

**In the Appellate Tribunal for Electricity**  
**New Delhi**  
**(Appellate Jurisdiction)**

**APPEAL NO. 107 OF 2018**

**Dated: 12<sup>th</sup> April, 2019**

**Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member**  
**Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

**In the matter of:**

- 1. M/s S D Bansal Iron and Steel Private Limited,  
3rd Floor, Tawa Complex,  
Bittan Market Bhopal – 462016** .... **Appellant No. 1**
- 2. M/s. Starang Steel and Alloys Limited  
1527/1A Civil Lines, Jankipuram  
Jhansi, (UP) – 284 001** .... **Appellant No. 2**
- 3. M/s. K G Iron and Steel Casting Private Limited  
65-G, Sector A, Industrial Area Mandideep  
District Raisen (MP) – 462 046** .... **Appellant No. 3**
- 4. M/s. Shivangi Rolling Mills Private Limited  
305-306, 3<sup>rd</sup> Floor, Airen Hights  
Near Pakiza, A.B. Road  
Indore – 452 010 (MP)** .... **Appellant No. 4**
- 5. M/s. O M Smelter and Rollers Private Limited  
Prem Prakash sadan, Mohore Colony  
Behind Radhikamandakpam  
Gwalior Road, Jhansi – 284 001** .... **Appellant No. 5**
- 6. M/s. Jhanavi Ispat Private Limited  
E-9-10, Phase II New Industrial Area  
Mandideep Raisen (MP) – 462 046** .... **Appellant No. 6**

**Versus**

1. **Madhya Pradesh Electricity Regulatory Commission,  
5<sup>th</sup> Floor, Metro Plaza,  
Bittan Market, Bhopal – 462 016** .... Respondent No.1
2. **Madhya Pradesh Power Management Company Limited (MPPMCL)  
Shakti Bhawan, Rampur,  
Jabalpur – 482 008** .... Respondent No.2
3. **Madhya Pradesh Madhya Kshetra Vidyut Vitran Company Limited (Central Discom)  
Nishtha Parisar, Govindpura,  
Bhopal – 462 023** .... Respondent No.3
4. **Madhya Pradesh Poorva Kshetra Vidyut Vitran Company Limited (East Discom)  
Block-7, Vidyut Nagar,  
Rampur, Jabalpur – 482 008** .... Respondent No.4
5. **Madhya Pradesh Paschim Kshetra Vidyut Vitran Company Limited (West Discom)  
GPH Compound,  
Pologround, Indore** .... Respondent No.5

**Counsel for the Appellant(s)** : **Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Neha Garg  
Ms. Ashwin Ramanathan**

**Counsel for the Respondent(s)** : **Mr. Parinay Deep Shah  
Ms. Surabhi Pandey for R-1  
  
Mr. G. Umapathy  
Mr. Aditya Singh  
Ms. Vaishnavi V for R-2 to R-5**

**JUDGMENT**

**PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER**

**1. The Appellant has sought the following reliefs:**

- (a) Allow the appeal and set aside the order dated 31.03.2017 passed by the State Commission to the extent challenged in the present appeal.
- (b) Direct the State Commission to extend the same rate of rebate to existing HT consumers, that are being given to new HT consumers;
- (c) Pass such other Order(s) and this Tribunal may deem just and proper.

**1.1 The Appellant has raised the following Questions of Law for our consideration:**

- A. Whether for the purpose of tariff determination, consumers can be differentiated on the basis of date of establishment, namely, old industries and new industries?
- B. Whether the State Commission was justified in levying differential tariff by virtue of the rebate for units established at different points and time?

**2. Brief facts of the case are as follows:**

- 2.1 M/s S D Bansal Iron and Steel Private Limited, M/s. Starang Steel and Alloys Limited, M/s. K G Iron and Steel Casting Private Limited, M/s. Shivangi Rolling Mills Private Limited, M/s. O M Smelter and Rollers Private Limited and M/s. Jhanavi Ispat Private Limited (hereinafter referred to as the “**Appellants**”) being aggrieved by the Order dated 31.03.2017 (hereinafter referred to as the “**Impugned Order**”) passed in Petition No. 71/2016 by the Madhya Pradesh Electricity Regulatory Commission have filed this instant Appeal under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) whereby the State Commission has approved the Annual Revenue Requirements and Retail Supply Tariff of the distribution licensees in the State of Madhya Pradesh for FY 2017-18.
- 2.2 By the Impugned Order, the State Commission has differentiated between existing industries and new industries in the State of Madhya Pradesh and approved differential tariff, being a lower tariff for the new industries without extending the benefit to the existing consumers. This action of the State Commission is contrary to the provisions of the Electricity Act, 2003, wherein the State Commission under Section 62(3) can only differentiate between consumers on limited grounds mentioned therein. The differentiation between existing industries and new industries is not a criteria under Section 62(3) of the Electricity Act.
- 2.3 The Appellants are companies presently existing under the provisions of the Companies Act, 2013. The Appellants are industrial consumers in the State of Madhya Pradesh and consumers of the distribution licensees of the State. The

Appellants are all existing consumers in the State, having electricity connections prior to the passing of the impugned order by the State Commission.

- 2.4 The Respondent No. 1, the State Commission is the State Electricity Regulatory Commission for the State of Madhya Pradesh exercising powers and discharging functions under the provisions of the Electricity Act, 2003.
- 2.5 The Respondent No. 2– Madhya Pradesh Power Management Company, is the holding company of all distribution licensees in the state of Madhya Pradesh. The Respondent No. 2 acts on behalf of the distribution licensees in the State of Madhya Pradesh, which are Respondent Nos.3 to 5.
- 2.6 The Respondent No.2 filed a Petition being Petition No. 71/2016 before the State Commission seeking approval of the revenue requirements and determination of retail supply tariff for the distribution licensees for the year 2017-18.
- 2.7 The Petition was disposed of by the State Commission by Order dated on 31.03.2017. By the said order, the State Commission has approved the Annual Revenue Requirements and retail supply tariff for the year 2017-18. The State Commission has in the impugned order, while determine the retail supply tariff for the consumers in the State, determined a differential tariff for the new HT industrial consumers and existing HT Industrial Consumers, by providing a further rebate to the new consumers. The relevant extract of the impugned order reads as follows :-

*“6.2 After giving due consideration to the suggestions/objections of the Stakeholders and the proposals submitted by the Discoms, the Commission has made some changes in the tariff design for FY 2017-18. These changes are mentioned in following paragraphs:*

*....*

*x). Rebate on energy charges for HV 3 tariff category consumers:*

*a. Rebate for existing HT connections: A rebate of 10% in energy charges is applicable for incremental monthly consumption w.r.t consumption of FY 2015- 16 same months. In the event of enhancement of contract demand the incremental consumption shall be worked-out proportionately.*

*b. Rebate for new HT connections: A rebate of Rs 1/Unit or 20% whichever would be less is applicable in energy charges for new connection for the consumption recorded. The rebate shall be allowed for a period of five years from the date of connection for such new projects for which agreements for availing supply from licensee are finalized during FY 2016-17 and FY 2017-18. Provided these connections are served to green field projects only and no rebate is applicable for new connections obtain by virtue of change in ownership in existing connection. The green field project shall be those projects where the consumer invests in the construction of new industry/plant from the ground up and there was no prior construction/structure on that particular land.”*

2.8 It is submitted that the State Commission in passing the impugned order has failed to take into consideration that the Electricity Act, 2003 in terms of Section 62(3) prohibits the State Commission from showing any undue preference to any consumer. Section 62(3) provides for an exhaustive list of factors to the limited extent of which the State Commission can differentiate between consumers.

The existing consumers also ought to have been given the same benefit as being made available to the new consumers.

- 2.9 It is further also pertinent to note that the State Commission has provided the rebate for new HT consumers for a period of 5 years, which is completely without any basis, as the tariff order is only applicable for one year.
- 2.10 Considering the patent error in the above order, the Appellant No. 1 had filed a Review Petition before the State Commission with a prayer to recall the provisions relating to differential tariff to only new consumers, and provide existing consumers with the same rebate as being given to new HT consumers. The Appellants No. 2 to 6 were also interveners in the said review petition before the State Commission.
- 2.11 By order dated 23.12.2017, the State Commission has dismissed the review petition principally for the reason that there is no ground made out for review.
- 2.12 Not being satisfied with the Impugned Order passed by the Respondent No.1/the State Commission the Appellant felt necessitated to present this Appeal:-

**3. Submissions of the learned counsel Mr. Andnd K. Ganesan appearing for the Appellant are as follows:-**

- 3.1 The State Commission has differentiated between existing industries and new industries in the State of Madhya Pradesh and approved differential tariff, being a lower tariff for the new industries without extending the benefit to the existing consumers. The sole criteria of the classification is that of old industries and

new industries to be established in the State, with all other factors being common.

3.2 It is submitted that this action of the State Commission is patently erroneous for the following reasons:

- a. The Impugned Order is contrary to the Electricity Act including Section 62(3) which provides for the specified grounds on which any differentiation can be made, and does not include old consumers and new consumers;
- b. The impugned order is contrary to the very principle of promoting competition and efficiency in operations. The non-provision of the same rebate to the existing industries would leave them unviable and uncompetitive;
- c. The rebate has been given for a period of 5 years, when the Tariff order itself is only applicable for one year.

3.3 The differentiation made by the State Commission is contrary to the provisions of the Electricity Act, 2003. In this regard, the following provisions of the Electricity Act are relevant:

- (a) The Statement of Objects and reasons of the Electricity Act, which requires the tariff determination to be made in an independent manner and distanced from the Government. Cross subsidies are to be reduced.
- (b) Section 3 of the Electricity Act provides for policy to be laid down by the Government of India. This is the only policy



provision. The Government of India has laid down the National Tariff Policy, which requires the cross-subsidies to be brought down to within the range of  $\pm 20\%$  of the average cost of supply.

- (c) Section 61- requires the principles of competition, efficiency and good performance to be promoted. Further, the cross-subsidies are to be progressively reduced. The National Tariff Policy is to be considered for tariff determination.
- (d) Section 62(3) provides for no undue preference to be shown and provides discretion for differentiation in tariff between consumers on limited grounds mentioned therein.
- (e) Section 65 – In case the Government requires a lower tariff for any consumer or category of consumers, then the said amount is to be paid in advance by the Government as a subsidy as a condition for providing the lower tariff.

3.4 Section 62(3) provides for an exhaustive list of factors to the limited extent of which the State Commission can differentiate between consumers. Section 62(3) of the Electricity Act, 2003 reads as follows:

*“Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

*....*

*(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.”*

- 3.5 In terms of Section 62(3), while the State Commission is prohibited from showing any undue preference to any consumer. For the purpose of classification of consumers for electricity tariff, the Commission may have categories only based on the following–
- a) Load factor;
  - b) Power Factor;
  - c) Voltage;
  - d) Total consumption of electricity during any specified period or the time at which the supply is required;
  - e) Geographical position of any area;
  - f) Nature of supply and;
  - g) Purpose for which supply is required.
- 3.6 Further, while there is clearly no criteria for different classification of existing and new industries under Section 62(3), there is also no residuary power to the State Commission for categorization on any other basis. The Electricity Act does not envisage providing for any differential treatment for new and existing industries. The list in Section 62(3) is exhaustive and is binding on the State Commission, which the State Commission has failed to follow. Therefore, while the rebate is being given to new industries, the same necessarily ought to be provided to the existing industries as well.
- 3.7 This Tribunal in various decisions has settled the position that the State Commission has to provide for categories strictly in terms of

Section 62(3) and not de-hors the same. In this regard, the following decisions are relevant:

- (a) Association of Hospitals v Maharashtra Electricity Regulatory Commission & Anr, Appeal No. 110 of 2009 and batch, dated 20/10/2011

*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.*

.....

*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”.*

.....

*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.*

- (b) Kannan Devan Hill Plantations Company Pvt Ltd v Kerala State Electricity Regulatory Commission &Anr, Appeal No. 140 of 2010 dated 28/01/2011

16.....

*Therefore, discrimination amongst the consumers of electricity except on the grounds referred to in the section 62(3) is prohibited in law.....”*

- 3.8 The above provision in Section 62(3) is in distinction with the provisions in Section 49 of the Electricity (Supply) Act, which provides for residuary powers of classification and not limited to the factors specified in the provision. In this regard, Section 49(3) of the Electricity (Supply) Act, 1948 provides as under:

*“49. Provision for sale of electricity by the Board to persons other than licensees. – Subject to the provisions of this Act and of regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.*

.....

*(3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.”*

3.9 It was under the above provision, wherein the differential tariff could be for *any other relevant factor*, that differential tariff was permissible under the Electricity (Supply) Act, 1948.

3.10 However, after the coming into force of the Electricity Act, 2003 and the repeal of the Electricity (Supply) Act, 1948, the discretion for classification of factors as considered appropriate was done away with. The exhaustive criteria for classification was provided for in the Electricity Act itself, and there is no classification provided for based on whether the industry is a new industry or an old industry.

3.11 Therefore, while under the Electricity Supply Act, 1948, the Board could classify consumer on any relevant factor as considered appropriate, there is no such residuary power under Section 62(3) of the Electricity Act. This is a conscious departure intended by the Parliament to ensure that the State Commission do not differentiate for any reason considered appropriate, but only for the reasons specified in Section 62(3).

3.12 There is also a purpose in the said provision in Section 62(3). The Electricity Act has the objective of distancing the Government from the tariff determination functions and also to encourage

competitive and efficiency. It would be inherently uncompetitive if two industries similarly placed are given different electricity tariffs merely on the ground that one industry came up subsequently but the other came up earlier.

3.13 The State Commission has an independent regulatory authority, cannot differentiate between two similarly placed consumers on the sole ground that one industry is established earlier and the other industry is to come up subsequently. This is de-hors Section 62(3), contrary to the object and scheme of the Electricity Act and is bad in law.

3.14 In the present case, the Appellants are existing industries in the State of Madhya Pradesh. The Appellants have huge investments, are employing people and are contributing to the State in the form of taxes and economic development.

3.15 Further, the Appellants are required to compete with others in a hugely competitive market. There has to be an even level playing field with regard to the tariff determination is concerned, to enable only the most competitive and efficient persons to succeed. This is only the principle in Section 61.

3.16 By providing an incentivized/subsidized tariff to new industries, the existing industries would be rendered uncompetitive. It could also be that less efficient persons succeed, only because they get cheaper electricity as compared to more efficient persons.

3.17 In case, there is to be a lower tariff for a particular consumer or category of consumers, it is for the State Government to give a

subsidy under Section 65 of the Electricity Act. The burden cannot be placed on the other consumers to subsidize the new industries.

3.18 This exact principle was also applied by the Punjab State Electricity Regulatory Commission to provide for a lower tariff to new industries. In the order dated 26/07/2016 in Petition No. 70 of 2015, the Punjab State Electricity Regulatory Commission agreed to approve the lower tariff for new industries only on the condition that the Government pays the subsidy. If the subsidy is not received, the lower tariff would not apply. The Commission, inter-alia, held as under:

*“7. Decision*

*The Commission notes that objectors have submitted that there is no provision under Section 62 of the Act for offering Special Tariff at lower rates for New Industries to come up under Punjab Progressive Investors Summits 2013 & 2015 as both New Industries and existing industries require supply of the electricity from the same purpose. No Intelligible Differentia on the ground of ‘purpose’ of supply exists as has been sought to be made by PSPCL for treating New Industry as different category of consumers. The Objectors have submitted that in case GoP desires lower tariff @ 4.99 per unit for five years from base date of 31.03.2015 to the New Industry, then GoP may do so under Section 65 of the Act by paying difference in tariff as subsidy to the Licensee, PSPCL. Section 65 of the Act provides as under-*

.....

*The Government of Punjab has agreed to provide subsidy to PSPCL for any loss on account of charging tariff as the rate*

*of Rs. 4.99 per unit to the New Industry, vide letter No. 2/5/2015-PE-2/2086 dated 25<sup>th</sup> July, 2016.*

*The Commission approves the special tariff for New Industry that may come up as per Punjab Progressive Investors Summits 2013 and 2015 @ 4.99 per unit on the condition that GoP shall pay subsidy for difference in tariff as determined by the Commission for respective category and the special tariff @ 4.99 per unit for the category of the New Industry.”*

3.19 In the above case, in case the Government does not pay the subsidy, the lower tariff will automatically become inapplicable to the new industries. The burden cannot be placed on the existing industries, who have to be given a level playing field.

3.20 It is also submitted that providing different tariffs to similarly placed industries merely on the criteria of being old industries or new industries would also amount to allocating cheaper power to new industries while providing more expensive power to the old industries. While the old Power Purchase Agreements at lower cost were being supplied to the existing industries, the new power purchase agreements at higher cost is actually for supplying to the new consumption including by new industries. Therefore, if at all the power purchases can be allocated, it is the old industries which should get lower tariff.

3.21 In any event, such classification or apportionment of the power purchase cost is not permissible under the Electricity Act. Therefore, the decision of the State Commission would also go against this principle and is therefore liable to be set aside.



3.22 In the circumstances, the provision of electricity at different tariffs to new industry and old industry is contrary to the provisions of the Electricity Act and is liable to be set aside. The same tariff should be given to the old industry as well which is given to the new industries.

3.23 Further, the rationale given by the State Commission that is of encouraging higher consumption, for restricting this rebate to only new industries, is inherently flawed. The Appellants and other existing consumers in the State are already consuming electricity and contributing to the demand in the State and the health of the distribution licensees. Therefore, extending the benefit of such rebate to the existing industries would in fact be in the interest of encouraging higher consumption by existing industries as well. The Appellants and existing consumers cannot be penalized or disincentivized for the purported reason of encouraging higher demand which will affect the competitiveness of the existing industries.

3.24 It is submitted that approval of classification between existing consumers and new consumers would be wholly contrary to the basic provisions of the Electricity Act and the object sought to be achieved. The following would be the consequences:

- (a) A residential consumer, who purchases a new flat can be given a lower tariff than his neighbor who was an existing consumer. Similarly, a new apartment complex can be given a lower tariff than the adjoining apartment complex which is existing.

(b) A new commercial shop in the same market locality can be given a lower tariff as compared to the other shops in the locality, which would only be anti-competitive.

3.25 The consequence would only be that the existing industries would be forced to shut down on account of higher tariff and move elsewhere where there is lower tariff or no discrimination. This would only result in lower consumption in the State, loss in employment, economic activity etc. The existing industries, who have already invested in the State would be left uncompetitive.

3.26 The reliance by the State Commission in the oral arguments on the decisions of the Hon'ble Supreme Court in relation to tax benefits is misplaced. The tax is collected by the sovereign and it is for the sovereign to decide to give any exemptions, remissions, concessions etc. There are not specified criteria based on which the exemptions can be given.

3.27 The reliance on the decision of this Tribunal in the case of Northern Railway v DERC, Appeal No. 268 of 2006 dated 13/03/2007 to contend that this Tribunal has approved the differentiation based on old consumer and new consumer is misplaced. The comparison was between Indian Railways and Delhi Metro Rail Corporation, which are two very different consumers. DMRC is a mass rapid transport system for the city, the Railways is for the country as a whole. Railways has a very substantial network, been in place for over 150 years, has financial strength and can maintain operations at existing level with nominal increase. Considering all of these, the different categories was approved. (Para 17 and 18)

3.28 There was no differentiation on the sole ground that one consumer is an existing consumer and the other is a new consumer. This Tribunal has in fact gone on various factors including the viability of DMRC, the requirements of DMRC, the nature of DMRC and the age of Railways etc. to provide for the different classification.

3.29 Similarly, the judgment of this Tribunal in the case of Shasun Research Centre v Tamil Nadu Electricity Regulatory Commission, Appeal No. 323 of 2013 dated 31/10/2014 was on the issue of classification between Government run non-profit institutions and private profit earning institutions. In the said context, the Indian Railways case was referred to for the purpose of age and financial condition taken together, where Railways was more than 150 years old and DMRC with its viability issues were to be given a special tariff. In fact, in para 25, this Tribunal has underscored the requirement of purpose to be gone into, wherein residential premises and hotels are different.

3.30 There is no finding that two identically placed persons both in regard to industrial activity, profit motive etc. can be given separate tariffs, merely because one consumers is existing consumer and the other is a new consumer. This would be wholly contrary to Section 62(3) of the Electricity Act and also the object and purpose of the Act.

RE: The impugned order is contrary to the very principle of promoting competition and efficiency in operations. The non-provision of the same rebate to the existing industries would leave them unviable and uncompetitive;

3.31 The action of the State Commission in not extending the rebate to the existing industries is without any logic or rationale, and would create a situation wherein the existing industries would be left unviable and uncompetitive. For industries such as that of the Appellant, electricity is one of the primary raw materials or inputs for production and constitutes a substantial portion of the total cost incurred by the Appellants. Any reduced tariff given to new industries without extending the corresponding benefit to the existing industries would seriously affect the competitive viability of the existing industries. This was not the intent of the Electricity Act, 2003 nor is any such mandate given to the State Commission for differentiation between existing industries and new industries.

3.34 The Electricity Act requires competitive and efficiency to be promoted and ensured in the tariff determination exercise. The action of the State Commission is in fact contrary to the above.

3.35 In fact, the cost of production for a unit established a few years earlier shall be far more than a unit established recently in view of advances in technology and efficiency of machines. By providing such lower tariff to only new industries and not extending the benefit to the existing industries would drive the existing industries to huge losses and make them unviable and uncompetitive, which may also result in reduction of electricity demand apart from other economic and social consequences which is undesirable and contrary to the objective sought to be achieved.

RE: The rebate has been given for a period of 5 years, when the Tariff order itself is only applicable for one year

- 3.36 Further, the rebate to new HT consumers has been provided for a period of five years, when the Tariff order itself is only applicable for one year. The decision of the State Commission in this regard is without any reason or logic and in fact goes beyond the period for which the tariff order is passed. The State Commission choosing to pass the tariff order for only one year ought to restrict its applicability only for one year and not for a longer period. Such action on the part of the State Commission is beyond its jurisdiction.
- 3.39 Such action also disables the industries to put across their point of view for each year for which the tariff order is passed. When the tariff order is to be passed every year, there is no purpose in the State Commission pre-empting the future tariff orders and deciding the issue in the present order itself.
- 3.40 In the circumstances, while the State Commission has decided to restrict the rebate to only new industries on the purported ground of encouraging consumption, the same necessarily ought to be given to the existing industries as well. The basis of differentiation sought to be made by the State Commission is not only contrary to the provisions of the Electricity Act, 2003, but also does not fully serve the intent of encouraging higher consumption. On the other hand, it is harmful to the existing HT Industrial consumers in so far as leaving them uncompetitive by not providing the same rebate to them.
- 3.41 In view of the above, the Impugned Order dated 31.03.2017 passed by the State Commission is liable to be set aside to the

extent challenged in the Appeal, and the State Commission ought to be directed to extend the same benefit/rebate to the existing industries as well.

**4. Submissions of the learned counsel Mr. Parinay Deep Shah appearing for the Respondent no.1/the State Commission are as follows:-**

- 4.1 The State Commission vide the Impugned Order has allowed rebate on Energy Charges for HV 3 tariff category consumers. A 10% rebate in Energy Charges is given for incremental monthly consumption of FY 2015-16 to the existing HT connections. Further the Impugned Order also gives a rebate to new HT connections of Rs. 1/Unit or 20%, whichever would be lesser, for Energy Charges for a new connection for the consumption recorded. The rebate is allowed for a period of 5 years, from the date of connection, for the new projects for which agreements for availing supply from the distribution licensee i.e. Respondent No. 2 are finalized during FY 2016-17 and FY 2017-18. The only condition for the grant of rebate to the new HT connections is that such connections are only served to green field projects and no rebate is applicable for new connections obtained by change in ownership in existing connection.. The State Commission, in the Impugned Order, has observed that there is a surplus quantum of 26,369 MU of electricity and there is a need to minimize the impact of fixed cost of un-dispatched power/surplus power on consumers of the State.

- 4.2 Aggrieved by the Impugned Order the Appellant filed a review which culminated into Order dated 23.12.2017. The State Commission, in its Order dated 23.12.2017, reasoned that differentiation in giving rebate to the new industries was made with the objective of promoting new industries in the State and to maximize consumption of surplus energy within the State so as to minimize the fixed cost of un-dispatched/surplus power. The new industries require creation of new infrastructure, market etc. which necessitates huge capital investment.
- 4.3 The Appellant has challenged the Impugned Order on the ground that the State Commission ought not to have differentiated between the new and old consumers for grant of rebate since such differentiation, according to the Appellant (erroneously) is outside the purview of Section 62(3) of Electricity Act, 2003.
- 4.4 It is submitted that classification of consumers into old and new industries for the purposes of giving rebate is permitted under Section 62(3) of Electricity Act, 2003 under the category for "*purpose for which the supply is required*". Section 62 (3) is as follows:

*"Section 62: Determination of Tariff*

\*\*\*\*

*(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.”*

- 4.5 It is submitted *that same differentiation in tariff determination has been previously allowed by this Tribunal in the matter of Northern Railway v. Delhi Electricity Regulatory Commission in Appeal No. 268 of 2006. The application of the said case to the present facts is evident from the table below:*

<i>Application of APTEL Order in Northern Railway v. Delhi Electricity Regulatory Commission</i>		
<i>Differentiation</i>	<i>APTEL’s Northern Railway Order</i>	<i>Present Case</i>
<i>Differentiation between new and old</i>	<i>Differentiation between old (Northern Railway) and new consumer (DMRC) for tariff given. In Para 9 (b) of the this Tribunal’s Order, Delhi Electricity Regulatory Commission (“DERC”) explained the basis of differentiation by stating that <i>DMRC is a new consumer.</i></i>	<i>Differentiation between new and old industries for propose of giving rebate</i>
	<i>Paragraph 3 of the APTEL Order records that the grievance of Northern Railway was that it has been discriminated against in as much as it had been made to pay tariff at a rate higher than that paid by DMRC. Although DERC’s Order did not specifically deal with the reasons for differentiation in the Order, DERC explained</i>	



	the differentiation in its reply.	
Appellant's objection to differentiation: basis of age	In para 16 of its Order this Tribunal holds that <i>DMRC is new consumer and is still in the process of building its infrastructure &amp; therefore, the impact of tariff on it is much higher than the impact of tariff on the appellant.</i> This Tribunal noted that the full meaning of the words "a new consumer of 220 kV and its differentiating nature of service" in the tariff Order for financial years 2002-03 and 2003-04 can be explained and understood in this context.	In the present case differentiation is done to promote new industries in the State and to maximize consumption of surplus energy within the State so as to minimize on the fixed cost of un-dispatched/surplus power. <i>The new Industries require creation of new infrastructure, market etc. which necessitates huge capital investment. (Please refer to Page 234, para 13 of the Appeal)</i>
Objection of the Appellant against differentiation on basis of new and old	Para 17 of the APTEL Order records that Northern Railway disputed that DMRC can be treated as a preferred class only because it is a new consumer at 220 kV. It was contended by Northern Railway that the comparative age of the consumers is not a criteria for differentiation under Section 62(3) of EA 2003.	The Appellant in the present case contests that new industries cannot be treated as a preferred class only because they are new consumers and that this differentiation does not fall within differentiation under Section 62(3) of EA 2003.
Contention of Appellant is that expansion of business is required by old industries	Para 17 of the APTEL Order records that Northern Railway <i>contended</i> that it is constantly expanding its services reach etc., and also has to undertake substantial expenditure every year towards	The Appellant <i>contests</i> that it too like the new industries has a business to run and expand therefore differentiation cannot be made on the ground that the new industries need to create new

	building new infrastructure.	infrastructure
New industries have to compete against established industries	This Tribunal holds in para 17 that the arguments of Northern Railway when examined closely lose their force. Northern Railway is an established organisation. <i>Unless DMRC is treated preferentially, its viability itself may be at stake. The purpose of supply of electricity to the two organisation can thus be distinguished. The DMRC can be distinguished from the appellant in terms of age. The purpose of supplying electricity to the two organisations namely the Appellant and DMRC can also be said to be different. For Appellant the purpose of supply of electricity is to maintain its operation at the existing level except for the nominal increase by the year whereas the purpose of supply of electricity to DMRC is to create an altogether new transport system for the City of Delhi.</i>	Unless the new industries are treated preferentially, they will not be able to compete with the older well established industries. Further the purpose of supply of electricity to the old industries is to enable them to continue their operations and nominal increase in growth of their business. However, the purpose of supply of electricity to the new industries is to set an altogether new project which is also termed as a green field project. Setting up green field project is a huge infrastructure cost and thus the new industries merit preferential treatment.

It is evident from the aforesaid table that purpose for which supply is required includes promotion of new industry which has to set up infrastructure from ground up and is not capable of immediately competing against older well established industries.

- 4.6 It is submitted that the fact that differentiation can be made on basis of age of an organisation has been reiterated by this Tribunal in the case of *Rajasthan Engineering College Society v. Rajasthan Electricity Regulatory Commission* in Appeal No. 39 of 2012, wherein this Tribunal held in paragraph 26 that “Again, on the issue of discrimination between two similarly placed consumers, this Tribunal in *Northern Railway v. Delhi Electricity Regulatory Commission* in Appeal No. 268 of 2006 has held that differentiation can be made on the basis of age of the organisation as well as on the financial condition of the organisation. The case of *Northern Railways* in Appeal No. 268 of 2006 was similar to the case of the Appellant before us. The grievance of *Northern Railways* in this case was although the purpose of supply is same for Railways and Delhi Metro i.e. traction, the Delhi Commission has shown undue preference to later by fixing lesser tariff as compared to the tariff for Railways.”
- 4.7 Therefore, it is clear from the aforementioned orders that the differentiation made between new and old industries to promote new industries, to set up infrastructure and increase consumption from distribution licensee, is within the category of “purpose for which the supply is required” under Section 62(3) of EA 2003.
- 4.8 The Hon’ble Supreme Court in the matter of *Orissa Sponge Iron Ltd. and Ors. vs. State of Orissa and Ors.*, Civil Appeal No. 8580 of 1997, held that preferential treatment to new industries between two similarly placed industries manufacturing the same goods, to encourage the new industries, can be done on basis of intelligible

differentia. The Hon'ble Supreme Court, in para 30 of the judgment, held as under:

*“30. A similar distinction between new units and old units while granting exemption from sales-tax was upheld by this Court in M/s Bharat General and Textile Industries Ltd. V. State of Maharashtra 1998(2)SCALE944. One of the arguments was that (see p. 189) the result to the 1983 amendment to Sec. 41-A was that while the old unit had to pay Purchase- tax, Sales-tax turnover tax etc. totalling Rs. 1650 per metric ton, the new units producing the same washed cotton-seed oil got away scot-free without paying any tax and these stood placed in a very advantageous position.*

*31. It was held that in case that the “exemption granted in favour of the new units has a sound economic and public policy underlying it”. After referring to what was stated by the Government in the Counter, this Court observed:*

*“It cannot, therefore, be contended that the old units should also have been granted the same benefit as new units since both the units are engaged in the manufacture of the same type of products. In fact, such a policy, if followed by the Government, would not only fail to provide incentive to the new Industries but would also place the new units at a comparative disadvantage in being made to face stiff competition with older units which have been established at lesser cost and which have stabilised themselves in the filed by successfully miming the units number of years”*

33. *Therefore, it was for the policy maker to consider whether he should not allow the older units to get benefits of sales-tax which they were proposing to give to new units. If they felt that units which were already established at lesser cost and which got well stabilised should not be allowed to have any advantages over new industries, then such a classification would be perfectly valid.*”

4.9 Thus, it is submitted that the differentiation to promote new industries is not only within the category of “*purpose for which the supply is required*” under Section 62(3) of EA 2003, but is also an intelligible differentia with nexus to objective sought to be achieved i.e. promoting new industries in the State and maximize consumption of surplus energy within the State so as to minimize on the fixed cost of un-dispatched/surplus power.

4.10 Further, this Tribunal in the matter of *Shasun Research Centre v. The Tamil Nadu Electricity Regulatory Commission*, 2015ELR(APTEL)352, held that under Section 62(3) of EA 2003 if the *classification is based on an intelligible criteria and such classification has nexus to the propose sought to be achieved*, it will be a valid classification. The Order in the same para also holds that *due preference can be given to some categories*. This Tribunal further holds in para 29 that *the issue of classification cannot be viewed in isolation from the point of view of the Appellant. But it has to be viewed in the larger context of the role played by the appropriate government under the Act of 2003*. This Tribunal held in paragraph 30 that *the concept of equality as sought for by the Appellant cannot be put in a straight jacket formula and it has to be examined on case to case basis*. This

Tribunal records in para 35 (b) of the aforesaid order that *Section 61(b) of the Electricity Act, 2003 stipulates that the Appropriate Commission while making Regulations shall ensure that the affairs of the distribution licensee are conducted on commercial principles.*

- 4.11 It is relevant to appreciate that the State Commission has carefully applied its mind to giving the rebate as is evident from the fact that the State Commission has set specific criteria's for industries to classify to avail the benefits of the rebate, which are as follows:

Specificity of Rebate	
a.	Rebate of Rs. 1/Unit or 20% whichever would be less is applicable in Energy Charges for new connection for the consumption recorded.
b.	The rebate shall be allowed for a period of five years from the date of connection for such new projects for which agreements for availing supply from licensee are finalised during FY 2016-17 and FY 2017-18
c.	Provided these connections are served to green field projects only and no rebate is applicable for new connections obtained by virtue of change in ownership in existing connection. The green field project shall be those projects where the consumer invests in the construction of new industry/plant from ground up and there was no prior constructions/structure on that particular land.

4.12 It is relevant to mention that Appellant No. 4 had itself proposed that *in order to utilize this surplus capacity which is available within the State, Rebate to New HT Connections of Rs. 1/- per unit may kindly be allowed for 5 years for 33/132 all H.T. HV-3 Category Connections*. It is germane to note that none of the Appellants objected to the proposal of the rebate to the New HT Connections before the State Commission at the time of passing the Impugned Order.

4.13 The Appellant has erroneously contended that providing rebate to new HT Consumers for a period of five years, when the tariff itself is only applicable for one year is incorrect. This contention of the Appellant is denied. The tariff determined under Impugned Order is applicable from 10.04.2017 to 31.03.2018 unless amended, extended or modified by an Order of the State Commission. Further, under the Impugned Order rebate shall be allowed for a period of five years from the date of connection for such new projects for which agreements for availing supply from distribution licensee are finalized during FY 2016-17 and FY 2017-18. It is submitted that Section 64(6) of EA 2003 empowers the State Commission to make a tariff order applicable for any time period. Under this provision a tariff order shall be valid for the period mentioned therein unless amended or revoked by the State Commission. A natural corollary of this would be that the State Commission is also empowered to make a component of tariff order applicable for any time period and that such component will be valid for the period specified therein, unless amended or revoked. Therefore, rebate being a component of the tariff order, can be extended to a period of five years. The State Commission

has, simply to assure new consumers and to give predictability to distribution licensee, mentioned that rebate will be applicable for a period of five years. However, it is obvious that financial impact of such rebate will be considered only in that particular year while determining tariff for the distribution licensee. Therefore, the Appellant will not bear any financial impact, adverse or otherwise, if the rebate is specified for a period beyond the period for which tariff is determined in the Impugned Order. Thus, the Appellant's contention that rebate cannot be given for five years when the tariff order is applicable for only one year is denied. The provision for continuing the rebate for a period of five years has been included in the tariff structure to promulgate stability in the tariff structure for upcoming industries in the State.

4.14 Further, new industries require creation of new infrastructure, market, etc. which necessitates huge capital investment. Hence, the comparison by the Appellant between industries which are yet to be established in the State or are in initial phase of establishment with already established industries is not apposite. The rebate given to the new industries in the Impugned Order is a well-considered decision, taken by the State Commission, in absolute compliance of Electricity Act, 2003 and the State Commission's regulations, issued from time to time, for better utilization of the resources of the State, better utilization of surplus power available by way of promoting establishment of new industries in the State and as per the feedback received from stake holders viz. Iron and Steel industries of the State during the public participation process for determination of retail supply tariff for FY 2017-18.



4.15 It is germane to the mention that the State Commission has given fair treatment to the existing industries as well by extending to them the rebate applicable when their incremental consumption increases with respect to their last year's consumption as included in the retail supply tariff orders for FY 2016-17 and FY 2017-18, to encourage the consumers to increase their consumption.

**5. Submissions of the learned counsel Mr. G. Umapathy appearing for the Respondent No.2 to 5 are as follows:**

5.1 The above Appeal arises out of the order dated 30.03.2017 in Petition No. 71/2016 passed by the Madhya Pradesh Electricity Regulatory Commission's ( "State Commission") confined to the levying of differential tariff in the form of rebate of energy charges for the new HT consumers in the State . The appeal is devoid of merits and is liable to be dismissed.

Appeal Not Maintainable:

5.2 The present Appeal is not maintainable as six separate corporate entities have filed a common appeal challenging the impugned order which is not maintainable and the affidavit has been filed by the representative of the 1<sup>st</sup> Appellant. The six Appellants are not part or members of an association of industries but individual companies and the appeal in the present form is at all maintainable.

No Objections raised by the Appellant during public hearing:

The State Commission initiated the process after filing the ARR and the Retail Supply Tariff for the year 2017-18, and invited objections/comments/suggestions from the various stakeholders.

The Appellant having failed to file any objection would not be entitled to raise any objections in the present proceedings and had only challenged it once the impugned order was passed by way of a Review Petition which was rightly dismissed by the State Commission.

Relevant Sections of Electricity Act, 2003 along with Case Laws:

*Sec 62(3): Determination of tariff):*

*“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.”*

It is respectfully submitted that the meaning of the term “purpose” under the above section clearly holds that the State Commission has to determine the purpose for which the supply is needed and under Sec 62(3), it is fully empowered to differentiate between similarly placed consumers on the basis of several factors including the purpose for which the supply is required. There can be a classification on the basis of intelligible criteria and such classification has nexus to the purpose sought to be achieved.

- 5.3 It is submitted that this Tribunal in the judgment *Rajasthan Engineering College Society v Rajasthan Electricity Regulatory Commission, Appeal No. 39 of 2012* has rightly held that 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

*“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 premise 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 recognised criteria for differentiating the retail tariff.”*

- 5.4 It is respectfully submitted that Section 62(3) itself talks about the purpose of the user as a relevant factor for determining tariff, meaning thereby that the nature and the object of the activities will have to be considered while performing an exercise of categorisation and in this regard, the judicial pronouncements guiding the classification of various consumers can be of decisive

nature and in view of Section 62(3), any deviation from the judicial interpretation will not be permissible.

- 5.5 In Appeal No. 268 of 2006, Northern Railway v. Delhi Electricity Regulatory Commission, this Tribunal clearly held that differential treatment can be meted out if the purpose of doing the same can be enshrined under Sec 62(3) of Act, 2003.

*“17. The appellant disputes that DMRC can be treated as a preferred class only because it is a new consumer at 220 kV. It is contended by the appellant that the comparative age of the consumers is not a criteria for differentiation/categorization under Section 62(3) of The Electricity Act, 2003. The parameters provided in such sections are exhaustive and cannot be expanded to include new parameters not included therein. The appellant, therefore, contends that even though the appellant is 150 years old organization, it is constantly expanding its services, reach, passenger handling and railway network to the ever increasing passengers and freight service requirements for the developing economy. Comparing the need to build up the infrastructure for DMRC with its own needs, the appellant contends that the appellant also has to undertake substantial expenditure every year towards infrastructure towards building new infrastructure and also for maintaining expanding ones. Accordingly, it is contended by the appellant that differentiation on ground that DMRC is the new organization cannot be permitted in law. Coming to the question of drawing power at 220 kV it is contended by the appellant that DMRC consumes power only at 66 kV just like the appellant although DMRC draws power at 220 kV only at ISBT due to absence of the 66 kV Page 16 of 18 sub-station at that point. Although the arguments made by the appellant are apparently quite sound, they lose their force when examined closely. The appellant is a massive organization established 150 years back and the proportion of its expansion and its consequent new infrastructure is nominal when compared to the proportion of the same factor vis-à-vis the DMRC. Unless DMRC is treated preferentially, its viability itself may be at stake. The purpose of supply of electricity to the two organizations can thus be distinguished. The DMRC can be distinguished from the appellant in terms of age. The*

*purpose of supplying electricity to the two organizations namely the appellant and DMRC can also be said to be different. For the Railways, the purpose of supply of electricity is to maintain its operation at the existing level except for the nominal increase by the year whereas the purpose of supply of electricity to DMRC is to create an altogether new transport system for the City of Delhi.”*

In the present case, the State Commission has differentiated the industries on the basis of benefit accrued from the establishment of these industries in the state.

- 5.6 It is respectfully submitted that Sec 62(3) provides that the Commission may differentiate the consumers on the basis of several factors including the purpose for which the supply is required. The same was held by this Tribunal in the judgement in Appeal No. 323 of 2013, *M/s Shasun Research Centre v. TNERC* wherein it was held that:

*28. Section 62 (3) of the Act permits differentiation between consumers. The first part of Section 62 (3) provides that the State Commission shall not show any undue preference to any consumers, which means that due preference can be given to some categories. The second part of Section 62 (3) provides that the Appropriate Commission may differentiate consumers on the basis of several factors including the purpose for which supply is required. The benefit accrued out of the Government run Research Units will be driven to the Public welfare and the profit earning is a secondary one, whereas in a Private owned Research Units, the profit earning is the prime object and public cause is relegated to next level. Therefore, both can be classified as separate categories for the purpose of levying tariff. Such classification is based on an intelligible criteria and such classification has nexus to the purpose sought to be achieved. The Government run Units are not profit oriented and purely service oriented. Thus, there is a clear distinction between the Research Units recognized by the Government*

*and the Research Units which are Government owned and Government affiliated.*

*29. Section 61 (b) of the Electricity Act postulates that the Appropriate Commission shall ensure that the affairs of the distribution licensee are conducted on commercial principles while making Regulations. A conjoint reading of Section 61 (b) and Section 62 (3) of the Electricity Act, 2003 would make it clear that the State Commission is empowered to make a reasonable differentiation between Government Laboratories and Private run Laboratories. The Government has multifarious role to perform under the Electricity Act, such as electrification of all parts of the State under Section 6 of the Act, 2003 and to promote generation of electricity under the National Electricity Policy, which is not the case with the Appellant. Therefore, the Appellant cannot claim parity with the Government owned Research Units as mere recognition by the Government does not amount to affiliation. The present issue of classification cannot be viewed in isolation from the point of view of the Appellant. But it has to be viewed in the larger context of the role played by the Appropriate Government under the Act of 2003.*

*Section 61. (Tariff regulations):*

*Section 61(c) of Act 2003 provides the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*

- 5.7 It is respectfully submitted that Sec 61(c) of Act clearly 2003 mandates that while determining the tariff the Commission has to take into consideration parameters and factors which would encourage competitiveness in the state. The Appellants are already getting a very low and tariff and they cannot compare themselves with consumers who have just entered into the sector and are fighting for its survival. Thus, the Commission has to play a very balancing role in order to help the new industries to grow and sustain in the market.

- 5.8 *The reliance on section Section 65. Of Act 2003 by the appellant is wholly misconceived. (Provision of subsidy by State Government).* It is submitted that the Government is fully entitled to grant certain concessions and benefits to any class of consumers. The State Commission has found that state is surplus in power and in order to utilise the same, the Government through the answering respondents proposed to grant incentives to the new industries which was also welcomed by the existing industries during the public hearing. In the present case challenge to the tariff order at the instance of handful consumers who failed to participate in the public hearing cannot seek the relief for setting aside the rebate which was offered to the new industries in the State of Madhya Pradesh.
- 5.9 It is submitted that Section 62(3) allows the Commission to differentiate in tariffs for different consumers on one or more of the criteria mentioned in the second part of the Section. Any differentiation shown between Consumers must be undertaken only with the utmost care and the greatest circumspection and based on one or more of the criteria mentioned in the second part of the Section. Even where Section 62(3) provides the criteria for such differentiation between Consumers, each of the criteria mentioned in the section is an option available to the Commission depending upon what would be the appropriate criteria to be applied to a specific consumer or consumer category. In the present case, the differentiation has been done in order to promote new industries for coming up in the State.
- 5.10 In Appeal No. 106 of 2008, Mumbai International Airport Pvt. Ltd. v Maharashtra Electricity Regulatory Commission, this APTEL held as under:-

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

Section 108 (Directions by State Government):

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.

5.11 In terms of the above section, the Commission was only discharging functions in accordance with the policy of the State Government to the new industries which fall under the HV 3 Category in order make the new industries viable since its inception and to attract potential consumers to set up units in the State which would have both direct and indirect benefit to the economy of the State.

5.12 Under Section 65 it is a prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in Sections 65 and 108 of Act of 2003 that to grant subsidy to any consumer or class of consumers is the prerogative of the State Government and such



other direction issued in the public interest shall be binding upon the Commission. (2014 16 SCC 212) – Para 23.

Attract new consumers to the state:

- 5.13 The State Commission in the impugned order as well as the order in the Review Petition filed by the Appellant has given cogent reasons pertaining to the levy of rebate to the new industries which fall under the HV 3 Category in order make the new industries viable since its inception and to attract potential consumers to set up units in the state.
- 5.14 The rebate to the new HT consumers in the State was enlarged with a vision to attract new consumers to set up units in the State as it is a very evident aspect that in terms of the existing industries, a new industry has to strive hard during the period of its initial establishment and affording of a rebate during that period becomes very essential to make that industry viable.
- 5.15 The object behind grant of rebates to the new HT industrial consumers in the state is to foster their economic growth and attracting new investors in the State to set up their industries. In the instant case, the intent is to attract new industries so that a surplus power situation in the state may be addressed adequately and the existing consumers are not burdened with an increase in fixed charges being paid by them. Since, a new industry has to strive hard during the initial period of establishment and thus rebate during this period becomes very essential.
- 5.16 The provision of differential tariff to the different consumers in the State has not caused any prejudice to the existing consumers in the State. The Rebate for HT consumers is provided to attract new consumers to the state and to use the surplus power available in the state thereby promoting the industrial growth which is in line

with the Industrial Promotion policy, 2014 of the state and is vital for the industrial growth in the State.

Definition of Tariff:

5.17 The definition of Tariff as provided under the Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for supply and wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, 2015 (RG-35 (II) of 2015) means;

*“Tariff shall mean the schedule of charges payable by consumers for Distribution and Supply of Electricity together with terms and conditions thereof”*

5.18 It is submitted that the tariffs applicable for HV 3.1,3.2,3.3 and 3.4 consumers are same for all the consumers falling under the respective categories and rebates are extended to facilitate one of the many requirements of the licensee for enhancing the business. The average tariff for the various category of HV 3 category as per tariff order dated 31.03.2017 is as follows:

Category of HT/EHT Consumer	Average Tariff
HV 3.1: Industrial	7.69
HV 3.2 Non Industrial	8.40
HV 3.3: Shopping Malls	8.50
HV 3.4: Power Intensive Industries	6.34

Average Tariff of Appellants is less:

5.19 It is submitted that the average tariff of the Appellant is considerably less than the average tariff of other categories and owing to the slew of rebates available to the Appellant pertaining to incremental consumption rebate, TOD rebates, the average tariff paid by the Appellants would further be reduced. The average Tariff applicable to the Appellant after deducting all rebates, Electricity Duty and other charges for the month of May, June and July, 2017 is as below:

S. No.	Month	Total Bill amount in Rs. After rebate & ED	Total Units consumed in KW	Average Tariff
1.	May, 2017	23557985	5418800	4.34
2.	June, 2017	24194313	5346800	4.52
3.	July, 2017	24319237	5536400	4.39

From, the above table it is clear that the power supplied to the Appellant industry is comparatively at cheaper rate as compared to the average tariff applicable to the Industrial Category (HV 3 Category).

Supported by the Industrial Policy of the State:

5.20 It is submitted that the industrial development policy, 2014 has clearly laid down that various incentives/rebates have to be offered to the setting up of new industries in the state. In the tariff schedule of the HV 3 Consumers, in the tariff order for the year 2017-18, the applicable tariff for all the consumers are same falling under the

respective categories subject to certain rebates granted in lieu of certain conditions.

Regulation 42.1(o):

- 5.21 It is submitted that in accordance with Regulation 42.1(o) of the MPERC, Regulations 2015, the State Commission is fully empowered to determine any rebate or surcharge and since the Appellant had not challenged the said regulation, it is not entitled to question the grant of rebate by the State Commission at this juncture.

Regulation 42.1(o) is reproduced below as:

*42. Determination of tariffs for supply to consumers*

*42.1(o) Any other incentive/surcharge: The Commission may prescribe any other surcharge/ incentive.*

- 5.22 It is submitted that the Regulations, 2015 are applicable for a control period from 2016-2019 and consists of provisions for providing the rebates/incentives in the tariffs structure specified by the Commission through retail tariff. Accordingly, the State Commission can specify rebates/incentives and surcharge in the tariff structure and therefore, the inclusion of the rebates in the tariff structure is strictly conforming to the legal provisions.

6. We have heard the learned counsel for the Appellant and the learned counsel for the Respondent No.2 at considerable length of time and after careful perusal of the Impugned Order passed by the State Commission and after going through the written submission and rejoinder filed by the counsel appearing for both the parties and after critical evaluation of entire relevant material available on

records and the pleadings available on the file, the only issue which arises for our consideration in the instant Appeal is:-

*“Whether the State Commission for determination of tariff, can differentiate between consumers placed similarly and belonging to same category on the basis of new and existing consumers.?”*

## **7. Analysis and Conclusion:**

- i) The State Commission has in the Impugned Order determined a differential tariff for the new and existing HT industrial consumers by providing a further rebate to new consumers. The relevant extracts of the impugned Order reads as follows:-

“6.2 After giving due consideration to the suggestions/objections of the Stakeholders and the proposals submitted by the Discoms, the Commission has made some changes in the tariff design for FY 2017-18. These changes are mentioned in following paragraphs:

...

- x] Rebate on energy charges for HV 3 tariff category consumers:
- a. Rebate for existing HT connections: A rebate of 10% in energy charges is applicable for incremental monthly consumption w.r.t. consumption of FY 2015-16 same months. In the event of enhancement of contract demand the incremental consumption shall be worked-out proportionately.
  - b. B. Rebate for new HT connections: A rebate of Rs.1/Unit or 20% whichever would be less is applicable in energy charges

for new connection for the consumption recorded. The rebate shall be allowed for a period of five years from the date of connection for such new projects for which agreements for availing supply from licensee are finalized during FY 2016-17 and FY 2017-18. Provided these connections are served to green filed projects only and no rebate is applicable for new connections obtain by virtue of change in ownership in existing connection. The green field project shall be those projects where the consumer invests in the construction of new industry/plant from the ground up and there was no prior construction/structure on that particular land.”

- ii) The Section 62(3) of the Electricity Act, 2003 provides for an exhaustive list of factors to the limited extent of which the State Commission can differentiate between consumers.

Section 62(3) of the Electricity Act, 2003 reads as follows:

*“Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

*....*

*(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.”*

- ii) It is clear that normally the Appropriate Commission shall not while determining the tariff under the Act show undue preference to any consumer of Electricity. However, the Act provides that the Appropriate Commission may differentiate according to the factors given in the Act. This issue has been dealt with in detail in various judgments of this Tribunal that differentiation between consumers can be done by the Appropriate Commission only on the basis of the factors given under Section 62 (3) of the Electricity Act, 2003 and not on the basis of any other factor. It has further been clarified that the Appropriate Commission cannot differentiate within the same category of consumers; the consumers who are placed similarly.
  
- iii) In this instant Appeal, the State Commission has differentiated between the same category of consumers i.e. HT industrial consumers on the basis of new and existing consumers to promote industrial growth in the State and also to utilise the surplus energy available in the State.
  
- iv) As a result of such kind of differentiation, the existing industrial consumers will have to bear the additional burden of promoting the new industrial consumers. It is important to note that both the new and existing consumers are producing the same items and are selling their product in the same market and competing with each other. This kind of differentiation between tariff adversely affects the existing consumers. There has to be an even level playing field with

regard to the tariff determination to enable only the most competitive and efficient persons to succeed. By providing incentives to the new industries at the cost of existing consumers, the existing industries would be rendered uncompetitive.

- v) The submission, to justify the differentiation, that the promotion of new industries would lead to higher industrial growth, job opportunities, higher revenue in terms of taxes etc. for the welfare of the State does not hold any ground. If that be the case then State Government should provide direct revenue subsidy to new consumers rather than penalising the existing industrial consumers.
- vi) As per Section 65 of the Electricity Act, 2003, the State Government can provide direct subsidy to any consumers.
- vii) If this argument is accepted then it may further lead to erroneous situations wherein differentiation may possibly be made in other categories of consumers also. For example differentiation between residential consumers who purchase a new flat as compared to consumers who is occupying an old flat. The State Commission ought to have considered such larger consequences in this particular case. The existing industries would become uncompetitive and may even consider moving outside the State to other places where there is no such differentiation or the tariff are lower which obviously is contrary to the desired objective.
- vi) The first Respondent/the State Commission has placed reliance on the judgment of this Tribunal in the case of Northern Railway v DERC, Appeal No. 268 of 2006 dated 13/03/2007 wherein it is



noticed that there is no similarity between the case considered in the Appeal No. 268 of 2006 and the present Appeal. In Appeal No. 268 of 2006, the issue is between the Northern Railway and the new consumer 'Delhi Metro Rail Corporation'. It is to be kept in mind that whereas Northern Railway and the Delhi Metro Rail Corporation both use electricity for the purpose of traction but their nature of service is different.

- vii) Delhi Metro Rail Corporation is meeting the requirement of mass rapid transport system in the city of Delhi. Delhi Metro Rail Corporation provides transportation for the citizens of Delhi to commute within the city from one place to another place whereas Northern Railway provides transportation for goods and services within the North India from one location to another location. In the instant appeal the issue is regarding differentiation between the consumers of the same category i.e. producing steel. In the instant case both the consumers are selling their product which are similar in nature in the same market and are rivals. They are competing with each other whereas in the other Appeal No. 268 of 2006 the Northern Railway and Delhi Metro Rail Corporation are not competing to each other and are not rivals. The Northern Railway does not provide city transportation and DMRC does not provide transportation within the Northern India to move anywhere from one location to another location in the northern part of India. They are different and therefore placing reliance on the judgment passed in Appeal No. 268 of 2006 by the State Commission in the matter of Northern Railways and Delhi Metro Rail Corporation is wrong and does not apply to this instant case in hand.

- viii) The first Respondent/the State Commission has further placed reliance on the judgment of the Hon'ble Supreme Court in the matter of Orissa Sponge Iron Ltd. and Ors. vs. State of Orissa and Ors., Civil Appeal No. 8580 of 1997 wherein it has been held that preferential treatment to new industries between two similarly placed industries manufacturing the same goods, to encourage the new industries, can be done on basis of intelligible differentia. The main difference between this case and the instant Appeal is that whereas in Appeal No. 8580/2017, it is a case of differentiation between new units and old units while granting exemptions from sale tax. While doing so the government is foregoing its revenue proceeds by exempting new industries from payment of sale tax. In doing so it is not levying any additional burden of providing the cross subsidies to old units. Whereas in the present Appeal providing incentives to new industrial consumers would be at the cost of additional burden on existing consumers. As such there is no similarity between Civil Appeal no. 8580 of 2017 and in instant Appeal. Therefore reliance placed on the judgment passed in Civil Appeal No. 8580 of 2017 by the Hon'ble Supreme Court is not applicable to the facts and circumstances of the instant case.
- vi) In view of the above, the first Respondent/the State Commission committed a grave error in differentiating between consumers of the same category on the basis of new and existing consumers and therefore the Impugned Order passed by the first Respondent/the State Commission is hereby set aside so far as it relates to the extent of providing differential incentives to the existing and new HT consumers. The first Respondent/the State Commission is hereby

directed to reconsider the matter afresh in the light of the preceding paragraphs.

**ORDER**

For the foregoing reasons as stated above, the instant Appeal being Appeal No.107 of 2018 filed by the Appellant is allowed in part.

The Impugned Order dated 31.03.2017 passed in Petition No. 71/2016 by the Madhya Pradesh Electricity Regulatory Commission is hereby set aside so far as it relates to the extent of providing incentives to the existing and new HT consumers.

The Respondent No.1/the State Commission is directed to pass the appropriate order in the light of the observations made in the preceding paragraphs.

The Appellant and the Respondents herein are directed to appear before the first Respondent, Madhya Pradesh Electricity Regulatory Commission personally or through their counsel without notice on 26.04.2019 to collect necessary date of hearing.

No order as to costs.

Pronounced in the Open Court on this **12<sup>th</sup> day of April, 2019.**

**(Ravindra Kumar Verma)**  
**Technical Member**

√

**REPORTABLE/NON-REPORTABLE**

mk

**(Justice N. K. Patil)**  
**Judicial Member**