rs. 8.47/kWh (20% cross-subsidy) or Rs. 8.83/kWh (25% cross-subsidy) for the period when the Tariff Order of RInfra was applicable to MIAL.

v) MIAL requested the Commission to compute the weighted average (composite) tariff for MIAL using the following Formula, i.e.,

Composite tariff = (% of aeronautical consumption x industrial tariff) +
(% of non-aeronautical consumption x commercial tariff)

vi) The weighted average formula proposed by MIAL may be applied for all components of tariff, i.e., Demand Charge, Energy Charge, etc.

73. As ruled earlier in this Order, the Commission has decided to determine the composite tariff for MIAL for the respective periods of FY 2008-09 and FY 2009-10. Further, the primary criteria applied by the Commission to determine the composite tariff for MIAL has been that the cross-subsidy levels are not increased vis-a-vis the previous year's levels, while at the same time ensuring that the direction of the ATE that MIAL should be categorized in a separate tariff category other than HT Commercial and a composite tariff for aviation and commercial consumption should be determined for this separate category, are also factored in while determining the composite tariff. Hence, the component of non-aeronautical/commercial consumption has been considered to be charged at the tariffs applicable for the LT II (B) Commercial category for the respective years, since these are LT connections, and the load of each connection is assumed to be between 20 kW to 50 kW, in line with the categorisation under LT II (B). Further, the tariffs of this category are the closest to HT II Commercial category, and the ATE has directed that the commercial consumption could be charged at the same rate, while the aeronautical component of the consumption should be charged at a lower rate. Thus, the tariff for the aeronautical component of the consumption has been adjusted in such a manner that the weighted average tariff (composite tariff) for MIAL works out to a tariff resulting in cross-subsidy levels of 30% in FY 2008-09 and 27% in FY 2009-10, which ensures that the cross-subsidy is also reduced in FY 2009-10. Thus, with the revised tariffs, the cross-subsidy applicable to MIAL has been reduced from 65% to 30% for FY 2008-09 (May 2008 to May 2009) and has been retained at 27% for FY 2009-10 ((June 2009 to Oct 2009), thereby resulting in a reduction in tariff applicable to

MIAL, as directed by the ATE in its remand Order. Based on the consumption data available with the Commission, the effective composite tariff applicable to MIAL for FY 2008-09 (May 2008 to May 2009) and FY 2009-10 ((June 2009 to Oct 2009) works out to Rs. 7.69 per kWh and Rs. 8.93 per kWh, respectively, as compared to the earlier applicable effective tariff of Rs. 9.79 per kWh and Rs. 8.97 per kWh, respectively, as submitted by MIAL.

As regards MIAL's submissions that the TOD tariffs should be adjusted to get the desired reduction in tariffs, the Commission has rejected the same, since TOD tariff and TOD time-slots have been maintained uniform across the State to ensure that the peak hour tariff signals are given consistently across the State, to ensure State-wise Merit Order Despatch.

74. Thus, the Commission hereby determines the following composite tariff for MIAL for the concerned periods of FY 2008-09 and FY 2009-10:

Sl.	Particulars	Demand Charges (Rs/kVA/month)	Energy Charges (Paise/kWh)	Reliability Charges (Paise/kWh)	
				Standby Charges	Expensive Power Charges
1	FY 2008-09 (May 2008 to May 2009)	150	531	27	175
2	FY 2009-10 (June 2009 to Oct 2009)	150	857		

Note: TOD tariffs have not been changed

75. As regards the issue (e) on computation of refund due to MIAL on account of the revised tariff applicable for FY 2008-09 and FY 2009-10, and the manner in which the refund has to be passed on to MIAL by RInfra, the submissions made by MIAL are summarised below:

i) Implementation of the ATE's Judgments would result in refunds due to MIAL for which the ATE has specified that the excess amount recovered by RInfra from MIAL should be adjusted in the future electricity bills of MIAL at the rate of not more than Rs. 1 crore per month. However, since MIAL is no longer a consumer of RInfra, therefore, this procedure for getting refund from RInfra may need modification to the extent that refunds may either be directly paid to MIAL or may be routed through TPC-D, which shall give credit in corresponding bills

ii) The summary of refunds under various Scenarios and Options as submitted by MIAL is as follows:

Table: Refund required under various Scenarios and Options (in Rs. Crore)

	Scenario 1	Scenario 2	Option 1	Option 2
Without carrying cost	23.77	27.42	19.77	22.21
With carrying cost	37.22	42.72	30.67	34.32

iii) As regards the proposed method to pass through the refund to the concerned persons from whom MIAL has recovered the earlier approved electricity related expenses, in case of refund due from the distribution licensee, MIAL submitted that since the commercial usage should fall under the same category even after re-determination of its tariff, no refund shall be due to such concessionaires engaged in commercial activities.

iv) MIAL submitted that refund shall be due to other concessionaires providing airport related services as the same are considered as aviation related essential services. Since, the consumption of these concessionaires is precisely known; refund equivalent to relief granted by the Commission shall be passed on to them upon receipt by MIAL.

76. Based on the tariffs approved by the Commission under Issue (d) above, the Commission has attempted to compute the quantum of refund due to MIAL on account of the reduction in composite tariff vis-a-vis the tariff charged earlier, based on available data. However, the Commission does not have the monthly consumption data for the concerned months of FY 2008-09 and FY 2009-10, and only annual consumption data is available. Hence, the Commission has considered the pro-rata consumption to assess the quantum of refund, which works out to Rs. 19.56 crore and Rs. 0.14 crore for FY 2008-09 and FY 2009-10, respectively. However, the actual quantum of refund would have to be calculated based on the actual monthly consumption over the concerned periods and the difference in the Energy Charges approved by the Commission, since the other tariff components have not been modified by the Commission. This refund shall be given by RInfra directly to MIAL, at the rate of Rs. 1 crore per month, as directed by the ATE, till such time the entire refund amount is paid.

The Commission notes that MIAL has submitted that refund shall be due to concessionaires providing airport related services as the same are considered as aviation related essential services. Since, the consumption of these concessionaires is precisely known; refund equivalent to relief granted by the Commission shall be passed on to them upon receipt by MIAL.

77. As regards the issue (f) on whether the revised tariff category for MIAL, if any, determined by the Commission in this Order also be made applicable when MIAL became the registered consumer of TPC (with effect from November 1, 2010) as sought by MIAL, the submissions made by MIAL are summarised below:

i) The Commission, in its Order dated October 15, 2009 in Case No. 50 of 2009, has specifically held that a consumer changing over supply from one distribution licensee to another distribution licensee within the same area of supply shall not be permitted to change his/her name or the purpose or the classification of the category at the time of changeover. Accordingly, the appropriate tariff category/classification for MIAL determined by the Commission in the present proceedings in Case No. 101 of 2011 will also be applicable when MIAL became the registered consumer of TPC-D.

78. TPC has not expressed any views in the matter. The Commission has noted MIAL's submission in this regard, and the issue of having the same categorisation in TPC's Tariff Schedule will be considered when TPC's tariffs are being determined in future. Further, TPC is directed to propose an appropriate consumer categorisation for MIAL in its subsequent MYT Petition, keeping in view the ruling of the Commission in this Order regarding applicability of composite tariff for MIAL's consumption.

79. As regards the issue (g) on whether MIAL can charge electricity tariff (by marking it up for services) to its concessionaires, etc., at a rate higher than that determined by this Commission or for that matter can MIAL sub-distribute electricity by receiving it at single point, the submissions made by MIAL are summarised below:

i) The legality of the said AAI Circular dated August 27, 2001, followed by MIAL for continuing the practice of collecting Service Charge by way of mark-up to the applicable tariff, and the entitlement of MIAL to collect Service Charge is not within the jurisdiction of the Commission under the Electricity Act, 2003 because neither does it relate to charges for an activity relating to generation, transmission, distribution or trading of electricity, nor is such a charge covered under Sections 45, 46 or 62 of the Electricity Act, 2003. Recovery of Service Charge relates to the operation and management of affairs of the Airport and this activity is in pursuance of the terms of OMDA and provisions of the AAI Act.

ii) The AAI Act is a special Act dealing with a special subject, i.e., administration and management of airports and the AAI Act is a complete code with respect to all the issues relating to the operation and management of affairs of an airport.

iii) Incompatibility, if any, between the AAI Act and the Electricity Act, 2003 has, therefore, to be examined in light of the above perspective. The Hon'ble Supreme Court has spelt out the rule on the issue of general vs. special statutes.

iv) The provision of supply of electricity by MIAL to its sub-concessionaires within the airport premises, and levying of and collecting a Service Charge in lieu of electricity infrastructure to meet its obligations under OMDA, are issues directly related to the management and operation of airport affairs and are not issues falling within the scope of Electricity Act, 2003.

v) The Electricity Act, 2003 may be a special statute for all aspects relating to electricity, but when the issues in question pertain to the operation and management of affairs of an airport, then the AAI Act is the governing statute, which prevails over all other statutes. Further, unlike the EA 2003, which extends to the whole of India, the AAI Act is specific to its scope and application and applies exclusively only to airports, civil enclaves, aeronautical communication stations and all training stations, establishments and workshops relating to air transport services.

vi) It is an admitted position in law that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. The Hon'ble Supreme Court has also ruled that general provisions should yield to specific provisions.

80. Per contra, RInfra has submitted that

i) Section 174 of the EA 2003 stipulates that the provisions of the EA 2003 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than EA 2003.

ii) Section 173 of the EA 2003 provides that the provisions of the Consumer Protection Act, 1986, Atomic Energy Act, 1962, and the Railways Act, 1989 shall prevail over the EA 2003, in so far as the EA 2003 is inconsistent with these three Acts. Since, there are no corresponding provisions in the AAI Act, the provisions of the EA 2003 have overriding effect.

81. During the course of the hearings in this matter, the Commission had framed certain issues regarding the legality of the Service Charge being levied by MIAL and the legality of the differential tariff being levied by MIAL, in response to which MIAL submitted its

arguments, which have been summarised above, along with RInfra's submissions on the same issues. The Commission's analysis and ruling on this issue are given below:

i) The Commission is of the view that the legality of supply at Single Point with sub-distribution along with a mark up/service charge is currently subjudice before the Hon'ble Supreme Court in Civil Appeal No. 8415 of 2011 in the matter of Mahratta Chamber of Commerce Vs. MERC and Anr. Since, the Commission, in its Order dated October 3, 2006 in Case No. 25 of 2005 and Case No. 53 of 2005 has held that there is no legality in supply at Single Point with sub-distribution along with a mark up / service charge without either the end user taking supply directly from the distribution licensee or the Bulk consumer converting itself as a franchisee of the distribution licensee, this Commission will be bound by the same while dealing with the case of MIAL. In the view of the Commission, MIAL should implead itself in the aforesaid pending proceedings before Hon'ble Supreme Court and in the meanwhile not charge any electricity tariffs from its concessionaires, etc., at a rate higher than that determined by the Commission in this Order.

82. With the above ruling and directions, the suo-matter proceeding initiated by the Commission in Case No. 82 of 2011 and Case No. 101 of 2011 is disposed of.

83. Further, in accordance with the Order of the Hon'ble Supreme Court of India in Civil Appeal No. 7525 of 2011 and 9351 of 2011, the rulings and directions of the Commission in this Order shall not be given effect to without the leave of the Hon'ble Supreme Court of India.

Sd/-	Sd/-
(Vijay L. Sonavane)	(V.P. Raja)
Member	Chairman

APPENDIX I

List of Date of Hearings

Sr. No.	Date of Hearings
1	July 20, 2011
2	August 23, 2011
3	September 21, 2011
4	November 8, 2011
5	November 25, 2011
6	December 15, 2011
7	January 2, 2012 (Postponed to January 18, 2012)
8	January 18, 2012
9	February 10, 2012
10	March 21, 2012

APPENDIX II

Sr. No.	People who attended the Public Hearing	Institution/ Individual
	July 20, 2011	
1	Shri. Partha Ganguly	MIAL
2	Shri. Sitesh Mukherjee	Advocate MIAL
3	Shri. Vikrant, Advocate	MIAL
4	Shri. Surendra Khot,	RInfra
5	Shri. P.S. Pandya,	RInfra
6	Ms. Anjali Chandurkar,	Advocate RInfra
7	Shri. Omkar Chandurkar	Advocate RInfra
8	Shri. Karthik Krishnan,	TPC
9	Shri. Amey Naik,	TPC
10	Shri. K.R. Cooper,	TPC
11	Shri. N. Ponrathnam,	Vel Induction Hardening
	August 23, 2011	
1	Shri. Pankaj Prakash	MIAL
2	Shri. Partha Ganguly	MIAL
3	Shri. Ravinder	V.P, MIAL
4	Shri. Sunil	MIAL
5	Shri. Pravind Kumar	MIAL
6	Shri. Sitesh Mukherjee	Advocate MIAL

Sr. No.	People who attended the Public Hearing	Institution/ Individual
7	Shri. Vikrant Negi	Advocate MIAL
8	Shri. Divekar	Advocate MIAL
9	Shri. Avijeet Lala	Advocate MIAL
10	Shri. Surendra Khot	RInfra
11	Shri. Ganesh Balsubramaniam	RInfra
12	Shri. S. N. Rao	RInfra
13	Ms. Anjali Chandurkar	Advocate RInfra
14	Shri. Onkar Savarkar	Advocate RInfra
15	Shri. Paresh Patkar	Advocate RInfra
16	Shri. Karthik Krishnan	TPC
17	Shri. N. Ponrathnam,	Vel Induction Hardening
	September 21, 2011	
1	Shri. Pankaj Prakash	MIAL
2	Shri. Partha Ganguly	MIAL
3	Shri. Ravinder Kumar Seth	V.P, MIAL
4	Shri. Sunil Parate	MIAL
5	Shri. Pravind Kumar	MIAL
6	Shri. Sitesh Mukherjee	Advocate MIAL
7	Shri. J.J. Bhat	Advocate, RInfra
8	Ms. Anjali Chandurkar	Advocate RInfra

Sr. No.	People who attended the Public Hearing	Institution/ Individual
9	Shri. Surendra Khot	RInfra
10	Shri. Ganesh Balsubramaniam	RInfra
11	Shri. Onkar Savarkar	Advocate RInfra
12	Shri. Paresh Patkar	Advocate RInfra
13	Shri. Pankaj Pandya	RInfra
14	Shri. S.P. Sanpolar	RInfra
15	Shri. A.K. Jain	RInfra
16	Shri. S.N. Rao	RInfra
17	Shri. P.V.Joshi	TPC
18	Shri. K.R. Cooper	TPC
19	Shri. S. Fanthome	Mulla & Mulla
20	Shri. D.J. Kakalid	Mulla & Mulla
21	Shri. N. Ponrathnam,	Vel Induction Hardening
22	Shri. Abhijit Dhandhere	IPPAI
	November 8, 2011	
1	Shri. Partha Ganguly	MIAL
2	Shri. Ravinder Kumar Seth	V.P, MIAL
3	Shri. Sunil Parate	MIAL
4	Shri. Sitesh Mukherjee	Advocate MIAL
5	Ms. Anjali Chandurkar	Advocate RInfra

Sr. No.	People who attended the Public Hearing	Institution/ Individual
6	Shri. Pankaj Pandya	RInfra
7	Shri. S.P. Sanpolar	RInfra
8	Shri. A.K. Jain	RInfra
9	Shri. S.N. Rao	RInfra
10	Shri. G.S. Thakkar	RInfra
11	Shri. Ameya Naik	TPC
12	Shri. Kartik Krishnan	TPC
13	Shri. K.R. Cooper	TPC
14	Shri. Onkar Savarkar	Mulla & Mulla
15	Shri. D.J. Kakalid	Mulla & Mulla
	December 15, 2011	
1	Shri. Partha Ganguly	MIAL
2	Shri. Ravinder Kumar Seth	V.P, MIAL
3	Shri. Sunil Parate	MIAL
4	Shri. Pravind Kumar	MIAL
5	Shri. Avijeet Kumar Lala	Advocate, MIAL
6	Ms. Anjali Chandurkar	Advocate RInfra
7	Shri. Pankaj Pandya	RInfra
8	Shri. S.N. Rao	RInfra
9	Shri. G.S. Thakkar	RInfra

Sr. No.	People who attended the Public Hearing	Institution/ Individual
10	Ashwini Jain	
11	Shri. Onkar Savarkar	Mulla & Mulla
12	Shri. Paresh Patkar	Mulla & Mulla
13	Shri. D.J. Kakalid	Mulla & Mulla
14	Shri. Abhinav Sharma	TPC
	January 18, 2012	
1	Shri. Pallav Shukla	Advocate, MIAL
2	Shri. H.M.Imandar	Advocate, MIAL
3	Ms. Anjali Chandurkar	Advocate, RInfra
4	Ms. Ashwini Jain	RInfra
5	Shri. G.S. Thakkar	RInfra
6	Shri. Omkar Savarkar	RInfra
	February 20, 2012	
1	Shri. R.K. Seth	MIAL
2	Shri. Sunil Pareti	MIAL
3	Shri. Pravind Kumar	MIAL
4	Shri. Sitesh Mukherjee	Advocate, MIAL
5	Shri. Avijeet Lala	Advocate, MIAL
6	Shri. P.S. Ganguly	MIAL

Sr. No.	People who attended the Public Hearing	Institution/ Individual
7	Ms. Anjali Chandurkar	Advocate, RInfra
8	Shri. P.S. Pandya	RInfra
9	Shri. A.K. Jain	RInfra
10	Shri. G.S. Thakkar	RInfra
11	Shri. Omkar Savarkar	RInfra
12	Shri. Abhinav Sharma	TPC-D
13	Shri. Dhishan Kukeja	Mulla & Mulla
14	Shri. N. Ponrathnam	Intervener