

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 50 of 2008

Petition filed by Mumbai International Airport seeking review of Order dated 4.6.2008 to the extent it classifies the Petitioner under the category of HT –II Commercial.

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

Mumbai International Airport Private Limited
Chhatrapati Shivaji International Airport,
1st Floor, Terminal, 1 B,
Santa Cruz (East),
Mumbai

...Petitioner

Versus

Reliance Energy Limited
Reliance Energy Centre
Santacruz (E)
Mumbai

... Respondent

ORDER

Dated: November 12, 2008

Mumbai International Airport Private Limited filed a Petition on 18.7.2008 seeking a review of the Commission's Order dated 4.6.2008 in Case No. 66 of 2007. The Petitioner as averred in the Petition is being supplied with electricity by the Respondent. The load factor of the Petitioner is about 90% making it a base load consumer. When the bill of June 2008 was received by the Petitioner, it is stated in the Petition that the Petitioner was amazed to see such a high electricity bill. Thereafter, on perusing the impugned order, the Petitioner realised that it has been transferred from HT - Industrial to HT – Commercial category.

2. The main contention taken is that the said Order which has created a new category namely 'HT II Commercial' and which applies to the Petitioner ought to be reviewed because it has the effect of increasing the airport charges including its costs of operation excessively ultimately having the effect of increasing the costs of air travel substantially. There is also an unprecedented increase in the crude oil prices.



The Petitioner has contended that earlier under the MYT Order dated 24.4.2007 it was classified under HT II Industrial Category. The effect of the impugned order is that the Petitioner is falling under HT II Commercial Category alongwith other commercial establishments, e.g., malls and shopping complexes, which are subjected to the highest tariff rates. It is averred in the Petition that the functions of the Petitioner ought to have been examined before categorising it into HT-Commercial category. It is averred in the Petition that the Petitioner has been awarded by the Government of India (“GOI”) / Airports Authority of India (“AAI”), a contract for operation, maintenance, development, design, construction, upgradation, modernisation, finance and management of the Mumbai Airport. This is part of the private sector participation initiatives of the Government of India for development of the Mumbai Airport. It is averred in the Petition that the public interest involved in the execution of said contract should prevail over all considerations. It is also stated that airport services provided by the Petitioner are per se public utility services and the management of aerodrome is an essential service under the Essential Services Maintenance Act, 1968.

3. The Petitioner has contended that the rationale of ‘unwarranted commercial consumption’ formulated by the Commission in its MYT Order dated 24.4.2007 as the basis for charging higher electricity tariffs to malls, shopping complexes, etc., does not apply to the Petitioner which has been categorised as an ‘essential service’ under the Commission’s earlier Order dated 3.10.2008 in Case Nos. 25 of 2005 and 53 of 2005. The Petitioner has also pointed out that the basis of ‘unwarranted commercial consumption’ has been found by the Appellate Tribunal for Electricity in its judgment dated 19.12.2007 (*Spencer Retail Ltd vs. MERC& Ors* - Appeal No. 146/07), as not capable of being giving effect to. It is contended that therefore LT-IX category was done away with by the Commission in its Order dated 4.6.2008. The Petitioner is of the opinion that it being in ‘airport services’ is not a ‘non-critical service’ which rationale applied to malls and shopping complexes for the specification of higher tariffs but not to the Petitioner. It is submitted by the Petitioner that it cannot be treated at par with other commercial establishments that are covered under ‘HT II Commercial’ category. The Petitioner has annexed (Annexure AA/3) a notification dated 23.11.2006 issued by the Joint Secretary, Labour, NCT-Delhi declaring ‘Service in International Airports Authority of India’ as a public utility service for the purposes of the Industrial Disputes Act, 1947 read with Government of India, Ministry of Home Affairs, Notification no. 2/2/61 – Judl II dated 24.3.1961. Such classification is effective for a period of six months from 23.11.2006. Therefore, it has been contended that the categorisation of the Petitioner under ‘HT II Commercial’ is not warranted.

4. The Petitioner has stressed on the increase in its cost of operation; increase in the crude oil prices; recession in the aviation industry; reduction in air traffic; unprecedented downsizing; adverse impact on revenue and other factors, as its main grounds to seek the aforesaid review of the impugned order. The increase in the electricity rates pursuant to the categorisation of the Petitioner into HT - Commercial is stated to be recovered through the aeronautical charges for the provision of the aeronautical and non-aeronautical services such as runway for take-off and landing of aircrafts, light operation assistance, crew support systems, movement and parking of



aircraft, aerodrome control facilities, baggage, display screens, air conditioning, lifts, heating, hotel reservation, car rental services, etc.

5. The Petitioner has submitted that although it was entitled to a nominal increase of 10% of aeronautical charges from 3.5.2008, the same has not been sanctioned by the Government of India, thereby adversely affecting the revenue projections of the Petitioner in addition to the grim aviation scenario which it is facing. Even the lenders had extended the loans assuming that there would be increase in the remuneration under the contracts between the GOI / AAI and the Petitioner.

6. The Petitioner has also contended that it has not been put to notice before applying the 'HT II Commercial' category to it.

7. On the above grounds, the Petitioner has sought a review of the Commission's Order dated 4.6.2008 in Case No. 66 of 2007, to the extent it classifies the Petitioner into a new category namely 'HT II Commercial'.

8. An additional affidavit has been filed by the Petitioner on 9.09.2008.

9. An admissibility hearing was held on 16.9.2008. Shri. Harish Jagtiani, Counsel, represented MIAL and Smt. Anjali Chandurkar, Counsel, represented Reliance Infrastructure Limited. During the hearing, various contentions have been taken by the Petitioner justifying as to why the Order dated 4.6.2008 in Case No. 66 of 2007, should be reviewed. It has also been submitted by the Petitioner that the services given by the Petitioner involve public interest and therefore, the tariff structure of the Petitioner requires re-consideration. Shri. Jagtiani submitted that an Appeal had also been filed before the Appellate Tribunal for Electricity on the impugned Order after the Review Petition was filed before the Commission. Shri. Jagtiani clarified that in accordance with the Judgment of the Honourable Supreme Court in this regard, the Commission could hear the Review Petition, and that he would not press for the Appeal to be heard, till such time as the Review Petition was dealt with by the Commission. Smt. Chandurkar, Counsel for Reliance Infrastructure Limited, clarified that the tariff applicable for MIAL under the MYT Order was under the HT-II Industrial and Commercial category, which was changed to HT-II Commercial category under the impugned APR Order. Smt. Chandurkar submitted that the Commission may take a view on the maintainability of the Review Petition. The Commission observed that Reliance Infrastructure Limited has to submit its views on the maintainability of the Petition, and could not take the position that the Commission should decide the maintainability. Smt. Chandurkar submitted that mentioned that Reliance Infrastructure Limited would submit its written submission on the maintainability of the Review Petition in two weeks time. However, she added that it may be noted that the Electricity Duty charged to MIAL was always the Electricity Duty applicable for the Commercial Category.

10. Written submissions on behalf of Reliance Infrastructure Limited (formerly 'Reliance Energy Ltd') were filed on 1.10.2008, wherein it has been stated that in case if the present petition is admitted, then it will submit such details as may be required to study the resultant adjustments that may be required to be made. The



Respondent has also submitted that it would need to file a more detailed affidavit on merits if so required.

11. Having heard the parties and after considering the material placed on record, the Commission is of the view that the Review Petition needs to be tested against the requirements laid down in Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004, which provide as under:

“Review of decisions, directions, and orders:

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

The increase in the cost of operations, recession in aviation industry, rise in crude oil prices, are not allowable grounds for review. There must be something in the Petition to show that there is an error in the impugned order. It is also a settled position that the error must be apparent. Where the error is required to be found out by re-hearing the basis on which the impugned order was passed or where prolonged examination of issues are required, these aspects do not fall within the ambit of review and such matters fall within the ambit of appeal. An appeal cannot be disguised as a review. It is well settled that review proceedings are not by way of an appeal and have to be strictly confined within the ambit of the said Regulation 85(a) that permits review only on three grounds, viz., (i) discovery of new or important matters or evidence, or (ii) mistake or error on the face of the record, or (iii) any other sufficient reasons. Review cannot be mistaken for an appeal as the scope of appeal is different from the scope of review, which is very limited. The grounds mentioned in the petition cannot be allowed for review of the impugned order.

12. The Petitioner has contended that the rationale of “unwarranted commercial consumption like flood lights, shopping malls, multiplexes, advertising and hoarding” taken as a basis of charging of higher tariff in the MYT Order dated 24.4.2007 should not be a basis of charging a higher tariff to the Petitioner. The Commission is of the view that this is a contention/ grievance arising out of the MYT Order dated 24.4.2007 and any redressal thereto ought to be taken with respect to the said Order. However, the present petition has been filed against the Order dated 4.6.2008. The grievance arising out of one Order cannot be a ground for seeking review of another Order. Moreover, review is not permissible on the ground that the decision was erroneous on merits as the same would be the province of an appellate court. The Commission is also of the view that before the passage of the impugned Order public notices were issued and public hearings were held. The question therefore to give a special hearing to the Petitioner which is one consumer out of several consumers, is neither mandated under the Electricity Act, 2003 nor is practically possible. The



procedure under Section 64 of the Electricity Act, 2003 is that once the distribution licensee files an application for determination of tariff such distribution licensee publishes its application in abridged form in newspapers. The suggestions and objections from the public pursuant to the public notice are required to be considered by the Commission. The public are entitled to receive the full set of the application filed by the distribution licensee in order to study the details of the tariffs and annual revenue requirements proposed by the licensee. It is not that whatever the licensee proposes and in whichever form is to be accepted by the Commission in toto. Therefore, the contention that the re-categorisation of the Petitioner was not proposed by the Respondent is not a sustainable ground to allow review. More importantly, MIAL has not been re-categorised as contended by MIAL in its Petition. In fact, MIAL was always under the commercial category. In the previous Tariff Order also, applicable for FY 2007-08, i.e., the MYT Order for REL issued on April 24, 2007 in Case 75 of 2006, MIAL was categorised under HT-II Industrial and Commercial category. In the impugned APR Order, the tariff for HT commercial has been de-linked from the tariff applicable for HT Industrial category, by specifying different tariffs for both categories. The process is that the Commission examines the Tariff application filed by the licensee and formulates the tariff order, directions therein, categorization of tariffs and consumers, subsidy and various other matters as deemed fit by the Commission. It is not possible to formulate the tariff order by using a straight jacket formula or by following or adopting whatever proposals, assumptions, rationale proposed by the licensee. The Commission is also of the view that the impugned order cannot be reviewed because the Petitioner has not been sanctioned a nominal increase of 10% aeronautical charges by the Government of India. Whatever be the electricity tariff increase, the Petitioner will have to work within that and have to ensure that it efficiently carries out its operations to offset the impact of the electricity tariff. The issue whether the amount of cross subsidy charged per unit at nearly Rs. 5/- per unit as stated in the petition to be unreasonably high and beyond 20% of the average cost of supply envisaged by the National Electricity Policy, do not establish that there has been an error in the impugned order. The Operation, Maintenance and Development Agreement and the State Support Agreement are the contracts executed by the Petitioner with the relevant Government Departments or entities and the Commission is neither a Party nor is bound under the law to ensure the economic viability of the project by maintaining the electricity tariffs at certain levels. The Commission does not agree with the contention that there is no scope for the Petitioner to reduce consumption of electricity by cutting down on essential services. In any case these are not grounds to allow review. The Petitioner has submitted a letter dated 20.8.2008 issued by the Ministry of Civil Aviation to the Principal Secretary (Industries), Industries, Energy and Labour Department, Government of India suggesting that there should be uniformity amongst all airports and like any other major airport, power supply to CSI airport should be on HT industrial tariff to optimize the input costs and to benefit the users of the airport. The Commission is of the view that this letter is not only not binding on the Commission but is also irrelevant in view of the Commission's jurisdiction in tariff matters under the EA 2003. Similarly, the Petitioner's submission of the notification of NCT Delhi dated 23.11.2006 declaring "service in the International Airports Authority of India" as a public utility service for the purposes of the Industrial Disputes Act, 1947 is not relevant on similar grounds. The Commission is of the view that it need not review



the impugned order because of the said notification which in any case was valid for a period of six months with effect from 23.11.2006.

13. The Commission is of the view that the doing away of LT-IX category pursuant to the ATE's judgment dated 19.12.2007 in the case of Spencer's Retail Limited Vs MERC and others (Appeal No. 146 of 2007 and IA No. 163 of 2007), which was in respect of the MYT order for FY 2007-08 in Case 75 of 2006, is not a ground to seek review of the categorization of the Petitioner under HT Commercial category.

14. As regards the contention that Airport was treated as an essential service in the Order dated 3.10.2006 in Case No. 25 of 1995 and 53 of 2005 for the purpose of applying Load Management Charges and Load Management Rebate, in the opinion of the Commission, does not demonstrate that there has been an error in the impugned order dated 4.6.2008 that categorizes the Petitioner into HT-II Commercial. In fact, all the entities mentioned therein have different categories as far as applicable tariff is concerned. Treating some consumer categories as essential services for the purpose of LMC and LMR does not necessarily result in all of them being combined for tariff categorisation purposes as well. The Order dated 3.10.2006 does not affect the category of the Petitioner in HT-II Commercial category and therefore, whether for the purpose of applying Load Management Charges and Load Management Rebate 'Airport' was treated as an essential service in the Order dated 3.10.2006, is not a ground for review.

15. On the whole the Commission is of the view that the impugned order cannot be reviewed because the grounds on which the present review petition has been filed do not at all fall within the ambit of review. Neither is there any error that has been shown to be apparent on the face of the record nor has any new material or evidence been discovered which was not within the knowledge of the Petitioner at the time when the impugned order was passed and pursuant to which the impugned order requires a review. The contention of the Petitioner being public utility service or critical service or essential service do not fall within the ambit of the phrase "*for any other sufficient reasons*" because the expression "*for any other sufficient reasons*" have to be interpreted ejusdem generis taking colour from other words and phrases employed in Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004.

16. By stating that a tariff shock has been caused to the consumer no error can be established on this basis for grant of review. These aspects fall within the ambit of appeal, if at all. Therefore, several contentions made by the Petitioner cannot be accepted such as the high rate of tariff imposed on it includes a high level of cross subsidy component covering cost of marginal purchase of power by the distribution licensee being inconsistent with the tariff policy.

17. As regards the submissions made by the Respondent, viz., Reliance Infrastructure Limited in this regard, the Commission observes that even after giving one more opportunity to make its submission, the Respondent has failed to clearly submit its stance in this regard, and has submitted that the Commission may take a view of the admissibility of the Review Petition. This is in contrast to its approach of



vehemently opposing Review Petitions filed by its other consumers. The Commission expresses its dismay over the approach taken by Reliance Infrastructure Limited in this matter, and directs it to take a consistent approach in such matters, irrespective of whether the consumer is big or small.

18. In view of the above, the Commission holds that the Petition filed by M/s. Mumbai International Airport Private Limited is not maintainable for the purposes of grant of review of the impugned order dated 4.6.2008. The Petition is hereby dismissed for the above reasons.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member



(Prafulla S. Varhade)
Secretary, MERC