Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.88 of 2012

Dated:20th May, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

Tata Teleservices Limited.,
2A, Old Iswar Nagar,
Main Mathura Road,
New Delhi-110 065

…Appellant

Versus

1. **Rajasthan Electricity Regulatory Commission,**
   Vidhyut Viniyamak Bhawan, Sahakar Marg,
   Near State Motor Garage,
   Jaipur (Rajasthan)

2. **Jaipur Vidyut Vitran Nigam Limited.,**
   Vidyut Bhawan, Janpath,
   Jaipur-302 005,
   Rajasthan

3. **Ajmer Vidyut Vitran Nigam Limited.,**
   Hathi Bhata, City Power House,
   Jaipur Road,
   Ajmer-305 001
   Rajasthan

4. **Jodhpur Vidyut Vitran Nigam Limited.,**
   New Power House, Industrial Area
   Jodhpur-342 003
   Rajasthan

...Respondent(s)

Counsel for the Appellant(s) : Mr. Amit Kapur
Ms. Sughandha Somani
Mr. Vishal Anand

Counsel for the Respondent(s): Mr. R K Mehta,
Mr. David A
Mr. Antaryami Upadhyay for R-1
Mr. Pradeep Misra
Mr. Daleep Kr. Dhayani
Mr. Manoj Kr Sharma for R-2 to 4

J U D G M E NT

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

1. M/s. Tata Tele Services is the Appellant herein.

2. Aggrieved by the impugned order dated 8.9.2011 passed by Rajasthan State Electricity Regulatory Commission re-categorising the Appellant from ML/LT-7 to Non-domestic Service ("NDS") category, the Appellant has presented this Appeal.

3. The Short facts are as under:

(a) The Appellant, a telecom service provider is an essential service provider. Jaipur Vidyut Vitran Nigam Limited (R-2), Ajmer Vidyut Vitran Nigam Limited (R-3) and Jodhpur Vidyut Vitran Nigam Limited (R-4) are the Distribution Licensees in the State of Rajasthan.

(b) In January, 2011, Jaipur Distribution Company (R-2) filed a Petition before the State Commission for determination of the Annual Revenue Requirement (ARR) and Retail Tariff for the Financial Year 2011-12. In the said Petition, the Distribution Company proposed for modification in the Non-domestic Category praying for the inclusion of the telephone Companies run on commercial basis in the Non-domestic Service category by shifting them from ML/LT-7 category.

(c) On this Petition, public notice was issued. After observing all the procedure and after hearing the public and also after considering the suggestions and comments from the consumers, the State Commission passed the impugned order by which the telephone/mobile exchanges i.e. Appellant's Category was re-categorized by shifting from ML/LT-7 to Non-domestic Service (NDS) category.

(d) In this public hearing, the Appellant did not participate in the proceedings before the State Commission. They came to know about the order re-categorising the Appellant category as Non-domestic Service (NDS) category only on 15.10.2011 when Rajasthan Distribution Companies raised the bills upon the Appellant charging the Appellant's tariff applicable for Non-domestic Service category. On receipt of the

same, the Appellant sent various representations to the Government of Rajasthan as well as to the Distribution Companies seeking for issuance of suitable directions and instructions to Rajasthan State Commission to revisit the impugned order. However, there was no response either from the Government or the Distribution Companies.

(e) Therefore, the Appellant filed the present Appeal challenging the impugned order dated 8.9.2011.

4. The learned Counsel for the Appellant has made the following submissions to challenge the impugned order re-categorising the Appellant from ML/LT-7 to Non Domestic Service category:

(a) The State Commission has re-categorised the Appellant by shifting from ML/LT-7 to Non Domestic Service Category in contravention of Section 62 (3) of the Electricity Act, 2003 after having failed to take into consideration that the Commission can differentiate the consumers in different categories only on the basis of the criteria specified u/s 62 (3) of the Electricity Act and not otherwise.

(b) The State Commission while re-categorising the Appellant, failed to consider the nature and purpose for which the supply is required by the Appellant i.e. to run

essential facility of telecom services which cannot be treated at par with other consumers placed in Non Domestic Service Category.

(c) The State Commission while re-categorising the Appellant has violated National Electricity Policy which mandates the State Commission to take into consideration the tariff in such a manner that the cross subsidy level is maintained at ± 20% of the average cost of supply. It has also contravened the IT and ITES Policy, 2007 of the Government of Rajasthan which induced the investments by fixing the power related incentives to IT and ITES industries including the Appellant's category by categorising them from commercial to low tension industry category.

(d) The State Commission has failed to consider that the Appellant is an essential service provider to the public and accordingly the tariff of the Appellant should have been determined near cost of supply having regard to the nature and purpose for which the supply was made.

5. On these grounds, elaborate arguments were made by the learned Counsel for the Appellant.

6. The learned Counsel for the Respondent State Commission before answering these issues raised preliminary objection

with regard to the maintainability of this Appeal. The crux of the objection raised by the learned Counsel for the State Commission, is as follows:

> "The present Appeal at the instance of the Appellant is not maintainable since the Appellant did not file any objection before the State Commission in response to the public notice issued by the State Commission. In fact, both in the proposal made by the Distribution Licensee before the State Commission as well as in the public notice as directed by the State Commission, the prayer of the Distribution Licensee seeking for the changes in existing categorisation had been mentioned. Despite the publication of this public notice, the Appellant neither filed any objection nor appeared during the public hearing before the State Commission questioning the change of existing categories. No reasons whatsoever have been given by the Appellant for not filing objection before the State Commission in spite of the public notice. Since the Appellant chose not to file any objection before the State Commission, the State Commission did not have any opportunity to adjudicate upon such objection. Even in the case where the party who had filed objection before the State Commission, files an Appeal on the grounds which were not raised before

the State Commission, this Tribunal would not normally permit those grounds to be raised in the Appeal on the basis that the said grounds of objection were not raised before the State Commission. When such is the position of law, the person who neither appeared before the State Commission nor raised the grounds of objection referred to in the Appeal, cannot be permitted to file the Appeal raising all these grounds. Therefore, the Appeal by the Appellant is not maintainable.

7. On the other hand, the learned Counsel for the Appellant submitted that the Appellant being aggrieved over the impugned order with regard to change of categorisation, is entitled to file the Appeal u/s 111 of the Electricity Act, 2003.

8. Before dealing with the main grounds urged by the Appellant in the Appeal, it would be proper to consider the question of maintainability of this Appeal raised by the Respondent Commission as a preliminary objection.

9. The perusal of Section 111 (1) of the Electricity Act, 2003 would show that any person aggrieved by any order of the Appropriate Commission can prefer an Appeal before the Tribunal. The same is as follows:

"111. Appeal ***to Appellate Tribunal:***

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under Section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty."

10. According to the Appellant, a person, even though he was not a party to the original proceedings, may still prefer an Appeal with leave of the Appellate Tribunal provided that the person claiming himself to be aggrieved shall show the prima facie case as he is aggrieved and as to how he is aggrieved and if that is established, the Appeal would become maintainable. In that context, it is stated by the Appellant that the Appellant feels aggrieved by the impugned order wherein the Appellant has been categorised by shifting from ML/LT-7 category to Non Domestic Service Category resulting in (a) categorisation of the Appellant being an essential service provider with the commercial

consumers (b) tariff shock to the Appellant. This aspect requires consideration.

11. It is true that the Appellant despite the public notice did not choose to appear before the State Commission to raise objection with regard to change of categorization. In this regard, the Appellant has submitted that the public notice dated 11.1.2011 which was issued inviting suggestions and objections did not specifically propose any change in category of consumers of ML/LT-7 category or the category of the telecom service providers. Though it is submitted by the learned Counsel for the State Commission that the distribution licensee has made proposal with regard to change in the existing categorisation, it is noticed that the said public notice dated 11.1.2011 did not specifically refer to the proposal for any change in category of consumers of ML/LT-7 Category or the category of the telecom provider i.e. the Appellant's category.

12. According to the learned Counsel for the Appellant, in that situation, the Appellant felt that it was not necessary to participate in the public hearing as the issue relating to the category of the Appellant was not the subject matter of the public notice.

13. On the other hand, the learned Counsel for the State Commission submitted that if the Appellant had appeared

and raised those grounds as an objection before the State Commission, the said objection would have been considered by the State Commission who in turn would have given a finding on that and this opportunity had not been given to the State Commission. We find force in this submission. But, the question here is whether the Appellant can be considered to be a person aggrieved or not, despite his non appearance before the State Commission.

14. What is the definition of a "Person Aggrieved"? A person aggrieved means a person who has suffered a legal injury, a person against whom a decision had been pronounced and a person who had been deprived of a legal right.

15. If this is the definition, then it has to be held that the Appellant can also be considered as an aggrieved person since the Appellant claims that because of the re-categorisation of the Appellant's category by shifting from ML/LT-7 Category to Non Domestic Service Category, a tariff increase is resulted to the Appellant. Therefore, in spite of the fact that the Appellant did not file objections nor appeared in the tariff proceedings before the State Commission, the Appellant has to be considered as an aggrieved person. The same principle has been laid down by this Tribunal in 2010 ELR (APTEL) 404 BSES Rajdhani Power Limited Vs DERC and in Appeal No.182 of 2011 in

the case of M/s. Rajasthan Steel Chambers vs Rajasthan State commission.

16. The relevant observations in the case of BSES Rajdhani Power Limited vs DERC 2010 ELR (APTEL) 404 are given as below:

> *"11...*
>
> *(i) A person who was not a party to the original proceedings may still file an Appeal with leave of the Appellate Court, provided that the person claiming himself to be the aggrieved party shall make it a prima facie case as to how he is aggrieved.*
>
> *(ii) A person can be said to be aggrieved by an order only when it caused on him some prejudice in some form or another unless the person is prejudicially or adversely affected by the order, he cannot be entitled to file an Appeal as an aggrieved person.*
>
> *(iii) The words "person aggrieved" did not mean a man who is merely disappointed of a benefit which he may have received if some other order had been passed. A person aggrieved means a person who has suffered a legal grievance, a person against whom a decision has been pronounced which have wrongly deprived him of something or wrongfully refused him something or wrongly affected his title to something.*
>
> *(iv) When a person had not been deprived of a legal right, when he is not subject to legal wrong, when he has not suffered any legal grievance, when he has no legal peg for a justifiable claim to*

hang on, he cannot claim that he is a person aggrieved".

17. The relevant observation in Appeal No.182 of 2011 in the case of M/s. Rajasthan Steel Chambers vs Rajasthan State Commission are as follows:

> *"13. We are also not impressed by the plea adopted by the 1st Respondent that since the 1st Appellant had not raised the issue of cross subsidy before the State Commission, the same cannot be raised in Appeal before this Tribunal. The licensee is required to publish its proposals submitted before the State Commission the abridge form inviting comments from all the stake holders under Section 64(2) of the Act. Accordingly, the stake holders submit their comments/objections to the proposals of the licensee. There could be circumstances where a person is not affected by the proposals of the licensee but could get aggrieved by the final order of the State Commission. Further, any person aggrieved by the final order of the State Commission could approach this Tribunal in Appeal for redressal of its grievance."*

18. In view of the settled position of law, we decide the preliminary question by holding that the Appeal has been filed by the Appellant as an aggrieved person over the impugned order and as such, the Appeal is maintainable.

19. Let us now deal with the other grounds urged in this Appeal.

20. The learned Counsel for the Appellant has urged following contentions as referred to in the earlier paragraphs:

(a) The State Commission in the impugned order has re-categorised the Appellant from ML/LT-7 category to Non Domestic Service Category on the grounds that telephone Companies run on commercial basis. This reasoning is wrong and unjust as it is contrary to Section 62 (3) of the Act and Regulation 123 of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2009. As per this section and Regulation, the State Commission while determining the tariff shall not show undue preference towards any consumer of electricity unless on the basis of some certain specific criteria based on which the consumer may be classified in different categorisation. The State Commission without taking into consideration the nature and purpose, for which the electricity supply is required by the Appellant, changed the category of the Appellant from ML/LT-7 to Non Domestic Service Category even though the electricity consumed by the Appellant Telecom Companies is to render essential public services. Thus, the purpose for which the supply is required by the Appellant is different from other consumers falling in Non Domestic Service category. Non Domestic Service category constitutes commercial consumers such as malls, multiplexes, shops and offices etc., Since the Appellant is providing essential

infrastructure services, it cannot be compared with other consumers falling under Non Domestic Service Category.

(b) The State Commission failed to comply with the mandate of National Electricity Policy to maintain the cross subsidy level at ± 20% of the average cost of supply. The tariff of the Appellant was increased from Rs.3.75 to Rs.5.90 i.e. 58% increase. This resulted in the tariff shock to the Appellant.

21. In reply to the above grounds, the Respondents in justification of the impugned order have submitted the following:

(a) While determining the tariff, the State Commission has not shown undue preference to any consumer as all mobile telephone service providers either Government or privately owned, have been kept at par and accordingly the State Commission has fixed the tariff for the telecom sector u/s 62 (3) of the Act by proper categorization.

(b) Since the tariff of the Appellant and similarly situated consumers has been modified after more than 10 years, the cross subsidy cannot be brought down in one Financial Year. Therefore, the cross subsidy level was slightly higher than ± 20% of the average cost of

supply. The Appellant being the commercial organisation has to pass through the electricity charges to its consumers. Hence, the question of tariff shock would not arise.

22. The above submissions would show that the impugned order dated 8.9.2011 passed by the Rajasthan State Commission has been challenged by the Appellant in this Appeal on the issues referred to above, which can be grouped into two main grounds. Those are:

(a) Change of categorization

(b) Cross subsidy

23. Elaborating these issues, the Appellant has submitted the following:

(a) The Appellant, being a telecom service Company, is providing essential services. Hence its tariff will have to be decided considering its nature of services. When that being so, the Appellant cannot be placed in the category of commercial consumers in contravention of Section 62(3) of the Electricity Act, 2003.

(b) The State of Rajasthan issued IT Policy 2007 which was effective till 31.3.2012. This policy was issued on the recommendations of the Rajasthan State

Commission. On that basis, the Appellant has originally been categorised under mixed load category. The said categorisation cannot be changed. Therefore, the State Commission has to categorise the Appellant according to nature of supply i.e. essential services.

(c) The State Commission failed to comply with the mandate of National Electricity Policy to maintain the cross subsidy level at ± 20% of the average cost of supply. In the present case, the tariff of the Appellant has been increased from Rs.3.75 to R.5.90 i.e. 58% increase. This has led to tariff shock to the Appellant.

24. While dealing with these issues raised by the Appellant, it would be appropriate to consider the background of the case by referring to the chronological events which led to the filing of this Appeal:

(a) In the year 2000, State of Rajasthan pronounced its IT Policy, 2000. By this policy, some incentives were granted to the IT industry. The Telephone exchanges were categorised under Non Domestic Service (NDS) Category.

(b) On 17.12.2004, the State Commission determined the retail tariff. In that order, the State Commission accepting the contentions of the Distribution Companies categorised the tariff of BSNL

with Radio Stations, TV Stations etc., under mixed load category. However, its exclusive offices had been categorised under Non Domestic Service Category.

(c) In the year 2007, the State Commission took up the suo-moto Petition No.130 of 2007, regarding the determination of tariff of the Distribution Licensees. In those proceedings, the Distribution Licensees contended that the Ratio Stations, TV Stations and their Transmitters, telephone/mobile exchanges/ switches including attached offices have to be included in Schedule ML/LT-2. Accepting the said contention, the State Commission directed the categorisation of the same in mixed load category. This order was passed on 31.8.2007. In compliance of this order, the Distribution Companies issued an order dated 24.9.2007 incorporating the modifications as directed by the State Commission.

(d) In the year 2007, the State of Rajasthan had declared IT and ITES as Public Utility Services under the provisions of Industrial Disputes Act, 1947. Besides this, the State Government on the recommendations of the State Commission changed the applicable category of tariff from commercial to low tension industry category.

(e) In January, 2011, the Distribution Company filed its ARR and Retail Tariff Petition for the Financial Year 2011-12 before the State Commission along with a proposal for inclusion of tariff for telephone/mobile exchanges/switches including attached offices in NDS category on the ground that telephone Companies run on commercial basis. Accordingly, the State Commission, by the impugned order dated 8.9.2011, determined the tariff of the Distribution Companies accepting the proposal of the Distribution Companies and categorising the Appellant and all other telephone exchanges in NDS category. This order is challenged in this Appeal.

25. In the light of the above background, we shall analyse the grounds raised by the Appellant.

26. The **1st ground** relates to **change of Categorisation**.

27. At the outset, it shall be stated that Section 62(3) of the Electricity Act, 2003 permits differential tariff on the basis of "nature" and "purpose" for which the supply is required and as such, the State Commission is entitled to fix appropriate tariff for the telecom sector u/s 62 (3) of the Electricity Act, 2003.

28. Section 62(3) of the Electricity Act, 2003 is reproduced below:

62. Determination of Tariff

(1).......................

(2)........................

(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".

29. The above section namely Section 62(3) uses the expression "shall not show any undue preference to any consumer". This means no undue preference to be made but due preference may be made. Thus, what is prohibited is a preference of an undue nature. In other words, there should be proper reasoning for giving due preference.

30. The justification for reduction of tariff depending upon the nature of activity being carried out by the consumers are given in two categories. In the first category, a lifelong consumer below poverty level can be given preference in the tariff based on his non affordability. Similarly, agricultural consumers also are given preference because of the important nature of the activities.

31. The second category is the primary school being run in the villages where otherwise schooling facility is not available.

Considering the nature of the activities being carried out, the State Commission can decide to reduce the tariff. Similarly, the primary health centres or spiritual centres meant for social up-liftment, public work, street lighting etc., can be given preference because of the nature of services rendered by them.

32. In the present case, the nature and purpose of supply has been taken into consideration while determining the tariff. Non Domestic Service Category is a residuary category. Consumers who are covered under any other category namely domestic, public street lighting, agricultural, industrial and mixed load have been covered under NDS category.

33. Earlier, P&T Department, Government of India was the only player in the telecom sector. In 2004's tariff order, the Government owned BSNL was kept under mixed load category while other private telecom operators were covered under NDS category. Only in the order dated 31.8.2007, the Commission brought all telecom operators, including the Appellant under one category namely mixed load category. However, the Distribution Companies proposed for re-categorisation of all telecom operators including BSNL into NDS category looking to the fact that all telecom Companies are run on commercial basis. In that context, the State Commission accepted the proposal of the Distribution

Companies by observing that by the passage of time and development in the Sector, the business characteristics of these organisations have considerably changed and therefore in view of the change of circumstances, the proposal of Distribution Companies was to be accepted with all telecom operators being kept in NDS category.

34. According to the Appellant, since it has been considered as an essential service under Essential Service Maintenance Act or by the Planning Commission, it should be categorised as a mixed load category. This submission cannot be accepted for the reason that treatment of the Appellant as essential service under any other enactment or by any other authority is not binding on the State Commission. The State Commission has to determine the tariff having regard to the provisions of the Electricity Act, Tariff Policy and its Regulations. On that basis, the State Commission has accepted the proposal of the Distribution Companies.

35. The relevant observations of the State Commission in the impugned order dated 8.9.2011 are as follows:

> *"18.5.1 Discoms have proposed to include all telephone service operators (BSNL or otherwise), telephone/mobile exchanges/switches including attached offices under NDS category as the telephone companies are run on a commercial basis and should not be kept at par with the GoI-P&T Department which so far have been covered under ML/LT-7.*

> *18.5.2 Commission finds force in this proposal. Some of the objectors also raised the issue. Last tariff order was issued in 2004 and since then telecom Sector has witnessed sea change and a total transformation. Commission, therefore, accepts the proposal of Discoms in this regard."*

36. So, the above observations would make it clear that the State Commission has given a finding that subsequent to the last tariff order passed in 2004, telecom sector has witnessed a sea change and a total transformation and as such, the telephone companies are run on commercial basis. Consequently, the State Commission has accepted the proposal of the Distribution Companies in this regard.

37. According to the State Commission, the operations of the telecom operators are run on a commercial basis that is with an aim to earn profit. They try to induce the consumers for their services in a manner akin to any other business. Since the activities of all telecom operators are similar, the tariff for all telecom operators is also being kept at par including BSNL and as such there is no discrimination caused to the Appellant on this account.

38. According to the Appellant, the Appellant is engaged in Public Utility Service and providing essential services and as such, they should be equated with the Charitable Trusts, Hospitals and Charitable Organisations. This also cannot be accepted.

39. It cannot be denied that the Appellant had been established in order to provide Public Services and accordingly, it has been serving. However, the Appellant cannot claim any such exemption or concession on this account.

40. As pointed out by the State Commission, the predominant object of the Appellant and other telecom operators is to earn profit. In fact, telecommunication is only one part of the service provided by the Appellant and other telecommunication services. The other services provided by the Appellant like data transfer by various modes namely 2G, 3G and 4G, promotional and competitive SMSs are services purely of commercial nature and offered with the main object of earning profit.

41. That apart, the services of telecom operators used by the consumers for social networking on Face Book, You tube, Twitter and Orkut etc., also cannot be treated as essential service. Moreover, the telecom operators also earn considerable revenue from the above services.

42. The learned Counsel for the Appellant relies upon the Clause 2.9.4 of the IT and ITES policy, 2007 wherein the State Government has changed the applicable category of tariff from commercial to low tension industrial category for IT and ITES units.

43. IT Policy and other policies issued by the State Government and classification made by the State Government for providing incentives under various programmes etc., do not have any role in tariff determination process. It cannot be denied that the jurisdiction for change of categorization is of the State Commission and not of the State Government. That apart, for the purpose of tariff determination by the State Commission, telecom services does not fall under the category of IT industry. As a matter of fact, in the tariff order dated 31.8.2007, the State Commission treated the IT industry differently from the telecom companies. This is evident from Para 96 and 111 of the said order.

44. The findings given in Para 96 and 111 are quoted below:

> "*96. The Commission agreed to the proposal for incorporating the residuary clause in NDS category and retain the classification of Radio Station/TV Station, their transmission, telephone/mobile exchange switches including attached offices without any distinction of its ownership of BSNL/MTNL in the category of ML/LT-7. The Discoms may amend the Tariff Schedule accordingly."*
>
> ....
>
> *111. The Companies of IT industries registered under Companies Act with aim and object of IT or those registered with industries Department of GoR for IT under IT & ITES Policy of GoR whether located within Industrial area or outside be treated as industries and categorised accordingly."*

45. This finding is perfectly valid. In any event, the observation in Para 2.9.4 in IT & ITES industries policy are only in the context of IT and ITEs industries and they have no relevance to the case of telephone operators. Therefore, the notification relied upon by the Appellant in order to borrow the definition of IT/ITES industries, has no application to the present case.

46. While dealing with the contentions of the Appellant that the Appellant being a provider of essential services cannot be placed in the category of commercial consumers, the State Commission, in the impugned order, has pointed out that the State Commission has not shown any undue preference to any consumer as all mobile/telephone service providers, whether owned by the Government or privately owned have been kept at par by placing all mobile/telephone service providers in the Non Domestic Service category.

47. As pointed out by the learned Counsel for the State Commission, earlier, only BSNL/MTNL that were Government agencies, were providing telecommunication services. However, with the passage of time, many private operators came to this field for doing their business with the intent to earn profit. The State Commission having considered this, have placed them in NDS Category.

48. In regard to the reliance of the IT Policy issued by the State Government, the learned Counsel for the State Commission has correctly pointed out that this Tribunal in a number of cases has held that even the directions of the State Commission u/s 108 of the Electricity Act, 2003, are not binding on the State Commission while determining the tariff.

49. In view of the settled position of law, it has to be observed that the policy of the State Government is not binding on the State Commission and it has to determine the tariff in accordance with the Act and Regulations framed therein.

50. That apart, the policy of 2007, did not mention that either categorisation or the tariff of the Appellant cannot be changed. Merely because the Appellant has been declared as essential service provider under the Industrial Disputes Act, 1947 and other Acts, it cannot claim concession as it has been providing services to its consumers on commercial basis.

51. The learned Counsel for the State Commission has further pointed out that the very same impugned order had been already challenged in other Appeal on the very same ground in Appeal No.39 of 2012 filed by the Rajasthan Engineering College Society which has been rejected by this Tribunal.

52. Let us now refer to the relevant observations and findings made by this Tribunal in the said judgment:

> "*20. Section 62(3) permits the State Commissions to differentiate between the tariffs of various consumers. The expression "may differentiate" as found in Section 62(3) clearly indicates that there shall be a judicial discretion to be exercised with reasons. 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 categorization of the consumers should be based upon the proper criteria legally valid. It cannot be arbitrary.*
>
> *21. We would now examine the question before us in the light of background elaborated as above.*
>
> *22. According to the Appellant, the Commission, while fixing tariff, can differentiate between the consumers only on the following grounds which are specified in the Section 62(3) of the Act and not on any other ground:*
>
> *1) 'Load factor'*
> *2) 'power factor'*
> *3) 'Voltage'*
> *4) 'Total Consumption of electricity during any specified period'.*
> *5) 'Geographical position of any area'.*
> *6) 'Nature of supply'*
> *7) 'Purpose of which supply is required.'*
>
> *23. As per the Appellant the State Commission has re-categorized the Appellant from Mixed-load to Non-domestic category but Education Institutes run by Government have been kept under Mixed-load category. Thus, the Commission has differentiated on*

the basis of ownership, which is not permissible under the law.

24. It is true that Commission cannot differentiate on any other ground except those given in 2nd part of Section 62(3) of the Act. However, the grounds mentioned in the Section are Macro level grounds and there could be many micro level parameters within the said macro grounds. The term 'purpose for which supply is required' is of very wide amplitude and may include many other factors to fix differential tariffs for various categories of consumers as explained below:

25. It could be argued that while residential premises are charged at domestic tariff, the Hotels are being charged at Commercial tariff. Both, the residential premises and the hotels, are used for purpose of residence and, therefore, cannot be charged at different tariff because purpose for the supply is same. The argument would appear to be attractive at first rush of blood, but on examination it would be clear the purpose for supply in both the cases is different. The 'Motive' of the categories is different. Whereas Hotels are run on commercial principles with the motive to earn profit and people live in residences for protection from vagaries of nature and also for protection of life and property. Thus 'purpose of supply' has been differentiated on the ground of motive of earning profit. The fundamental ground for fixing different tariffs for 'domestic' category and 'commercial' category is motive of profit earning. In this context it is to be noted that in even charitable 'Dharamshalas' are charged at Domestic tariff in some states. The objective of Dharmshalas and Hotels is same i.e. to provide temporary accommodation to tourists/ pilgrims but motive is different; so is the tariff. Thus the 'Motive of earning profit' is also one of the accepted and recognized criterions for differentiating the retail tariff.

53. In that case also, the Appellant namely Rajasthan Engineering College Society has been re-categorised from mixed load category to Non Domestic Service category. The Tribunal held that the re-categorisation is perfectly justified even though the other educational institutions run by the Government have been kept under the mixed load category. But, in this case, the State Commission has put all the private owned Companies as well as the Government Companies into one category by shifting them from mixed load category to NDS category.

54. The Appellant has relied upon the judgment of this Tribunal in the case of Association of Hospitals vs MERC in the judgment in Appeal No.110 and 111 of 2009 dated 20.10.2010. The perusal of the said judgment would not support the Appellant but in fact, supports the impugned order of the State Commission. The relevant observations of this Tribunal in the above judgment are as follows:

> *" 17……………………….*
>
> *(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.

..

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 cannot be put into the category of those persons. This amounts to treating unequal 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 are 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 cannot be equated with the above class of commercial business.

……………………………………

39. The categorisation of the Charitable Trust Hospitals together with Malls Multiplexes and Cinema Theatres is patently erroneous. This would amount to treating unequal 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.

55. The above judgment would indicate that this Tribunal has held that re-categorisation of the charitable trust hospitals which run on no profit motive with commercial entities is not reasonable.

56. In that decision, it has been held that the charitable service oriented organisations cannot be equated with the class of commercial business. As such, this judgment is supporting the impugned order passed by the State Commission. Therefore, the reliance by the Appellant on this judgment is misplaced.

57. The learned Counsel for the Appellant cited one more judgment in the case of Delhi Jal Board Vs Delhi Electricity Regulatory Commission (MANU/ET/0069/2012). This judgment also does not support the case of the Appellant. In fact, the said judgment supports the stand of the State Commission. The relevant observation is as follows:

> "*7……………Therefore, merely because the Appellant is engaged in public utility service and providing essential services of water supply, sanitation etc., that itself cannot be taken as a criteria for the concessional tariff determination."*

58. In view of the above decisions, it cannot be concluded that the Appellant who is telecom service provider, which is an essential service, cannot automatically claim to have a concessional tariff determination. As a matter of fact, as indicated earlier, the predominant object of the Appellant and other telecom operators is to earn profit. Moreover, as mentioned earlier, telecommunication is only one part of the services provided by the Appellant and other telecom operators. The other services provided by the telecom

operators are services purely of commercial nature and offered with the main object of earning profit. The fundamental ground for fixing different tariff for domestic category and commercial category is motive of profit earning.

59. The Appellant has cited one more judgment of this Tribunal in Appeal No.195 of 2009 in the Case of Mumbai International Airport Vs Maharashtra State Commission in support of its claim. That judgment would also not apply to the present case because in that case, this Tribunal has held that even in respect of Airport which is a public utility service, the differential tariff would be charged for purely aviation services and the commercial activities carried out at the airport. Therefore, none of the judgments cited by the learned counsel for the Appellant would be of any help to the Appellant’s stand.

60. On the other hand, the learned Counsel for the State Commission has cited the judgment of Hon’ble Supreme Court in the case of W.B. vs Rash Behari reported in (1993) I SCC 479. In this judgment, the Hon’ble Supreme Court has held that a commercial or profit making venture has always been considered to be a class different from the one engaged in non commercial activities. It is further held that the classification based on such distinction is well

recognised as valid for the purposes of revenue. The relevant extract from the said judgment is quoted below:

> *"6. ………………………………………A commercial or profit making venture has always been considered to be a class different than the one engaged in non-commercial activities. Classification based on such distinction is well recognized and is accepted as valid for purposes of revenue."*

61. As stated above, the State Commission has got full right to categorise various consumers u/s 62 (3) of the Act, 2003 wherein the nature of supply is one of the factors as laid down by this Tribunal as well as Hon'ble Supreme Court.

62. In view of the above discussions, we do not find any merit in the contention urged by the learned Counsel for the Appellant that re-categorisation is wrong.

63. The **next issue** is with regard to **Cross Subsidy**.

64. According to the Appellant, the State Commission by changing the category of the Appellant, has substantially increased and burdened the Appellant with the cross subsidy in contravention of the tariff policy and several judgments of this Tribunal. The learned Counsel for the Appellant has cited the judgements rendered in the case of 2011 ELR (APTEL) 1022 Tata Steel Limited Vs Orissa State Commission and 2007 ELR (APTEL) 492 Udyog Nagar Factory Owner's Association vs Rajdhani Power Limited in order to show that the cross subsidy must be within ± 20%

of the average cost of supply and this has been contravened in the present case.

65. On the other hand, the learned Counsel for the Respondent pointed out that the very same issue arising out of the impugned order 8.9.2011 has been raised in the other Appeal 182 of 2011. This Tribunal has in Appeal No.182 of 2011 rejected the similar contention urged in this Appeal and confirmed the findings of the impugned order while dismissing the Appeal. As the very same impugned order, the subject matter of this Appeal, has been confirmed by this Tribunal in the said judgment in Appeal No.182 of 2011, it would be necessary to refer to the relevant observations made by this Tribunal in the said judgment.

66. The relevant question and the discussions leading to the findings which has been given in Appeal No.182 of 2011 is quoted below:

> *"21. The third question for consideration is as to whether the State Commission has acted consistent with the provisions of the Electricity Act, the policies notified by the Central Government under Section 3 of the Electricity Act, 2003, Tariff Policy and Tariff Regulations, 2009 in determining the appropriate cost to supply and in dealing with cross subsidies in the tariff.*
>
> *22. Admittedly, the State Commission has not determined the average cost of supply, category wise cost of supply and the cross subsidy elements in the impugned order. Section 61(g) of the Act stipulates that*

the tariff progressively reflects the cost of supply and also reduces the cross subsidies. Thus it is essential that these parameters are determined and appropriately reflected in the tariff orders. However, we are not inclined to remand back the impugned order on this technical ground and would like to examine the issue as to whether the cross subsidies have been reduced and brought to within ± 20% of average cost of supply.

"23. The 1st Respondent State Commission in its reply has provided a table showing category wise cross subsidies as per last tariff order dated 17.12.2004 and the impugned order dated 8.9.2011. The said table is set out below:

Category	2004-05 (after increase) Average Cost of Service Rs.4.12/kWh					2011-12 (after increase) Average Cost of Service Rs.5.25 /kWh				
	Sales MU	Revenue Rs.Crore	Av Rate Rs./Unit	Realization as % of av. COS	Cross Subsidy	Sales MU	Revenue Rs. Crore	Av. Rate Rs/Unit	Realization as % of Av COS	Cross Subsidy
Non Domestic	500	285.43	5.71	138.53%	38.53%	1117	724	6.48	123.48%	23.48%
Small Industry	193	90.48	4.69	113.77%	13.77%	268	146	5.45	103.86%	3.86%
Medium Industry	321	142.4	4.44	107.65%	7.65%	651	365	5.61	106.93%	6.93%
Large Industry	1288	541.41	4.20	102.01%	2.01%	4046	21.34	5.27	100.46%	0.46%
Public Waterworks (M)	24	10.06	4.19	101.72%	1.72%	26	14	5.33	101.52%	1.52%
Public Waterworks (L)	82	34.84	4.25	103.10%	3.10%	130	67	5.19	98.85%	-1.15%
Bulk supply to Mixed Load	98	41.94	4.28	103.85%	3.85%	533	282	5.28	100.58%	0.58%
Electric Transaction Railways	268	109.8	4.10	99.42%	-0.58%	409	218	5.32	101.35%	1.35%

24. Perusal of the above table would reveal that cross subsidies have been reduced for all the subsidizing categories. It also reveals that cross subsidies have been brought within the permissible limit of ± 20% of average cost of supply except for the non-domestic category. Thus the essential requirement in reducing the cross subsidies and bringing then within ± 20% of average cost of supply has been achieved except for one category of consumers.

> *25. Thus the essential requirements of the Act and the Tariff Policy have been achieved. This question is also answered against the Appellants accordingly.*

67. The perusal of the findings referred to above, would show that this Tribunal rejected the contentions urged by the Appellant in that Appeal with regard to cross subsidy and upheld the impugned order.

68. It is contended by the Appellant in the present case that in the tariff order for NDS category, the cross subsidy has been fixed above ± 20%. It is settled law that one of the factors guiding the determination of tariff will be that it progressively reflected the cost of supply and cross subsidy have to be reduced progressively. The electricity policy provides for progress and gradual reduction of the cross subsidy of the subsidizing consumers without giving tariff shock to the subsidized consumers.

69. According to the Appellant, the cross subsidy recovered from the Appellant has increased from Rs.3.85% to Rs.23.48%. This is not factually correct. The fact remains that the categorization of the Appellant has been changed from mixed load to Non Domestic Service category. However, the cross subsidy in the Non Domestic Service category has not been increased but reduced from 38.53% in 2004-2005 tariff order to 23.48% in the impugned tariff order for the year 2011-12.

70. It is contended by the Appellant that the judgment in Appeal No.182 of 2011, will not apply to the present case since in the said Appeal, the category of the Appellant was not changed whereas the category of the Appellant in this case has been changed from mixed load to NDS category and as such, the said judgment would not apply to the present case.

71. This contention is not tenable in view of the fact that the judgment in Appeal No.182 of 2011 rejecting the contentions with regard to cross subsidy has been followed in Appeal No.39 of 2012 filed by Rajasthan Engineering College Society and in the said Appeal, the Appellant namely Rajasthan Engineering College Society had not only challenged with regard to cross subsidy but also challenged the change of its categorisation from mixed load to Non Domestic Category as in the present case. Therefore, the findings rendered in Appeal No.39 of 2012 would squarely apply to the present case also.

72. It is also pointed out by the learned Counsel for the Respondent that since the tariff of the Appellant and similarly situated consumers has been modified after more than 10 years, the cross subsidy cannot be brought down in one Financial Year and thus the cross subsidy level was slightly higher than $\pm$ 20% as mentioned in the National Electricity Policy.

73. As observed by this Tribunal in Appeal No.182 of 2011, the table in the impugned order would reveal that the cross subsidy has been reduced for all the subsidizing categories except for one category of consumers for the above reasons.

74. Therefore, the findings in regard to this issue given by the State Commission cannot be said to be wrong especially when the findings given by the State Commission on this issue has been confirmed by this Tribunal in Appeal No.182 of 2011. We agree with the views expressed by this Tribunal in the above judgment.

75. Consequently, this issue is also decided as against the Appellant.

76. <u>Summary of the findings:</u>

i) **The Appeal has been filed by the Appellant as an aggrieved person over the impugned order and as such, the Appeal is maintainable. The same principle has been laid down by this Tribunal in 2010 ELR(APTEL)4040 BSES Rajdhani Power Ltd., Vs DERC and in Appeal No.182 of 2011 in case of Rajasthan Steel Chambers Vs Rajasthan State Commission.**

ii) **In the present case, the nature and purpose of supply has been taken into consideration while**

determining the tariff. We do not find any infirmity in the order re-categorising the Appellant and all telecom operators in Non Domestic Service Category.

iii) The contention of the Appellant regarding cross subsidy is rejected in the light of the findings of the Tribunal in Appeal Nos.182 of 2011 and 39 of 2012.

77. In view of our above findings, there is no merit in the Appeal. Hence, the Appeal is dismissed. However, there is no order as to cost.

(Rakesh Nath)	***(Justice M. Karpaga Vinayagam)***
Technical Member	***Chairperson***

Dated: 20th May, 2013

√REPORTABLE/~~NON-REPORTABALE~~