

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 45 of 2009

In the matter of
Petition of Shree Mahivara Jaina Vidyalaya seeking dispensation from HT-II
Commercial category

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

ORDER

Dated: March 2, 2010

Shree Mahivara Jaina Vidyalaya (SMJV), Pune had filed an Appeal No. 98 of 2009 before the Hon'ble Appellate Tribunal for Electricity challenging the Commission's Order dated 31.05.2007 (Operative Order) and 20.06.2008 (Detailed Order), passed in Case No.72 of 2007, in the matter of Maharashtra State Electricity Distribution Company Limited's (MSEDCL) Petition for approval of APR for FY 2007-08 and determination of tariff for FY 2008-09, with respect to including them under HT-II Commercial category. The Hon'ble Tribunal delivered its Judgment on the Appeal on July 10, 2009 and remanded the matter back to the Commission.

2. Certain passages from the Hon'ble Tribunal's Judgment in Appeal No.98 of 2009 dated July 10, 2009 are reproduced below:

“Accordingly, the impugned order is set aside. The matter is remanded to the State Commission. The Commission shall decide the matter afresh in accordance with the law on the basis of the pleadings and the materials that can be placed by the Appellant. The learned counsel for the Appellant undertakes to pay the present electricity bills till the decision is arrived by the State Commission. Accordingly, the Appellant is directed to continue to pay the electricity bills till the matter is decided by the Commission without prejudice to their rights and contentions.”



The Appellant is directed to approach the State Commission on getting the order of this Tribunal immediately and file the necessary application before the State Commission to bring to the notice of the State Commission this Order and avail the opportunity. This exercise may be completed by the Commission as expeditiously as possible. With these directions, the Appeal is allowed.”

3. However, SMJV did not file any application before the Commission as directed by the Hon’ble Tribunal. The Commission, suo motu issued its Notice dated August 6, 2009, and scheduled a hearing in the matter on August 25, 2009, and directed SMJV to serve a copy of its pleadings and materials on affidavit before the Commission to substantiate its pleas and serve a copy of the same to MSEDCL and the four Consumer Representatives authorised on a standing basis under Section 94 of the Electricity Act, 2003 (EA 2003).

4. During the hearing held on August 25, 2009, Shri. H.V. Mirashi, Advocate appeared on behalf of SMJV and Shri. Karthik Somasundram, Advocate, appeared on behalf of the respondent, MSEDCL.

5. The Counsel for Respondent sought adjournment on the ground that they have not been served a copy of the application. The Petitioner agreed to serve a copy and also sought adjournment in the matter for 15 days for making additional submissions.

6. The Commission directed SMJV to serve a copy of its Petition to the Respondent forthwith and to file its Rejoinder and to serve a copy of the same to the Respondent.

7. SMJV filed its Petition under affidavit before the Commission on August 27, 2009. The main prayers in the Petition filed by SMJV are as follows:

- a. *“The Hon’ble Commission should determine tariff only in case of consumers who require less than 1 MW power and;*
- b. *The Hon’ble Commission should determine only ‘wheeling charges’ and ‘surcharge’ in respect of consumer falling within open access category.”*

8. SMJV submitted as under in its Petition:

- a. The Electricity Act, 2003 (EA 2003) was enacted inter-alia for taking measures conducive to development of electricity industry, promoting competition therein, protecting the interest of consumers, rationalisation of electricity tariff, etc. One of the objects of the EA 2003, inter-alia was to permit Open Access in distribution in phases and where there is direct commercial relationship between a consumer and

a Generation Company or a Trader, and the price of electricity would not be regulated and only Transmission Charges and Wheeling Charges with Surcharge would be regulated.

- b. By amending the EA 2003, w.e.f. 21/01/2004, the Legislature inserted the fifth proviso to Section 42 of EA 2003. The said proviso reads as under:

“[Provided also that the state Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003,(57 of 2003) by regulations, provide such open access to all the consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]”

Further, Section 2 (47) of the Electricity Act, 2003 defines Open Access as under:

“ “Open Access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;.”

The proviso to Section 42 of the Amended EA 2003 clearly mandates that once a consumer’s consumption is more than 1 MW, the State Electricity Regulatory Commission (SERC) shall allow such consumer Open Access. Thus, Section 42 provides the eligibility for consumers who are eligible for Open Access. In terms of the above mentioned provisions, the Commission has already framed the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2005.

- c. The Petitioner submitted that once a consumer becomes eligible for Open Access, the proviso to Section 86 (1) (a) of the EA 2003 will come into operation, which reads as under:

*“ (1) The State commission shall discharge the following functions, namely:-
(a) Determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;”

Thus, Section 86 (1) (a) mandates that once a consumer category becomes eligible for Open Access under Section 42, the SERC is to only determine (a) Wheeling Charge and (b) Surcharge, and the SERC cannot determine the tariff.

The spirit behind Proviso 5 to Section 42 and Section 86 (1) (a) is that small consumers should not be charged excessively.

- d. In case of consumers falling in Open Access category, the tariff is to be determined by the consumer (falling within specific category) and the concerned suppliers of electricity vide a mutual agreement, as provided for in Section 49 of the EA 2003, which reads as under:

Section 49: (Agreement with respect to supply or purchase of electricity):

“Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions containing in clause (d) of sub-section (1) of section 62, may enter in to an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.”

- e. The consumers having energy consumption of more than 1 MW of electricity fall into a specific category of consumers who are eligible for Open Access, and the Commission can no longer determine the tariff for consumers falling within such category.
- f. The tariff classification and the tariff determined by the Commission for consumers having consumption more than 1 MW of electricity is against the law. The entire exercise of the Commission, while determining tariff is carried out on the presumption that the Commission can determine tariff for all consumers including those consumers who require 1 MW and above of power.
- g. After five years of the EA 2003 coming into effect, in case of Open Access category of consumers, i.e., consumers having power requirement of 1 MW and above, the Commission can decide only Wheeling Charges and Surcharge.
- h. In the light of the above, tariff determination be conducted and tariff may kindly be fixed.

9. Subsequently, the Commission, vide its Notice dated August 31, 2009, scheduled a hearing in the matter on September 17, 2009.

10. During the hearing held on September 17, 2009, Advocate for SMJV questioned whether the Commission has the jurisdiction to determine the tariff of Open Access consumers.

The Commission observed that the submission made before the Commission regarding whether the Commission has the jurisdiction to determine tariff of consumers who are eligible for Open Access was not raised before the Hon'ble Tribunal, and therefore, the issue of jurisdiction of the Commission to decide tariff was not relevant in view of the Judgment of remand by the Hon'ble Tribunal.

11. SMJV submitted that after five years of the EA 2003, the Commission cannot determine tariff for consumers who can avail Open Access. The Commission observed that the EA 2003 has mandated the Commission to introduce and promote competition and Open Access, and therefore, a Discussion Paper will be floated in this regard.

12. SMJV submitted that the actual tariff increase for the Petitioner was 16.29% as against the average tariff increase of 6.76% stated in the Commission's Tariff Order, and this level of cross-subsidy was not tenable.

13. SMJV enquired regarding the basis for classification of the Petitioner under HT II Commercial category, and submitted that the Commission should clarify as regards the class of consumers who are classified under industrial and commercial category. SMJV further enquired whether the Commission was following the Industrial Disputes Act, or the Industries Development Regulation Act or Shops & Establishments Act, for classifying any consumer under Industrial or Commercial category. SMJV added that if the Shops & Establishments Act was being followed, then SMJV could not be classified under Commercial category, since they do not fall under the purview of Shops & Establishments Act.

14. The Commission observed that the rationalisation of tariff categories is on the basis of Section 62 (3) of EA 2003, while keeping in mind historical developments. The Commission added that the rationale and philosophy of tariff rationalization has been detailed in the Commission's Order.

15. The Petitioner submitted that it is a religious trust registered under Bombay Charitable Trust Act, and was providing hostel facility to girls free of cost and to boys at subsidised rate, and spent three times more to provide them a foundation in Pune City. Section 62 (3) of EA 2003 states about undue preference but here the purpose for which electricity supply is required is charity, and this purpose cannot be equated with multiplexes, theaters, hospitals or anybody. SMJV submitted that it was not undertaking any commercial activity and was not buying or selling anything, and hence, could not be classified under Commercial category.

16. MSEDCL, in its written submission dated September 15, 2009, submitted as under

- a. The Public Notice was given in leading English and Marathi newspapers and ignorance of the Public Notice cannot be a reason for review of the Order passed by the Commission. Earlier: institutions were charged under the HT-I Industries category, and MSEDCL had proposed a tariff of Rs. 450/kVA/month as Demand Charge and Rs.5.00/kWh as Energy Charge for consumers connected on Express Feeders and Rs. 4.60/kWh as Energy Charge for consumers connected on Non Express Feeders in HT-I: Industries category. The institutions did not submit their contentions to this proposal in the Public Hearing, hence, it is not correct to say that the opportunity to submit their viewpoint was not given to the said consumers.
- b. The Commission, while re-categorising SMJV from HT-VI to HT-II Commercial category, has determined the tariff as it was empowered under the provisions of Section 62 read with Sub-Section 3 thereof. The tariff so determined for HT-II: Commercial category has been differentiated in accordance with the load factor of the consumers in that category read with total consumption of electricity and the nature and purpose for which the supply is required. The Commission within its jurisdiction may differentiate and determine tariff for this category of consumers.
- c. MSEDCL has strictly followed the procedure as laid down in the MERC (Terms and Conditions of Tariff) Regulations, 2005 while submitting the Petition for Annual Performance Review for FY 2008-09. MSEDCL, in its Petition for Annual Performance Review for FY 2007-08 and tariff determination for FY 2008-09 has not specifically requested the Commission to prescribe a separate tariff for the Petitioners or such other similarly placed consumers.

- d. MSEDCL, in the said Petition, had proposed revision in tariff as applicable to each specific consumer category, however, it also needs to be noted that, it is neither mandatory nor binding on the Commission to restrict its scope within the limited periphery of the Petition for Annual Performance Review and tariff determination as submitted to the Commission from time to time. It is further submitted that the decision of the Commission to carve out a separate High Tension Commercial category in its Tariff Order of June 2008 is not an exclusive case, however, the Commission has from time to time modified the structure of electricity tariff as applicable to different consumer categories, either by way of merger of some consumer categories or providing a separate category for certain specific consumers.
- e. The tariff so determined by the Commission is after considering the ARR of MSEDCL, which had gone up substantially during the relevant year, inter alia, on account of increase in the approved power purchase expenses, because of increase in the quantum of expensive power required to be purchased by MSEDCL.
- f. The provisions of Section 61 (g) are not the only guiding principles for fixation of tariff. The other guiding principles such as factors which result in, inter-alia, economic use of resources, safeguarding of consumers interest and recovery of cost of electricity in a reasonable manner are also required to be followed by the Commission. While the National Electricity Policy as well as the Tariff Policy are also guiding principles, the legislature in its wisdom has only provided in Sections 61 and 86(4) that the principles set out therein are guiding principles especially in view of the power situation in the country and the EA 2003, has done away with the earlier legislations, viz., The Indian Electricity Act, 1910 and The Electricity (Supply) Act, 1948.
- g. The power purchase costs have gone up and as a result the cost of supply has also increased. The consumers connected at high voltage also get benefit of lesser load shedding as compared to consumers connected at lower voltage. Clause 8.2.1 (1) of the Tariff Policy also mentions that all power purchase costs need to be considered as legitimate and recovered from consumers.
- h. SMJV and such other similarly placed consumers have now been classified under a particular consumer category, which was not in existence previously and therefore, no comparison is possible between the presently applicable tariff with the tariff that was previously applicable to SMJV or such other similarly placed consumers, when SMJV and such other similarly placed consumers were included in different categories.

- i. There is nothing unconstitutional in the re-categorisation of consumers in accordance with Section 62(3) of the EA 2003. The Commission has, after taking cognizance of the provisions of the EA 2003, categorised the consumers and determined the tariffs applicable for them for FY 2008-09.
- j. A perusal of the Tariff Order passed by the Commission reveals that had the low end consumers of MSEDCL not been granted cross subsidy and had the costly power been loaded to their tariff equally, they would have been unable to pay for electricity at such rates.
- k. The provisions of Section 61(g) and Clause 5.5.3 and 8.3.2 of the Tariff Policy ought to be read and interpreted accordingly. In the circumstances, it is submitted that the aforesaid provisions cannot be followed without considering the glaring fact of shortage of power as well as the need to procure expensive power and the need to curb consumption in view of the shortage situation.
- l. An appeal was filed before the Hon'ble Tribunal bearing Appeal No.107 of 2008 in the case of "Spencer Retail Ltd. v/s MERC and Anr." wherein same issues were raised regarding re-categorisation of certain consumers. The Hon'ble Tribunal was pleased to allow the said appeal vide Judgment dated July 1, 2009. The relevant portion from the said Judgment is reproduced as under:

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

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

18) No order as to costs. "

- m. MSEDCL preferred an appeal before the Hon'ble Supreme Court impugning the Hon'ble Tribunal's Judgment dated July 1, 2009 in Appeal No.107 of 2008. The said appeal has been registered as Civil Appeal No.4303 of 2009 - "MSEDCL Vs Spencer's Retail Ltd." and came up before the Supreme Court of India on July 17, 2009 whereby the Court was pleased to stay the operation of Order passed by the Hon'ble Tribunal and further admitted the appeal. The relevant portion from the said Order is being reproduced as under:

"The Civil appeals are admitted.

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

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

Hearing expedited."

- n. Under these circumstances, the broad principles in the present matter are almost similar to that pending for consideration before Hon'ble Supreme Court.
- o. If the amounts collected by MSEDCL are ordered to be refunded, then the same would be borne by other consumers of MSEDCL who will not and may not have either the capacity or the capability to pay a higher tariff or curb consumption.
- p. The present petition may be kept pending till the final outcome of the Appeal pending before Supreme Court.

17. MSEDCL's written submissions dated November 19, 2009 reiterated the same arguments submitted on September 15, 2009.

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

19. The present matter is a consequence of the Hon'ble Tribunal's Judgment in Appeal No. 98 of 2009, remanding the matter back to the Commission for necessary action. It is necessary to understand SMJV's contentions before the Hon'ble Tribunal in Appeal No. 98 of 2009, as reproduced below:

"The Appellant Trust runs a hostel within Shri Mahavira Jaina Vidyalaya (Pune). The hostel provides various facilities to the boys and girls including accommodation, breakfast etc. The said facilities are provided free of cost to the girls and to male students at a very subsidised rates i.e. Rs. 15,000/- p.a.

The grievance of the Appellant is that he was originally in HT-VI category and now he has been placed in HT-II, commercial category by which the tariff has been increased up to Rs. 3/- per unit. Challenging this order this Appeal has been filed. As pointed out by the learned counsel for the Appellant that on the similar issue, the Tribunal has passed several orders earlier remanding the matter to the Commission and to give opportunity to the Appellant to establish before the Commission that they cannot be categorized as HT-II commercial category.”

20. Based on the above prayer of SMJV, the Hon’ble Tribunal ruled as under:

“Accordingly, the impugned order is set aside. The matter is remanded to the State Commission. The Commission shall decide the matter afresh in accordance with the law on the basis of the pleadings and the materials that can be placed by the Appellant. The learned counsel for the Appellant undertakes to pay the present electricity bills till the decision is arrived by the State Commission. Accordingly, the Appellant is directed to continue to pay the electricity bills till the matter is decided by the Commission without prejudice to their rights and contentions.

The Appellant is directed to approach the State Commission on getting the order of this Tribunal immediately and file the necessary application before the State Commission to bring to the notice of the State Commission this Order and avail the opportunity. This exercise may be completed by the Commission as expeditiously as possible. With these directions, the Appeal is allowed.”

21. However, in its submissions in the present matter, SMJV has made altogether different prayers questioning the jurisdiction of the Commission to determine tariff for consumers who are eligible for open access. The scope of the remand from the Hon’ble Tribunal, though, was to consider as to whether the Appellant could be given an opportunity to establish before the Commission that they cannot be categorized as HT-II commercial category. The grievance of the Appellant before the Hon’ble Tribunal was that it was originally in HT-VI category and now it has been placed in HT-II commercial category by which the tariff has been increased up to Rs. 3/- per unit. Challenging this order the Appeal had been filed. In fact, the Appellant submitted before the Hon’ble Tribunal that on the similar issue, the Hon’ble Tribunal had passed several orders earlier remanding the matter to the Commission and to give opportunity to the Appellant to establish before the Commission that they cannot be categorized as HT-II commercial category. But the contentions raised by SMJV in the present petition that the Commission should determine tariff only in case of consumers who require less than 1 MW power and

that the Commission should determine only ‘wheeling charges’ and ‘surcharge’ in respect of consumer falling within open access category, is in the view of the Commission, completely extraneous to the scope of the appeal filed before the Hon’ble Tribunal and the remand to the Commission.

22. Therefore, the Commission has dealt with the present petition only on the issue as to whether SMJV cannot be categorized as HT-II commercial category as this is the sole issue within the scope of the remand. As regards whether SMJV should be classified under the ‘Industrial’ category or ‘Commercial’ category, the Commission is of the view that it is appropriate to classify SMJV under the HT Commercial category, since the purpose of use is clearly not ‘industrial’, as explained subsequently in this Order, wherein the Commission has explained as to what exactly is industrial consumption.

23. Further, as regards the categorisation of the Petitioner by the State/Central Government or any other agency as a ‘Charitable Organization’ under any other statute/law, the said categorization is not recognized under Section 62(3) of the EA 2003 for creating a differentiation in tariff or for separate categorization for the purpose of the EA 2003.

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

*“14) It is not the case of the appellant that the Commission had no power to create a tariff design different from the one proposed by the licensee. **The Commission has the power to design the tariff as per its own wisdom. The Commission need not, before issuing the actual order, publicly announce the tariff it proposed and call for public comments.** In fact this is not even the appellant’s contention.*

*15) The rule of natural justice requires the Commission to issue a public notice about the ARR and Tariff petition of the licensee and to allow the public to make its submissions on the ARR and Tariff proposals. The Commission has, thereafter, to design the scheme for recovery of the ARR keeping in view various relevant factors. **If the classification of the consumers can be supported on any of the grounds mentioned in section 62(3) it would not be proper to say that the tariff fixing was violative of principles of natural justice because the Commission did not issue a public notice of the tariff categories which the Commission had intended to create.***

16) We have no hesitation to say that the Commission is entirely at liberty to create a new category which is not available in the licensee's proposal provided of course the new category falls within the scope of section 62(3) of the Act... ”

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

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

26. It should be noted that it is not possible to apply all the above specified criteria at the same time for designing the tariff categories; else, with many permutations and combinations, there will be too many categories creating confusion and yet not achieve what each and every consumer desires vis-à-vis its category. Thus, it will be seen from the elucidation given below, as to how different criteria have been used to categorise different types of consumers:

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

27. 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.

28. As regards SMJV's contentions on the ground of their being a Trust, which is a non-profit making organization established with a sole objective of providing various facilities like lodging, boarding for students, 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 or operating on a no loss no profit basis, 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.

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

30. In view of the rationale explained above, the categorisation of SMJV for tariff purposes would continue to apply as stipulated in the Order dated 20.6.2008.

With the above observations and ruling, Case No. 45 of 2009 stands disposed off.

Sd/-
(V. L. Sonavane)
Member

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(V. P. Raja)
Chairman



(K.N.Khawarey)
Secretary, MERC