

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.110,111,170,171,201 & 202 of 2009
&
Appeal No.70,71,78,79,80,81 & 82 of 2010

Dated: 20th Oct, 2011

Present: **Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson,**
Hon'ble Mr.Rakesh Nath, Technical Member

Appeal No.110 of 2009

Association of Hospitals,
C/O Bombay Hospital
14th Floor, New Wing,
12 New Marine Lines,
Mumbai-400 020

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Reliance Energy Limited (Now renamed as RLnfra),
Reliance Energy Centre,
Santacruz (East),
Mumbai-400 055

.....Respondents

Counsel for Appellant(s): Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Ranjitha Ramachandran
Ms. Sneha Venkatramani
Ms. Swapna Seshadri

,Counsel for Respondent(s): Mr. A Buddy Ranganathan for R-1
Ms Anjali Chandurkar for R-2
Mr. Hasan Murtaza for R-2
Mr. Shiv K. Suri for R-2

Appeal No.111 of 2009

Association of Hospitals,
C/O Bombay Hospital
14th Floor, New Wing,
12 New Marine Lines,
Mumbai-400 020

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Brihan Mumbai Electric Supply and Transport Undertaking
Best Bhavan,
Best Marg, Post Box No.192,
Mumbai-400 001

.....Respondents

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Mr. Harinder Toor for R-2
M. Mukesh Kumar for R-2
Ms. Padam Priya for R-2

Appeal No.170 of 2009

Association of Hospitals,
C/O Bombay Hospital
14th Floor, New Wing,
12 New Marine Lines,
Mumbai-400 020

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005

2. Reliance Energy Limited (Now renamed as RLnfra),
Reliance Energy Centre,
Santacruz (East),
Mumbai-400 055

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Ms Anjali Chandurkar for R-2
Mr. Hasan Murtaza for R-2
Mr. Shiv K. Suri for R-2

Appeal No.171 of 2009

Association of Hospitals,
C/O Bombay Hospital
14th Floor, New Wing,
12 New Marine Lines,
Mumbai-400 020

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

....Respondent(s)

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Ms. Ranjitha Ramachandran,
Ms. Sneha Venkatramani,
Ms. Swapna Seshadri

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Mr. Varun Pathak for R-2 (MSEDCL)
Mr. Abhishek Mitra for R-2
Mr. Raunak Jain for R-2
Mr. Hazan Murtaza for R-2

Appeal No.201 of 2009 & IA 366 of 2009

Association of Hospitals,
C/O Grant Medical Foundation,
40, Sassoon Road, Camp,
Pune-411 001

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

...Respondent(s)

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Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Abhishek Mitra for R-2 (MSEDCL)

Appeal No.202 of 2009 & IA 368 of 2009

Association of the Managements of Un-Aided Engineering,
Colleges (Maharashtra) Nasik,
C/O K.K. Wagh Education Society,
Hirabai Haridas Vidyanagari,
Amrut Dham, Panchavati,
Nasik-422 003, Maharashtra

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

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Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Abhishek Mitra for R-2 (MSEDCL)

Appeal No.70 of 2010

Maharishi Karve Stree Siksha Sansthan,
Karve Nagar,
Pune-411 052,
Maharashtra

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

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Mr. Vishal Anand,
Mr. Avijeet Kumar Lala
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Mr. Sudeep Nargolkar

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Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Abhishek Mitra for R-2 (MSEDCL)

Appeal No.71 of 2010

Association of Hospitals,
C/O Grant Medical Foundation,
40, Sassoon Road, Camp,
Pune-411 001

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

....Respondent(s)

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Mr. Sudeep Nargolkar

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Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Abhishek Mitra for R-2 (MSEDCL)

Appeal No.78 of 2010 & IA 93 of 2010

Ramrao Adik Education Society,
Plot No.1, Sector-7,
Nerul, Navi Mumbai-400 706

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

....Respondent(s)

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Mr. Abhishek Mitra for R-2 (MSEDCL)
Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Varun Pathak for R-2 (MSEDCL)

Appeal No.79 of 2010 & IA 94 of 2010

Dr. D.Y. Patil Sports Academy,
Plot No.2, Sector No.7,
Nerul, Navi Mumbai-400 706

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

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Mr. Abhishek Mitra for R-2 (MSEDCL)
Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Varun Pathak for R-2 (MSEDCL)

Appeal No.80 of 2010 & IA 95 of 2010

Continental Medicare Foundation,
Plot No.2, Sector No.5,
Nerul,
Navi Mumbai-400 706

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,

- Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

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Mr. Abhishek Mitra for R-2 (MSEDCL)
Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Varun Pathak for R-2 (MSEDCL)

Appeal No.81 of 2010 & IA 97 of 2010

Osho International Foundation
17, Koregaon Park,
Pune-411 001

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

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Ms. Ramni Taneja

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Mr. Abhishek Mitra for R-2 (MSEDCL)
Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Varun Pathak for R-2 (MSEDCL)

Appeal No.82 of 2010

Neo Sannyas Foundation
17, Koregaon Park,
Pune-411 001

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Mumbai-400 005
2. Maharashtra State Electricity Distribution Company Ltd.,
G-9, Professor Anant Kanekar Marg,
Prakahgad, Bandra (East),
Mumbai-400 055

.....Respondent(s)

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Ms. Ramni Taneja

Counsel for Respondent(s): Mr. Buddy A Ranganathan for MERC
Mr. Abhishek Mitra for R-2 (MSEDCL)
Mr. Raunak Jain for R-2 (MSEDCL)
Mr. Varun Pathak for R-2 (MSEDCL)

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

All these Appeals are being disposed of through this common judgement as the issues involved in these Appeals are common.

2. These 13 Appeals have been filed by the Association of Hospitals, Educational Institutions, Sports Academy and Spiritual Foundations, etc; In these Appeals, the Appellants have challenged the orders of

Maharashtra State Electricity Regulatory Commission for the Financial Year 2008-09 and the FY 2009-10.

3. These Appeals can be classified into 3 categories on the basis of the orders of the State Commission challenged as under:

(A) Appeal No.110/09 and 111/09 relate to the tariff order for the year 2008-09 creating HT-II Commercial Category/LT Commercial category for the Appellants Association of Hospital Mumbai said to be resulting in tariff shock and high cross subsidy.

(B) The other Appeals No.70/10, 71/10, 78/10, 79/10, 80/10, 81/10 & 82/10 would relate to the orders of the State Commission regarding the tariff shock and high cross subsidy on the basis of the directions given by this Tribunal to the Commission in the Appeals by remanding the matter to give an opportunity and consider the submission of the Appellants, relating to the re-categorisation after setting aside the tariff order for the year 2008-09. In this category, the Appellants are M/s. Maharishi Karve Stree Siksha Sansthan (Appeal No.70/10). Association of Hospitals, Pune (Appeal No.71/10), Ram rao Adik Education Society (Appeal No.78/10), D Y Patil Sports Academy (Appeal No.79/10), Continental Medicare

Foundation (Appeal No.80/10), Osho International Foundation (81/10) & Neo Sanyas Foundation (82/10).

(C) The third category relates to the tariff order for the year 2009-10 where the State Commission continued with the HT-II Commercial Tariff/LT Commercial Tariff Category tariff in Appeal No.170 of 2009 (Association of Hospitals, Mumbai), Appeal No.171 of 2009 (Association of Hospitals, Mumbai), Appeal No.201 of 2009 (Association of Hospitals, Pune) and Appeal No.202 of 2009 (Association of Management of Unaided Engineering Colleges, Nasik).

4. As far as Appeals in category 'A' are concerned, the issue is already covered by this Tribunal in earlier judgements as under;

(i) The judgement in the matter of Spencer's Retail Ltd Vs. MERC & Ors in Appeal No.107 of 2008 dated 1.7.2009.

(ii) The judgement in the matter of Inorbit Malls Vs State Commission in Appeal No.130 of 2008 dated 5.11.2009.

5. As far as the judgement in Appeal No.107 of 2008 dated 1.7.2009,

the Hon'ble Supreme Court has stayed the operation of the order till further orders.

6. The next judgement in Appeal No.130 of 2008 etc dated 5.11.2009, by this Tribunal covered by the following judgements of this Tribunal:

(i) Judgement dated 27.1.2009 in Appeal No.98 of 2008 covering some LT consumers which has since been stayed by Hon'ble Supreme Court in Civil Appeals No.1602 and 1603 of 2009.

(ii) Judgement dated 23.10.2009 setting aside the State Commission's order in Appeal No.131/2008 , 5/2009 and 11/2009.

(iii) Judgement dated 1.7.2009 in Appeal No.107/2008 which has since been stayed by the Hon'ble Supreme Court.

7. These judgements dated 27.1.2009; 23.10.2009 and 1.7.2009 have been challenged before the Hon'ble Supreme Court which in turn stayed the orders. Thus, these cases in the category 'A' will be subject to the outcome of the Hon'ble Supreme Court order. In view of the above, we feel that it is not necessary to deal with the issue with reference to the Category 'A'.

8. The 'B' category relates to the Appeal Nos. 70/10, 71/10, 78/10, 79/10, 80/10, 81/10 and 82/10 as against the orders passed by the State Commission dated 30.12.2009 in pursuance of the orders of remand passed by this Tribunal. In this order, the State Commission rejected the claim of the Appellants regarding the re-classifications sought for by the Appellants.

9. With regard to 'C' category, the Appeals No.170/09, 171/09, 201/09 and 202/09 are as against the order of the State Commission which continued with HT-II Commercial Tariff/LT Commercial Tariff for the Appellants rejecting the arguments of the Appellants with regard to re-categorisation despite the judgement of the Tribunal in respect of the Financial Year 2008-09.

10. The reasons of rejection given by the State Commission broadly in the impugned orders relating to these categories are as follows:

(i) The Appellants cannot be classified under the 'industrial' category as the purpose of use of electricity is not industrial.

(ii) The 2003 Act does not permit differentiation between

consumers on the basis of the ownership or whether they are loss making or profitable or running on no loss no profit basis.

(iii) Categorisation for Charitable Organisation is not recognised under Section 62 (3) of the 2003 Act.

(iv) Tariff increase for Appellant has occurred due to re-categorisation to more appropriate category on account of creation of a new category viz. HT-II Commercial, rather than any attempt to increase the cross subsidy. In any tariff rationalization exercise impact on one category of consumers will be higher than other categories.

(v) There is a direct nexus between the classification of the Appellants in category HT-II Commercial and the requirement and the object sought to be achieved by Section 62 (3) of the Act. Thus, there is no violation of Article 14 of the Constitution.

(vi) Malls and Multiplexes as also the Appellants are availing supply at HT voltages. Thus, there is no question of treating unequal as equals. Malls and Multiplexes are only a small part of HT-II commercial category. There are many other types of

consumers with which the Appellants have been placed in HT-II Commercial Category.

11. We have to deal with the issue of re-categorisation in the Appeals of this Category as the Appellants have claimed they cannot be charged for commercial II tariff as they are institutions which are service oriented and charitable, as such they shall be put in a different category.

12. With regard to cross subsidy, already this Tribunal has dealt with the issue in Appeal No.102 etc of 2010 dated 30.5.2011 in the matter of Tata Steel Ltd., vs. OERC & ORS wherein it has been held that there should be no tariff shock to any category of consumer with regard to issue of cross subsidy and cost of supply raised in these Appeals.

13. It is clear from the above judgements that the cases covered in category 'A' and 'B', there has been substantial increase in cross subsidy on the Appellants by re-categorisation in HT-II Commercial Category, subjecting them to tariff shock.

14. Regarding the cases in the category 'C' for the Financial Year 2009-10, if we compare the tariff change with respect to the tariff decided by the State Commission for the FY 2008-09, as such, there is only marginal

increase in tariff for LT Commercial Category and reduction in tariff for HT-II Commercial Category. However, if the Hon'ble Supreme Court endorses the decision of the Tribunal and the tariff for the FY 2008-09 is reduced then there may be a case for revising the tariff for the Financial Year 2009-10 too.

15. Under the above circumstances we now deal with the question which needs to be dealt with by this Tribunal is "***Whether the Hospitals, Educational Institutions dispensaries and other service oriented organisations etc., have to be treated differently under Section 62 (3) of the Act under the head 'purpose for which the supply is required' ?*** .

16. At the outset, it shall be mentioned that the Appellants may not be differentiated on the basis of their being Public Charitable Trust being run on non profit motive. But we may now consider as to whether they can be differentiated on the basis of the purpose for which supply is required.

17. (i) A combined reading of Section 61 relating to Tariff Regulation and Section 62 relating to Determination of Tariff would indicate that the State Commission shall determine tariff without showing any undue preference to any consumer of electricity. If no preference is to be shown to any consumer then it would mean that all the

consumers are to be supplied electricity reflecting the cost of supply. In other words, uniform tariff is to be recovered from every category of consumer having same cost of supply.

(ii) The provisions of Section 62 (3) allows differentiation between the consumer categories or any consumer from others in the matters of tariff to the extent that preference can be given to a certain category of consumers. The first part of Section 62 (3), provides that the Commission shall not show any undue preference to any consumer. This would mean that due preference can be given to some categories. The second part of Section 62 (3) provides that the Commission may differentiate the category of consumers on the basis of several factors including the purpose for which the supply is required. The purpose for which the supply is required relates to the use of electricity namely whether it is required by Hospitals or Commercial entities or industries etc.,

(iii) As a matter of fact, this Tribunal has already recognised the concept that the State Commission may choose to have a differential category tariff depending upon the purpose for which the electricity is being put into use as referred to in Appeal No.106 of 2008 dated 26.2.2009 in Mumbai International Airports Pvt Ltd.,Vs

MERC. Therefore, the differentiation between the consumers can be based on the use of electricity by a hospital or a charitable educational institution or even any educational institution as compared to commercial entities such as multiplexes, shopping malls, cinema theatres, recreational areas such as bowling alleys, advertisements, hoardings, hotels etc.

(iv) The categorisation or classification of consumers should be based on proper criteria and justified by reasons. The expression 'may differentiate' appearing in Sub Section (3) of Section 62 is clearly a judicial discretion to be exercised by the Commission on the basis of the valid reasons. Therefore, it would not be proper for the State Commission to group the different types of consumers in one category without considering that inherent differentiation based on the purpose for which the electricity is required to exist between them. The re-categorisation of hospitals, educational institutions and grouping them with consumers of commercial category such as multiplexes, shopping malls, hotels, cinema theatres etc., is patently wrong.

(v) The State Commission has proceeded to re-categorise the charitable trust hospitals which run on no profit motive from the

category of LT Domestic and HT Industry and grouped them in the highly profit motive commercial categories and subjected to Charitable Hospitals in the tariff. The above grouping amounts to treating the charitable hospitals along with commercial entities is not a reasonable classifications which has no nexus for the purpose for which the electricity is used.

(vi) The State Commission cannot create a residuary category and put all the non-domestic and non-industrial units into a commercial category in order to impose tariff on such categories. If there is intelligible differentia which is a separate group within the clause from the rest and that differentia has nexus with object sought to be achieved, there can be further classification. The classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of use. Section 62(3) mandates exercise of power for determination of tariff on the basis of criteria, which is specified under the stature. If power is exercised with reference to such a criteria, then Court would set aside such order and direct the authorities to take a decision on relevant considerations.

(vii) The purpose for which supply is required by the Appellant can

not be equated to that of Malls and Multiplexes alongwith the Appellants who have now been categorised HT-II commercial category. As such, the Commission has failed to take into consideration the differentia factor, the purpose for which supply is required, for the purpose of categorising services similar to that of the Appellant.

(viii) The Commission has simply proceeded on the basis of the fact that the Appellants contention that they have been carrying out their operation on no-profit and no-loss basis can not be the basis for differentiation, since the motive for profit for carrying out any activity can not be the differentia factor under section 62(3). This approach is not correct.

18. As indicated above, the Appellants cannot claim for different category merely because that they are acting on no-profit and no loss basis. But the Appellants are entitled to seek for separate categorisation in view of the services carried out by them.

19. This Tribunal in the case of Udyog Nagar Factory Owner Association (BRPL) held that differential tariff can be fixed for the Railway traction, Delhi Metro Rail Corporation as they stand on different footing than the

other class of consumers. The Railway and Delhi Metro Rail Corporation draw power for specified needs of the masses providing the essential service, when there are separate category for Railways as well as the Delhi metro Rail Corporation providing essential services, the same would apply to the Appellants also as they are providing essential hospital services.

20. The Commission, in the impugned order, justified the creation of HT-II commercial category and placing the Appellants in the same category alongwith the Malls and Multiplexes. According to the Commission, the category i.e. HT-II commercial specified twin test of Intelligible differentia. No.1 - the classification was founded on an intelligible differentia which distinguishes persons that are grouped together from others left out within the group. No.2 – Such differentia must have rational relation to the object sought to be achieved. The Commission has failed to understand the true import of Article 14 of the Constitution and the applicability of the twin test though the Commission has understood the classification basis on intelligible differentia.

21. The Commission has failed to understand the second test correctly. Second test provides such a differentia must have rational relation to the object sought to be achieved by the statute in question. While classifying

the consumers under various categories the Commission has not specified in the impugned order, what is the object that is sought to be achieved by the classification of consumers and what is the purpose for which supply is required. Hence, there is an incomplete application of the twin test. Under Section-62(3) of the Act there are various categories classified:

- 1) 'Load factor' and 'power factor'
- 2) 'Voltage'
- 3) 'Total Consumption of electricity during any specified period'.
- 4) 'Geographical position of any area'.
- 5) 'Nature of supply'
- 6) 'Purpose of which supply is required.'

The Commission has fixed different consumer categories like the following:-

- Domestic
- Non-domestic
- PWW
- Agricultural
- Industrial
- Street Light
- Temporary
- Advertisement & hoardings
- Crematorium & burial grounds
- Commercial
- Railway traction
- Group Housing Society and Commercial complex and
- Mula Pravara

22. The reason for creating different categories by the Commission was

that the purpose for which supply is required by these categories is different. But the Commission in the present case wrongly placed all the consumers including the Appellant who were neither domestic nor industrial nor falling under any of the categories under the commercial category.

23. The purpose for which supply is required by the Appellants can not be equated at par with other consumers in the commercial category. The Appellants are seeking separate categorisation on the basis of purpose for which supply is required by the Appellant i.e. rendering essential services. The purpose for which supply is required by the Appellants and that of Malls and Multiplexes can not be the same. Therefore, the Appellants are required to be separately categorised by the Commission.

24. The differentiation should specify the well settled principle contained in Article 14 of the Constitution of India namely – 1) There must be a reasonable classification, 2) Such classification should have nexus to the purpose sought to be achieved, 3) Such classification should not be arbitrary and 4) Unequal should not be treated equally.

25. Last differentiating category provided in Section-62(3) is “the purpose for which the supply is required”. The learned Counsel for the

State Commission contended that the purpose for which the supply is required does not refer to the use, for which the electricity is put but it refers to the manner of utilisation of electricity namely – whether for lighting, heating, etc. This contention is not correct. The purpose for which the supply is required relates to use of electricity namely – whether it is for essential service purpose, commercial purpose or industrial purpose. Therefore, the differentiation between consumers can be based on the use of electricity by the hospital, educational institutions, as compared to the commercial utilities such as Malls and Multiplexes etc.

26. It is well settled that any discretion vested in the statutory authorities is a judicial discretion. It should be exercised supported by the reasons. In other words, the categorisation of the consumers should be based upon the proper criteria legally valid. It can not be arbitrary. The expression “may differentiate” as found in Section 62(3) clearly indicates that there shall be a judicial discretion to be exercised with reasons. Therefore, it would not be proper for the State Commission to group different types of consumers in one category without considering the inherent differentiation that exists between them, based on the purpose for which electricity is required.

27. The word “purpose” has been defined in P. Ramanathan Iyer’s

Advance Law Lexicon as the “thing intended or the object and not motive behind the action”. It is clear that the object for which electricity required by the Appellants is to perform the essential services. The motive behind the same can be profit or no profit. The Appellants cannot seek re-categorisation on the basis of profit or no profit. But the Appellants can seek re-categorisation on the basis of purpose of which the electricity is consumed by the Appellants namely – essential services.

28. As referred to above, the Railways and Delhi Metro Rail Corporation have been differentiated as separate category as they are providing essential services. The same would apply to the Appellants as well.

29. The Supreme Court in (2002) 3 SCC 711 i.e. in the case of Association of Industrial Electricity Users vs. State of AP & Ors has held that on the basis of the Act, the classification of consumers according to the purpose for which the electricity is used is permissible. In (2001) 7 SCC 708 in the case of State of AP Vs. Nallamilli Rami Reddi & Ors, the Supreme Court has held that charitable or religious institutions or endowments fall into a separate category and form a class by themselves.

30. The real meaning of expression, “purpose for which the supply is

required” as used in Section 62 (3) of the Act does not merely relate to the nature of the activity carried out by a consumer but has to be necessarily determined from the objects sought to be achieved through such activity. The purpose is the design of effecting something to be achieved or accomplished. The overt act of the person must be looked at so as to find out the effect of the transaction.

31. Webster’s New International Dictionary defines the work ‘purpose’ as that which one sets before him as an object to be attained; the end or aim has to be kept in view of any plan, measure, exertion or operation. Therefore, it is beyond doubt that ‘purpose’ has to be determined with regard to the ultimate object of the consumer for the use of electricity. While determining the purpose for which supply is required by a consumer, it is ultimately the end objective of the user that has to be ascertained.

32. The grouping of the institutions in HT II category along with commercial consumers reflects complete non-application of mind. The multiplexes and shopping malls and other High Tension electricity users as also the existing HT II consumers are purely commercial establishments. The Appellant can not be put into the category of those persons. This amounts to treating unequals as equals which is clear

violation of Article 14 of the Constitution of India. The consumers who utilise electricity to generate profits are in a class apart from the consumers such as the Institutions utilising electricity to advance the cause of charity education and essential services.

33. Section 62 (3) uses the expression “shall not.....show undue preference to any consumer”. This means that due preference can be given. What is prohibited is a preference of undue nature. There should be rationale or reason for giving due preference. The justifications for reduction in tariff depending upon the nature of the activity being carried out by the consumer is given in two categories. In the first category, a life line consumer below poverty level can be given preference in the tariff based on his non-affordability. Similarly, agricultural consumers can be given preference because of the important nature of activities. In the second category, a primary school being run in the village where otherwise schooling facility is not available, though the school may be able to afford to pay the cost of electricity, considering the nature of the activities being carried out, the State Commission can decide to reduce their tariff. Similarly, a primary health centre or a Spiritual centre for the social up-liftment can be considered. Similarly a public work, street lighting etc can be given preference because of the nature of service rendered by them.

34. The application of mind should be on identifying the categories of consumers who should be subjected to bear the excess tariff recoverable based on a valid reason and justification. The re-categorisation of Charitable Hospitals and charitable organisations and grouping them with the consumers of the category such as Shopping Malls, Multiplexes, Cinema Theatres, Hotels and other like commercial entities is patently erroneous. The Charitable Service oriented Organisations can not be equated with the above class of commercial business.

35. Section 62 (3) of the Electricity Act, 2003 reads as under:

“(3) 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”.

36. Section 62 (3) of the Electricity Act, 2003 permits differentiation between classes of consumers on aspects mentioned in the said Section which include power factor, load factor, voltage, total consumption, nature and **purpose for which the electricity is required** etc.,

37. By the impugned Order, the State Commission classified the

members of the Appellant into 'commercial' category following a mechanical approach and without application of mind. This has been done only because the Appellant cannot fall under either industrial or agricultural or residential category, and that therefore, the Appellant would automatically fall in the 'Commercial Category'. In case the State Commission felt that the Appellant is not falling under any particular existing category, then the State Commission ought to have applied its mind and provided for a new category for public charitable trust hospitals and given them a competitive tariff having regard to the purpose for which the electricity is used by them.

38. The State Commission has ignored the parameter of 'purpose for which the supply is required mentioned in Section 62 (3) of the Electricity Act, 2003 while classifying consumers into various categories. If otherwise, the State Commission would have noted that the electricity required by the charitable trust hospitals is for providing access to essential medical services to the general public and not for carrying on any 'commercial' activity.

39. The categorisation of the Charitable Trust Hospitals together with Malls Multiplexes and Cinema Theatres is patently erroneous. This would amount to treating unequals as equals and in a way it is a violation

of Article 14 of Constitution of India. Consumers who utilise the electricity to provide luxury and entertainment and thereby generating profit fall in a totally different class of consumers dealing with entertainment and other luxurious activities. Such consumers cannot be equated with or put in the same category as the consumers such as Public Trust Hospitals which utilise electricity for benevolent objectives of providing health care, human life saving and for relief from health hazard and not making any profit for any one.

40. The Appellant has pleaded various aspects and the manner in which several legislations provide for favourable treatment to Charitable Trust Hospitals which shows that it is not the intention of the Government to burden public charitable trust hospitals. The State Commission must also appreciate that a substantial part of the expenditure of the hospitals is towards electricity charges.

41. The Appellant, Charitable Trust Hospitals cannot be placed in commercial category clubbed with malls.

42. The Charitable Institutions run public utility services for the benefit of the society at large and the malls are profit making establishments catering to the luxury of elite class. Clubbing such two

together for the purpose of the determination of the tariff is not correct.

43. According to the Commission, the categorisation of the charitable hospitals with other commercial establishment having regard to the purpose of supply was proper and that profit earning cannot be a criteria for differentiation under Section 62(3) of the Act is erroneous. The purpose is not merely relatable to the nature of the activity carried out by a consumer but to be necessarily determined from the objective i.e ought to be achieved through such activity.

44. The Hon'ble Supreme Court in (1976) 2 SCC 310 in the judgement of State of Kerala Vs. N M Thomas has held that if there is intelligible differentia which separate a group within that class from the rest and that differentia has nexus with the object sought to be achieved, there can be further classification. The relevant portion of the judgement is extracted below:

“83. A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. In other words, the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. It is a mistake to assume a priori that there can be no classification within a class, say, the lower division clerks. If there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, I see

no objection to a further classification within the class. It is no doubt a paradox that though in one sense classification brings about inequality, it is promotive of equality if its object is to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons. In this view, I have no doubt that the principle laid down in All India Station Masters and Assistant Station Masters Association Vs General Manager, Central Railway, S.G. Jaisinghani Vs Union of India (supra) and State of J&K v. Trikoki Nath Khosla has no application here”.

45. Similarly, the Supreme Court in the judgement of State of Kerala Vs Haji K Kutty cited as AIR 1969 SC 378 has held where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result for, refusal to make a reasonable classification may itself in some case operate as denial of equality. The relevant portion of the judgement is extracted below:

“The charging section section of the Kerala Buildings Tax Act (19 of 1961), viz S. 4 read with Schedule to the Act is violative of the equality clause of the Constitution and as such is ultra vires. In enacting the Kerala Buildings Tax Act no attempt at any rational classification is made by the Legislature. The Legislature has not taken into consideration in imposing tax the class to which a building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation. They have adopted merely the floor area of the building as the basis of tax irrespective of all other considerations. Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, refusal to make a rational classification may itself in some cases operate as denial equality. AIR 1967 SC 1801, Foll: AIR 1967 Ker 114,

Affirmed”.

46. Section 62 (3) mandates exercise of the power for determination of tariff on the basis of the criteria which are specified under the statute. If power is exercised without reference to such criteria, Court of law would set aside such order and direct the authority to take a decision on the relevant considerations.

47. The Commission has ignored the obligation cast upon it. One of the reasons indicated by the Respondent Commission for re-categorising the Appellant in HT-Commercial Category is that within the existing categories created by the Respondent Commission, the Appellant could have come only under the Commercial category since it did not fall under the industrial or Residential category. It is the intent or the object and not the motive behind the action. It is submitted that it is absolutely clear that the object for which electricity is required by the Appellant is to perform the essential educational services or essential health services. The motive behind the same can be profit or no-profit. However, the Appellant has not sought its re-categorisation on the basis of profit or no-profit. The Appellant is seeking re-categorisation of Appellant on the basis of purpose for which electricity is consumed by the Appellant i.e. essential educational services or essential health services. The Hon'ble Tribunal in the case of Udyog Nagar Factory Owner Association Vs. BRPL held that the differential tariff can be fixed for the railway

traction and DMRC as they stand on different footing than other class of consumers i.e. the railway and DMRC draw power to satisfy the needs of masses. Therefore, there can be separate category for Railways and DMRC. Similarly, the Appellant is providing essential educational services and the same cannot be equated with purely commercial activities carried out by other consumers categorised under HT Commercial category.

48. The State Commission cannot create a residuary category such as non domestic or non-industrial and group some categories not otherwise dealt elsewhere, particularly, in the background that the State Commission had proceeded to impose excessive tariff on such category.

49. A discretionary power must be exercised on relevant and not on extraneous considerations. It means that power must be exercised taking into account the considerations mentioned in the statute. If the statute mentions no such considerations, then the power is to be exercised on considerations relevant to the purpose for which is conferred. On the other hand, if the authority concerned pays attention to, or takes into account, wholly irrelevant or extraneous circumstances, events or matters or considerations then the action taken by it is invalid and will be quashed.

50. Even though an authority may act in its subjective satisfaction, there must be cogent material on which the authority has to form its opinion. In the purported exercise of its discretion must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations, must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter and to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously”.

51. The Commission has completely ignored the obligation cast upon him. One of the reasons indicated by the Respondent Commission for re-categorising the Appellant in HT-Commercial category is that within the existing categories created by the Respondent Commission, the Appellant could have come only under the Commercial category since it did not fall under the Industrial or Residential category. It is to be stated that such a simplistic approach adopted by the Respondent Commission is not only discriminatory, but it also shows failure of the Respondent Commission to discharge its functions under section 62 (3) of the Act.

52. The word ‘may’ used in second part of Section 62(3) does not provide absolute discretion upon the Respondent Commission to take

those factors into account or not. The term 'may' is used to indicate that as and when the situation arise the Respondent Commission in exercise of its judicial discrimination can utilise certain or all the criterias specified under Section 62(3) of the Electricity Act, 2003. However, once the discretion has been exercised by the Respondent Commission, it has to be exercised in a proper manner having regard to all relevant facts and circumstances to ensure that no undue preference is given to any consumer and no discrimination is made against any consumer. It is submitted that Section 62 (3) embodies the same principle which is enunciated in Article 14 of the Constitution of India.

53. Once the Respondent Commission chooses to have different tariff u/s 62 (3), it is incumbent upon the Respondent Commission to fix different tariff on the basis of criteria specified u/s 62 (3). The failure on the part of the Respondent Commission to properly exercise the discretion vested in it is violative of Article 14 of the Constitution.

54. As mentioned above, the purpose for which supply is required by the Appellant cannot be equated to that of malls and multiplexes along with which, the Appellant has been categorised in the HT Commercial category. Therefore, the Respondent Commission has failed to take into consideration the differentiating factor of "the purpose for which the

supply is required” for the purpose of categorising services similar to the Appellant.

55. During the hearing, it is brought to our notice that the State Commission recently passed an order dealing with this issue. We have gone through the said order. The Commission in its order dated 12.9.2010 in the case No.111 of 2009 has created a separate category for hospital and educational institutes differentiating it from the other consumers under HT-II commercial category based on the “purpose for which supply is required”. The relevant portion of the order is extracted below:-

“Commission’s Ruling

The Commission accepts MSEDCL’s proposal to create a sub-category within LT II (A) Commercial with load from 01 to 20 kW, to cater to all educational institutions, hospitals and dispensaries, since MSEDCL has submitted the required data, and such a request has been made by the affected consumers also during the public hearings. It should be noted that this sub-category (LT II (A) (i) will be applicable to all educational institutions, hospitals and dispensaries getting supply at LT voltages, as proposed by MSEDCL, and is not restricted to only Government owned or aided educational institutions, or charitable hospitals, etc., since Section 62 (3) of the EA 2003 does not permit differentiation between consumers on the basis of ownership, as ruled by the Commission in earlier Orders.

The tariff for the two sub-categories under LT II (A), i.e. LT II (A) (i) – Educational Institutions, Hospitals and Dispensaries, and LT II (A) (ii) –Others, have been determined subsequently in this Section.

As regards MSEDCL's proposal to create a sub-category within HT II Commercial to cater to all Government Owned and/or aided educational institutes and Hospitals, the Commission is of the view that Section 62 (3) of the EA 2003 does not permit differentiation between consumers on the basis of ownership. Hence, the Commission has extended MSEDCL's proposal to all Educational Institutions and Hospitals under HT II Commercial category, by adopting the same approach as adopted for LT II (A) Commercial. Since, the Commission has already created two sub-categories for Express and Non express feeders under HT II Commercial, will be as under:

HT II Commercial

(A) Express Feeders

- (i) Educational Institutions and Hospitals***
- (ii) Others***

(B) Non-Express Feeders

- (i) Educational Institutions and Hospitals,***
- (ii) Others"***

56. In view of the Commission's ruling as reflected in the above order, the Commission may classify the hospitals, educational institutions and spiritual organisations which are service oriented and put them in a separate category for the purpose of determination of tariff.

57. **Summary of Our Findings**

(i) The State Commission in the present case wrongly placed all the consumers including the Appellants who were neither domestic nor industrial nor falling under any of the categories under the Commercial Category. The purpose for which the

supply is required by the Appellants can not be equated at par with other consumers in the Commercial Category. The Appellants are seeking separate categorisation on the basis of purpose for which the supply is required by the Appellants i.e. rendering essential services.

(ii) The real meaning of expression ‘ “purpose for which the supply is required” as used in Section 62 (3) of the Act does not merely relate to the nature of the activity carried out by a consumer but has to be necessarily determined from the objects sought to be achieved through such activity. The Railways and Delhi Metro Rail Corporation have been differentiated as separate category as they are providing essential services. The same would apply to the Appellants as well.

(iii) The application of mind should be on identifying the categories of the consumers who should be subjected to bear the excess tariff recoverable based on a valid reason and justification. The re-categorisation of Charitable Hospitals and Charitable Organisations and grouping them with the consumers of the category such as Shopping Malls,

Multiplexes, Cinema Theatres, Hotels and other like commercial entities is patently wrong.

(iv) By the impugned order, the State Commission classified the members of the Appellants into 'Commercial' category following a mechanical approach. This has been done only because the Appellants cannot fall under either in the industrial or agricultural or residential category and therefore, the Appellant would automatically fall in the Commercial Category. This is not a proper approach. In case the State commission felt that the Appellants are not falling under any particular existing category, then the State Commission ought to have applied its mind and provided for a new category and given them a competitive tariff having regard to the purpose for which the electricity is used by them.

(v) The State Commission may classify the hospitals, educational institutions and spiritual organisations which are service oriented and put them in a separate category for the purpose of determination of tariff.

(vi) We feel that the re-categorisation should be implemented by the State Commission in the next Tariff Order which is yet to be passed for the following reasons:

(i) FY 2008-09 and FY 2009-10 are already over and tariff has been collected by the Distribution Licensees as per the respective Tariff Orders.

(ii) The Hon'ble Supreme Court has granted stay on some of the judgements issued by this Tribunal for the FY 2008-09 in similar matters.

(iii) The tariff shock and increase in cross subsidy for FY 2009-10 for the above consumer categories will depend on the outcome of the above Appeals pending before the Hon'ble Supreme Court for tariff for FY 2008-09.

58. In view of our findings, we direct the Commission to take note of our observations in the above paragraphs and pass consequential orders in these matters.

59. Appeals are allowed. No order as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:20th Oct, 2011

REPORTABLE/NON-REPORTABLE