Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 39 of 2012

Dated: 28th August, 2012

Present: MR. JUSTICE P. S. DATTA, JUDICIAL MEMBER
MR. V J TALWAR, TECHNICAL MEMBER,

IN THE MATTER OF:

Rajasthan Engineering College Society
102, City Centre, Sansar Chandra Road,
Jaipur ……Appellants

VERSUS

1. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhawan,
Near State Motor Garage,
Sahakar Marg, Jaipur– 302005

2. Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Bhawan, Janpath, Jyoti Nagar,
Jaipur -302 055 …..Respondents

Counsel for the Appellant: Mr M.G. Ramachandran
Ms Swapana Sheshadari

Counsel for the Respondent : Mr R K Mehta for R-1
Mr Pradeep Misra for R-2

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant is a society registered under the Rajasthan Societies Registration Act and consists of the various engineering colleges in the State of Rajasthan. The Rajasthan Electricity Regulatory Commission (Commission) is the 1st Respondent. Jaipur Vidyut Vitran Nigam Limited (Distribution Licensee) is one of the distribution licensees in the state of Rajasthan and is the 2nd Respondent herein.

2. On 4.1.2011 the 2nd Respondent Distribution Licensee filed a Petition for determination of its Annual Revenue Requirements and revision of Retail Supply Tariff under Section 62 and 64 of the Electricity Act for the Financial Year 2011-2012. In accordance with the provision of Section 64(2) of the Electricity Act, 2003, the Electricity Board published the abridged form of its application inviting objections and comments from the stake holders.

3. On 8.9.2011 the State Commission passed tariff order determining the Annual Revenue Requirements (ARR) and revision of retail tariff supply for the financial year 2011-2012 for 2nd Respondent Distribution Licensee.

4. Being aggrieved with the tariff order dated 8.9.2011, the Appellant filed review petition no. 275 of 2011 before the Commission on 30.11.2011. The Commission dismissed the review petition by an Order dated 26.12.2011.

5. Aggrieved by the order dated 26.12.2011of the Commission rejecting its review petition, the Appellant has filed this Appeal against the Tariff Order dated 8.9.2011.

6. The Appellant has raised three issues in this appeal. These are:

i. 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 Regulations, 2009 and the binding precedents of this Tribunal in determining the appropriate cost to supply and in dealing with cross-subsidies in the tariff.

ii. Whether the State Commission has calculated the average cost of supply in the proper manner.

iii. Whether the State Commission can ignore the phrase '*purpose for which the supply is required*' appearing in Section 62 (3) of the Electricity Act, 2003 while classifying consumers in various categories and classifying the educational institutions in different categories merely because of the difference in ownership ?

7. With regard to the first two issues, the same has already been decided by this Tribunal by Judgment dated 30.5.2012 in Appeal No. 182 of 2011 as under-

"8. The contention of the Appellants that the Average Cost of Supply is the ratio between total recoverable revenue through tariff and total sale of energy is misconceived and is liable to be rejected for the following reasons:

i. This Tribunal in Appeal No. 131 of 2008 in the matter of Inorbit Malls (India) Pvt. Ltd., Mumbai Vs. Maharashtra Electricity Regulatory Commission, Mumbai and Maharashtra State Electricity Distribution Company, Mumbai reported in 2009 ELR APTEL 0864 has held as under:-

> *"9. Let us first examine the extent of hike in the Tariff for the three Appellants. The average cost of supply is determined by taking into account the total*

Revenue requirement of the Licensees divided by the total energy sold …."

ii. *Average cost of supply and average revenue recovery rate are two distinct aspects of tariff determination exercise. As the name itself suggests, the 'cost of supply' is the total revenue required by the licensee to meet its universal obligation to supply electricity to the consumers. Average cost of supply would, therefore, be the total revenue requirement divided by total energy sold. Average revenue recovery rate or average tariff is total revenue recoverable by the licensee through approved tariff divided by the energy sold by the licensee during the corresponding period. What the Appellants have suggested is actually average revenue recovery rate or average tariff and not the average cost of supply.*

iii. *The issue in hand can be viewed from another angle. The whole reforms process purported to be achieved by the 2003 Act and the Tariff Policy would be derailed if the contention of the Appellants is accepted. One of the hallmarks of the 2003 Act and the Tariff policy is progressive reduction of category wise cross subsidy. Cross subsidy for a particular category is to be calculated as difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the distribution licensee to supply electricity to the consumers of the applicable class. Here, tariff applicable to the relevant category is the ratio between the total revenue recovered from that particular category through tariff and energy sold to that category. If cost of supply for the same category is also, as suggested by the Respondents, the ratio between total revenue recovered from the category through approved tariff and total sale to that category, then the category wise cost of supply would be same as average tariff (revenue recovery rate) for the same category and cross subsidy under all circumstance would be equal to zero. Let us explain the above proposition through the actual values taken from the impugned tariff order as per Table given below:*

.....

19. *Principles for determining the average cost of supply and category wise cost of supply has to be the same. It cannot be*

claimed that while determining the average cost of supply one has to consider total recoverable revenue from the approved tariff and while determining category wise cost of supply one has to consider the cost of the distribution licensee to supply electricity to the consumers of the applicable category of consumers.

20. The question is answered against the Appellants accordingly."

8. In view of the judgement of this Tribunal in Appeal no. 182 of 2011, reproduced above, the learned Counsel for the Appellant did not press for these issues. Therefore, the only issue remained for our consideration is as to whether the State Commission can ignore the phrase '*purpose for which the supply is required*' appearing in Section 62 (3) of the Electricity Act, 2003 while classifying consumers in various categories and classifying the educational institutions in different categories merely because of the difference in ownership

9. The learned Counsel for the Appellant submitted that the Commission has shown undue preference to Government run education institutes by keeping those institutes in Mixed-load category and changing the category of the private run institutes from mixed-load to Non-domestic category. Section 62(3) of the Electricity Act, 2003 (Act) requires the Commission to fix the tariff without giving undue preference to any consumer, However, later part of this Section permits the Commission to differentiate on the basis of certain criterion enunciated in the section itself. One of such criteria is '*for purpose for which supply is required*'. Whereas, the institutes run by the members of the Appellant Society as well as the institutes run by the Government impart education to the public and therefore the '*purpose*' in both the cases is same i.e.

imparting education, the Commission has erred in shifting Appellant from Mixed-Load category to Non-domestic Category while the educational institutes run/aided by the Government have been kept in Mixed-load category, thereby giving undue preference to Government run institutes. Thus, the Commission has violated the provisions of the Act. According to the Appellant profit earning motive cannot be the criteria for differentiating under section 6293) of the Act. The Appellant has cited the following authorities in support of its contentions.

i. **Mumbai International Airport Pvt Ltd v. Maharashtra Electricity Regulatory Commission (**Judgment dated 26.2.2009 in Appeal No. 106 of 2008**)**

ii. **Association of Hospitals** v **Maharashtra Electricity Regulatory Commission & Ors** (Judgment dated 20.10.2010 in Appeals No.110, 111 of 2009)

10. The learned Counsel for the Commission made the following submissions:

i. The Commission's observation in the impugned order on the issue of re-categorization is in respect of all Educational Institutions and not just for Engineering Colleges. It is a well known fact since last few years there has been massive growth in the Education field. There is lot of difference in the services/facilities offered by private institutions as well as their load requirement, consumption etc. as compared to Government owned Institutions. It is in the light of the above fact situation that the Commission accepted the proposal of Discoms.

ii. Section 62(3) permits differential tariff on the basis of purpose for which supply is required. Even though both Govt. and Private Educational Institutions are established for imparting Education, the object or purpose of establishment of such Institutions is different. The object of establishment of Govt. Institutions is to impart education in larger public interest and giving opportunity to all including students belonging to economically weaker section of Society. On the other hand even though Private Educational Institutions impart education, they are established primarily as a business venture for the purpose of earning profit.

iii. In view of the difference in purpose for which supply is availed, the sub-classification of Educational Institutions into 'Govt.' and 'Private' is fully justified.

iv. The change of Categorization of Private Educational Institutions and inclusion of such Institutions in the non domestic category is based on rational criteria and is fully justified. Such categorization is permissible under Section 62 (3) of the Electricity Act, 2003.

v. Classification of Private Education Institutions and Government owned or run Educational institutions into two separate classes, satisfies the test of reasonable classification as laid down by the Hon'ble Supreme Court. Reliance in this regard is placed on the following judgments:-

(i) ***Pallavi Refractories v. Singareni Collieries Co. Ltd., (2005) 2 SCC 227***

(ii) ***Shashikant Laxman Kale v. Union of India, (1990) 4 SCC 366***

(iii) ***Hindustan Paper Corpn. Ltd. v. Govt. of Kerala, (1986) 3 SCC 398***

vi. The ratio of the above judgments would equally apply in the context of differential tariff for Educational Institutions run by Government and educational institutions promoted by Private.

11. We have heard the learned Counsels for the parties. The Appellant has alleged that the Commission has violated the provisions of Section 62(3) of the Act by giving undue preference to the Government educational institutes. Section 62(3) of the Act reads as under:

> *"(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required."*

12. Clearly, the mandate of Section 62 (3) is that no undue preference should be shown to any consumer. If no preference is to be shown to any consumer of electricity, it would mean that all consumers are to be supplied electricity at uniform tariff reflecting the cost of supply. This is clear from the first part of Section 62 (3) which uses the expression ***"shall not…….show undue preference to any consumer***". This would mean that due preference can be given. What is prohibited is a preference of undue nature. There should, however, be a rationale or reason for giving due

preference. For example, 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 being carried out by them and they being not able to meet the highest cost. Similarly, an infrastructure industry, a public work, street lighting etc can be given preference because of the nature of service rendered by them.

13. The provisions of Section 62 (3) however, allow differentiation between the consumer categories or any consumer from others in matters of tariff to the extent that preference can be given to a certain category of consumers.

14. The second part of Section 62 (3) provides for specific aspects based on which the State Commission may differentiate the consumer or category of consumers. These are Load factor, Power factor, Voltage, total consumption of electricity during a specified period, Time at which the supply is required, Geographical position of any area, Nature of supply and Purpose for which supply is required.

15. Thus, retail tariff for the Consumers can be differentiated, *inter alia*, on the basis of purpose for which supply is required. There can be numerous purposes for which supply is taken. Some of these are:

> Residential, Paying Guest Accommodation, Guest House, Hotels, Motels, Gaushala, Piyao, Dharmshala, Night Shelter Cheshire homes, etc.
>
> Shops, Shopping Malls, Clubs, restaurants etc.
>
> Agriculture, cultivation, horticulture, floriculture, mushroom production, etc.,

Public water works, Lift Irrigation, Public lighting,

Industry, Glass industry, Liquid Air, Steel Industry, Induction Furnace, Rolling mill, Pharma Industry, Plywood Industry,

Transportation, Inter-city and intra-city bus service, Railway, Metro, Metra, Airport, Aerodromes, Ship yards etc.

16. The above list is only indicative and not exhaustive. In all the cases purpose for supply can be differentiated. For example requirement supply for glass industry is totally different from induction furnace. In first case no interruption is acceptable where as induction furnace can be switched on and off any time.

17. It would not be practical for the Commissions to fix tariff for each of the groups of consumers as listed above. Therefore, the State Commissions all over the country have created various categories clubbing some the groups where supply is taken for similar purposes and created sub-categories within the main categories on other parameters enunciated in Section 62(3). Thus, State Commissions have created following main categories:

i. Domestic
ii. Agriculture
iii. Industry
iv. Public Lighting
v. Public Water Works
vi. Railways.

18. In addition to above, State Commissions have also created another category viz., Non-domestic which is residual category. Any consumer which could not fall within main categories is categorised as non-domestic category.

19. Commission have created sub-categories within the main categories to fix differential tariff based on Voltage (LT/HT

Industrial tariff), Total Consumption (Slab wise tariff in domestic category), Time of day, (Introduction of ToD tariff for select categories), Load factor (Load factor based Incentive/disincentive), geographical location (lesser tariff for hilly areas) etc.

20. Section 62(3) permits the State Commissions to differentiate between the tariff 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 categorisation 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 retail 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'
2) 'Voltage'
3) 'Total Consumption of electricity during any specified period'.
4) 'Geographical position of any area'.
5) 'Nature of supply'
6) 'Purpose of which supply is required.'

23. As per the Appellant the State Commission has re-categorised 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 recognised criterions for differentiating the retail tariff.

26. Again, on the issue of discrimination between two similarly placed consumers, this Tribunal in Northern Railway Versus 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 Appellant before us. The grievance of Northern Railway 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.

27. The relevant portion of the judgment is reproduced below:

> *"The grievance of the appellant is that although DMRC and the appellant are both railways the appellant has been discriminated against in as much as it has been made to pay tariff at a rate higher than that paid by DMRC. The order is challenged both on the grounds of principles of equality as enshrined in Article 14 of the Constitution of India and also on the ground of equality as envisaged in Section 62 of The Electricity Act.*
>
> *...**Although the appellant is also a social sector utility for the public of Delhi and its viability is also likely to be impacted by price of electricity yet there is a great difference between the appellant and the DMRC in that the DMRC is the new consumer and is still in the***

process of building up its infrastructure and therefore, the impact of tariff on it is much higher than the impact of tariff on the appellant. *The full meaning of the words "a new consumer of 220 kV and its differentiating nature of services" in the Tariff Order for financial years 2002-03 and 2003-04 can be explained and understood in this context.*

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 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.***
>
> *It was pointed out at the time of arguments that the appellant is carrying passengers at a fare much lower than that charged by DMRC.* ***This itself indicates the financial strength of the appellant vis-à-vis DMRC. This factor also can be included in understanding the purpose of the supply of electricity. The purpose of supporting the establishment of DMRC for providing the Mass Rapid Transit System, a crying need for the people of Delhi, is itself one great ground for treating the DMRC as a separate class of consumers. It can, therefore, be safely stated that the purpose of supply of electricity to the DMRC is different from the purpose of supply of electricity to the appellant and therefore, 62(3) of The Electricity Act 2003 permits preferential treatment to DMRC as compared to the appellant."{emphasis added}***

28. From the above it is clear that the term 'purpose' includes many factors. However, the differentiation done by the Commission has to be tested on the anvil of 'undue preference' as per first part of Section 62(3). The Appellant has submitted that the Commission has given undue preference to the Government run institutes by keeping them in the mixed-load category and re-categorised the Appellant and shifted it to non-domestic category. According to the Appellant ownership cannot be the criteria to differentiate the tariff under section 62(3) of the Act. Both the government run institutes and institutes run by members of the Appellant society imparts education and therefore the purpose for supply is same. Article 14 of the Constitution prohibits Equals to be treated unequally.

29. The above contention of the Appellant that Government run educational institutes and institutes run by private parties are equal is misconceived and is liable to be rejected for the following reasons:

i. Government run institutes are controlled by the education departments and run on budgetary support. On the other hand private institutions are run by the Companies incorporated under Companies Act 1956 and operate on the commercial principles. The survival of Government run institutes very often depends upon the budgetary provision and not upon private resources which are available to the institutes in the private sector.

ii. Right to education is a fundamental right under Article 21 read with Articles 39, 41, 45 and 46 of the Constitution of India and the State is under obligation to provide education facilities at affordable cost to all citizens of the country. Private institutes are not under any such obligation and they are running the education institutes purely as commercial activity.

iii. Article 45 of the Constitution mandates the State to provide free compulsory education to all the children till they attain the age of 14 years. In furtherance to this directive principle enshrined in the Constitution, a Municipal School providing free education along with free mid-day meal to weaker sections of society cannot be put in the same bracket along with Public School with Air-conditioned class rooms and Air-conditioned bus for transportation for children of elite group

of society. They are different classes in themselves and have to be treated differently. Where Article 14 of the Constitution prohibits equals to be treated unequally, it also prohibits un-equals to be treated equally.

iv. The same is true for hospitals. Right to health is a fundamental right under Article 21 of the Constitution and Government has constitutional obligation to provide the health facilities to all citizens of India. Therefore, Hospital run by the State giving almost free treatment to all the sections of society cannot be treated at par with a private hospital which charges hefty fees even for seeing a general physician.

30. Hon'ble Supreme Court in Hindustan Paper Corpn. Ltd. vs. Govt. of Kerala, (1986) 3 SCC 398 has also held that government undertakings and companies form a class by themselves.

31. In view of above, we are of the opinion that the Commission has rightly distinguished the Government run educational institutes from the institutes run by the members of the Appellant Society and that the Commission has not shown any undue preference to the government run institutes over the institutes of the Appellant Society. Accordingly the Commission has not violated the provisions of Section 62(3) of the Act.

32. In view of our clear independent findings as above, we do not wish to catalogue the cases relied upon by both the parties.

33. In the light of our above findings, we do not find any reason to interfere with the impugned order of the State Commission. The

Appeal is accordingly dismissed being devoid of merits. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice P. S. Datta)
Judicial Member

Dated: 28th August, 2012

REPORTABLE/~~NOT REPORTABLE~~