

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 42 OF 2013

Dated: 11th April, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

IN THE MATTER OF

Bharati Hexacom Limited,
Circle Office at K-21,
Sunny House, Malviya Marg,
C-Scheme, Jaipur-302 001

.... Appellant/Petitioner

VERSUS

1. Rajasthan Electricity Regulatory Commission,
Vidhyut Viniyamak Bhawan,
Sahakar Marg, Jaipur-302005

2. Jaipur Vidyut Vitaran Nigam Limited,
Vidyut Bhawan,
Jyoti Nagar, Jaipur-302005

.... Respondents

Counsel for the Appellant(s)

...

Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent(s)

...

Mr. Raj Kumar Mehta
Ms. Ishita Dasgupta
Ms. Mansha Mong for R-1

Mr. Bipin Gupta for R-2

JUDGMENT

PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present Appeal has been filed under Section 111 of the Electricity Act, 2003 against the Order dated 11.12.2012 passed by the Rajasthan Electricity Regulatory Commission (hereinafter called the '**State Commission**') in Petition No. RERC/332/2012, whereby the petition filed by the Appellant-Petitioner under Section 142 read with Section 146 of the Electricity Act, 2003 for the unauthorized action of Respondent No.2 – Jaipur Vidyut Vitaran Nigam Ltd in charging tariff for the Telecom Towers of the Appellant as per the Non-domestic category instead of the Industrial Category under the tariff order of the State Commission, has been dismissed holding that the Base Transceiver Station (BTS) Towers of the Appellant-petitioner do not fall under the mixed load category as claimed by the Appellant under the tariff order passed by the learned State Commission.

2. In the beginning, it is very necessary to elucidate about the term 'BTS Towers'. The BTS stands for Base Transceiver Station, which is a piece of equipment that facilitates communication between user equipment (like mobile phone) and a network (like GSM and CDMA). BTS could be attached to a tower holding antenna or could even be mounted on buildings. BTS tower has obviously been held as an integral part of a mobile telecom system by the impugned order.

3. The relevant facts giving rise to the present Appeal are reproduced as under:-

- (a) that the Appellant, M/s Bharti Hexacom Ltd., is a company incorporated under the provisions of the Companies Act, 1956. The Appellant is engaged in the business of telecommunications providing voice and data services to the end customers. The

Appellant is India's largest integrated and first telecom service provider with operations in all 23 telecom circles in India.

- (b) that the Appellant has been issued a Unified Access Service Licence (UASL) by the Department of Telecommunication, Government of India. The Appellant's services include 2G, 3G and 4G services, fixed line, high speed broadband through DSL, IPTV, enterprise services including national & international long distance services to carriers, in data services. The Appellant offers its customers the opportunity to access applications anytime and anywhere through services like Mobile Application Tool for Enterprise (MATE), bulk SMS, interactive SMS, group SMSs, General Packet Radio Service (GPRS), email, live chats and data card (USB modem). The services provided by the Appellant are in the nature of public utility services leading to all segments of the society and population.
- (c) that the services are provided by the Appellant to its customers through Mobile Towers, also called as Cell Sites, which primarily comprises of Base Transceiver Station (BTS) Towers, apart from feeder cables and ancillary equipments. The primary load of the Appellant for electricity purposes is at the BTS Towers.
- (d) that the Respondent No. 1, State Commission is the Regulatory Commission for the State of Rajasthan and Respondents No. 2 is one of the distribution licensees in the State of Rajasthan, engaged in the activities of distribution and retail supply of electricity in its area of operation. The Appellant is supplied electricity for the purposes of its BTS Towers by the Respondent No. 2. The tariffs for the supply of electricity by the Respondent No. 2 to the retail supply consumers including the Appellant are determined and regulated by the State Commission under the provisions of the Electricity Act, 2003.
- (e) that the Government of Rajasthan issued a Policy 2000 for the development and growth of information technology industry in the

State of Rajasthan and in furtherance thereto, the State Government issued Circular No. F5 (151)DOIT/tech/01/32 dated 08.01.2003 defining the term 'IT Industries' 'IT Infrastructure' and 'Telecommunications' 'Information Technology Industry' as used in the IT Policy 2000. Thereafter, in April 2007, the Government of Rajasthan issued the IT & ITES Policy 2007 with an attempt to encourage private sector to make investment in the IT Sector in the State of Rajasthan.

- (f) that after the commencement of the IT and ITES Policy, 2007 the State Commission vide order dated 31.08.2007 in Suo-Moto Petition No. 130 of 2007 for rationalization of retail tariff for distribution licensees in Rajasthan, held as under –

“Commission’s Decision- 96. The Commission agrees to the proposal for incorporating the residuary clauses in NDS category and retain the classification of Radio Station/TV Station, their transmission, telephone/mobile exchange/switches including attached offices without any distinction of its ownership of BSNL/MTNL in the category of ML/LT-7. The discom may amend the tariff schedule accordingly.”

- (g) that this order was made effective from 01.10.2007.
- (h) that in pursuance to the above, the Respondent No. 2 amended the tariff schedule as directed by the State Commission vide notification dated 24.09.2007, published the new tariff schedule applicable to the consumers. In the said tariff schedule, the Respondent No. 2 had specifically included telephone/mobile exchanges/switches under the Mixed Load category and consequently started issuing bill w.e.f. 01.10.2007 under Mixed Load category. The Tariff Notification dated 24.09.2007, inter-alia, provides as under:

“10. Bulk Supply for Mixed Load (Schedule ML/LT-7 and ML/HT-4)

Following words appearing in clause –(a) “Applicability” under tariff schedules “bulk Supply for Mixed Load (ML/LT-7 and ML/HT-4) i.e. “Radio Stations, TV Stations and their transmitters, BSNL Exchanges/switches including attached offices” be substituted by the words;

“Radio/TV Stations & their transmitters, all telephone exchanges/switches, BTS towers including attached offices”

- (i) that the Respondent No. 2, by clarification dated 06.07.2009 regarding the application of tariff for BTS Towers for various mobile/telephone companies, stated that in accordance with the order dated 24.09.2007, the correct tariff applicable to the BTS tower is under mixed load category and not under Non-Domestic category. Thus, there was a specific stipulation made by the Respondent No. 2 for inclusion of the BTS Towers under the Mixed Load category as applicable.
- (j) that for the tariff year 2011-12, the Respondent No.2 – Vidyut Vitran Nigam and two other DISCOMS, namely, Ajmer Vidyut Vitran Nigam Ltd. and Jodhpur Vidyut Vitran Nigam Ltd. filed a separate petition being Petition Nos. RERC/238/2010, RERC/239/2010 and RERC/240/2010 respectively, before the learned State Commission for approval of the Annual Revenue Requirement (ARR) and revision of the Retail Supply Tariff (RST) applicable to the consumers. In these petitions, three DISCOMS proposed the change in the categorization of the consumers, proposing to include all telephone service operators, (BSNL or otherwise), telephone/mobile exchanges/switches including attached offices under Non-Domestic Service (NDS) Category as the telephone companies are run on a commercial basis and should not be kept at par with the Government of India – P&T Department which so far have been covered under ML/LT-7. The learned State Commission finding force in this proposal, observed that last tariff order was issued in 2004 and since then telecom sector has witnessed sea change and a total transformation and accepted the proposal of the DISCOMS in this regard. Thus, the learned State Commission, vide its order dated 8.9.2011, in the aforesaid three petitions being petition nos. RERC/238/2010, RERC/239/2010 and RERC/240/2010 accepted the proposal of

the DISCOMs including Respondent No.2 regarding change in categorization. Thus, the learned State Commission, vide order dated 8.9.2011, approved the proposal and all telephone service operators (BSNL or otherwise), telephone/mobile exchanges/ switches including attached offices were put under non-domestic category from the mixed load category.

- (k) that since there was no proposal for change in the tariff categorization of the BTS Towers of the Appellant-petitioner by the Respondent No. 2 and the primary load of the BTS Towers of the Appellant-petitioner, there was no occasion for the Appellant to file any objection or appear before the State Commission at the time of hearing of the petition no. RERC/238/2010 on the tariff categorization proposal of the Respondent No.2. According to the Appellant-petitioner, the change in categorization was restricted to telephone operators and mobile exchanges and switches with attached offices. There was no proposal or any decision taken for change of categorization of BTS Towers nor was there any such change effected in the learned State Commission's order dated 8.9.2011.
- (l) that, in pursuance to, the learned State Commission's order dated 8.9.2011, the Respondent No.2 amended the tariff schedule on 07.10.2011 as applicable for the different categories of consumers w.e.f. 11.9.2011 (the date of publication of notification in the local daily newspaper). Thus, tariff for supply of electricity-2011 was issued on 7.10.2011, in pursuance to the State Commission's order dated 8.9.2011. Part-II-Non-Domestic Service (Schedule NDS?LT-2) of Tariff for Supply of Electricity, 2011 provides as under:-

"II. NON-DOMESTIC SERVICE (Schedule NDS/LT-2)

(a) Applicability:-

The Schedule shall include all categories which are not covered by other tariff schedules of Part-I as mentioned below:

<i>DS/LT-1</i>	<i>PSL/LT-3</i>	<i>AG/LT-4</i>
<i>SP/LT-5</i>	<i>MP/LT-6</i>	<i>ML/LT-7</i>

and includes supply of energy for light, fans, heating and power appliances in Commercial and Non-domestic establishments such as shops, business houses, places of public worship having sanctioned connected load above 5KW, hostels having no exclusive bonafide domestic uses, Dharamshalas which are not run by registered charitable trusts or societies and where facility of accommodation, electricity and water is not provided free of cost, hotels, restaurants, petrol pumps, service stations, garages, auditoriums, cinemas.

Also available to educational institutions, hospitals nursing homes, dispensaries and clinics which are not maintained and run by Government or agencies of the Government, all telephone service operators (BSNL or otherwise), telephone/mobile exchanges/switches including attached offices, wedding houses, Jojoba Cultivation, Goshalas & Nurseries etc. and such portion of residential premises used for the conduct of business or any other activity of these commercial and non-domestic establishments. Also offices of the Advocates not situated at their own residence.”

- (m) that after the tariff notification dated 7.10.2011 issued by the Respondent No.2, the Respondent No.2 began issuing bills to the Appellant for the BTS Towers under Non-Domestic Service (NDS) category. The main grievance of the Appellant in the instant Appeal is that BTS Towers are to be billed under mixed load category as was applicable earlier, and hence, the order of the learned State commission dated 8.9.2011 passed in Petition No. RERC/238/2010 is being violated by the Respondent No.2 by issuing bills to the Appellant for BTS Towers under non-domestic service category.

In the circumstances and aggrieved by the action on the part of the Respondent No. 2 for the tariff categorization of BTS Towers of the Appellant from mix load category to non-domestic service category and unreasonable act of the Respondent No. 2, the Appellant filed a petition being Complaint Case No. 332 of 2012 under Section 142 read with Section 146 of the Electricity Act, 2003 seeking a direction for proper implementation of the order dated 08.09.2011 and for a direction to the Respondent No. 2 to refund the excess amount charged from the Appellant.

- (n) that in response to the petition filed by the Appellant, the Respondent No. 2 filed its reply, primarily contending that the intention of the order dated 8.9.2011 of the learned State

Commission was to include the BTS Towers also in the Non-Domestic category along with the telephone exchanges and switches and there was no requirement to mention BTS Towers in the tariff proposal or the tariff order.

- (o) that the Respondent No.2 filed Petition No. 278 of 2011 before the State Commission for determination of Annual Revenue Requirement, wheeling charges and revision of retail supply tariff for the financial year 2012-13, in which petition the Respondent No. 2, for the first time specifically proposed for the change of category of BTS Tower from Mixed Load to Non-Domestic category. The Appellant filed objections, inter-alia, stating that the proposal of the Respondent No. 2 for change of the category of BTS Towers from Mixed Load to Non-Domestic category is against the Electricity Act, Regulations and also the change as proposed, should not be effected.
- (p) that the State Commission, vide order dated 08.08.2012, determined the annual revenue requirement of the Respondent No 2 for the FY 2012-13. Regarding the change of category of BTS Towers the State Commission held as under;
- “2.29.03. Commissions views;**
1. Commission observed that two petition in respect of BTS Towers are under consideration of the commission. A petition for re-categorization of telephone service provider is also pending in APTEL.
 - a. as regards BTS towers, a view would be taken by the Commission in the pending petitions before Commission and therefore no decision on Discoms proposal as regards BTS towers is being given in this order.
 - b. as mentioned earlier, inclusion of telecom services in NDS category was done in the last tariff order, which is under appeal in APTEL and no decision on this is required to be taken by the Commission in this order.
 - c. in the light of this said position, the detailed arguments as well as the case cited by the learned counsel/ representative of the stakeholders in respect of tariff of BTS towers and telecom services are not being discussed in this order.”
- (q) that the learned State Commission vide impugned order dated 11.12.2012 in petition no. RERC/332/2012 filed under Section

142 read with Section 146 of the Electricity Act, has dismissed the Appellant's petition with the following observations:-

"17. The Commission through its order dated 31.8.2007 decided as under in respect of tariff of telecom sector:

"96. The Commission agree to the proposal for incorporating the residuary clause in NDS category and retain the classification of Radio Station/TV Station, their transmission, telephone/mobile exchange/switches including attached offices without any distinction of its ownership of BSNL/MTNL in the category of ML/LT-7. The Discoms may amend the tariff schedule accordingly.

18. It would be seen from the said decision that all the telecom operators, without any distinction of ownership, were placed in the tariff category of Mixed Load (ML/LT-7) as far as telephone/mobile exchange/switches including attached offices were concerned. It may be mentioned that prior to the said order, private telecom operators were subject to tariff of NDS category whereas Govt. agencies (BSNL/MTNL) were in Mixed Load category except their exclusive offices. Vide order dated 31.8.2007, the distinction between private telecom operators and Govt. entities (BSNL/MTNL) in respect of tariff was done away with. The Commission directed the licensee to amend the tariff schedule accordingly.

19. The Discom in pursuance of the said order amended the tariff vide order dated 24.9.2007 and the Mixed Load schedule was revised as under:

"Radio/TV Stations and their transmitters all telephone exchange/switches, BTS towers including attached offices"

20. The important point to be noted here is that Discom on its own incorporated the words "BTS towers" in the schedule despite the tariff order of the Commission not classifying BTS towers as a separate item.

21. The said schedule obviously was somewhat at variance with the Commission's order dated 31.8.2007. However, the deviation was not material as BTS towers continued to be in the same category as that of telephone/mobile exchange/switches, including attached offices. BTS towers earlier also were being subjected to the same tariff as applicable to telephone/mobile exchange/switches.

22. In the tariff petition for revision of tariff of FY 2011-12, Discoms proposed for inclusion of telephone/mobile exchange/switches, including attached offices under NDS category and the same was accepted by the Commission in its order dated 8th September, 2011. The Discoms in their proposal did not mention words "BTS towers" nor the tariff order of the Commission mentions this.

23. On account of non inclusion of BTS towers in the proposals of the Discoms, which stood accepted by the Commission, the petitioners are alleging contravention by Discom of the tariff order of the

Commission, as BTS towers were also billed by Discom at the same rate as applicable for telephone/mobile exchange/switches.

24. At the juncture, it would now be useful to have a look at what has been stipulated in various tariff orders as regards tariff applicable for BTS towers. As has been mentioned earlier, the Commission has never treated BTS towers as a separate item as far as tariff is concerned. The tariff as applicable to telephone/mobile exchange was being charged by Discoms throughout for BTS towers also and when telephone/mobile exchanges of private telecom operators moved from NDS category to Mixed Load category in pursuance of Commission's order dated 31.8.2007, the BTS towers were subjected to tariff of revised category i.e. Mixed Load instead of NDS.

25. The words used in tariff classification in order dated 8.9.2011 are similar to that of order dated 31.8.2007. After the order of year 2007, BTS towers moved from NDS category to Mixed Load category though nothing was mentioned in the Commission's tariff order in respect of BTS towers. BTS towers continued to be treated as part of tariff category of telephone/mobile exchange/switches. We, therefore, find no reason to infer that BTS towers deserve to be treated differently as a consequence of the tariff order dated 8.9.2011 passed by the Commission.

26. In fact, insertion of BTS towers in the schedule of Discom after Commission's order in year 2007 was done by Discom on their own, though this seems more in the clarificatory nature, as explained by petitioners in their pleadings, as quoted below from para 6 of the reply of respondent:

"BTS Towers are part of telephone exchange and switches and just for clarify it was written in the order of the discom whereas the regulatory commission had not classified any thing as BTS Towers which is evident from the original order passed in the year 2007 by Regulatory Commission.

27. BTS towers were incorporated in the same category as applicable for telephone/mobile exchanges and there was no deviation, though such incorporation was unwarranted in view of the fact that there was no such item as 'BTS towers' in Commission's tariff order dated 31.8.2007.

28. Even otherwise, there seems no merit or justification in treating mobile towers differently than telephone/mobile exchanges in tariff classification on account of the fact that BTS towers are integral part of mobile telecom system as discussed earlier.

29. In the light of the position discussed above, we find no merit in the contention of the petitioners that Discoms have violated the tariff order dated 8.9.2011 of the Commission as far as BTS towers are concerned. The petitions accordingly are being dismissed as devoid of merit with no order as to cost."

4. We have heard the arguments of Mr. Anand K. Ganesan and Ms. Swapna Seshadri, the learned counsel for the Appellant and Mr. R.K. Mehta and Mr. Bipin Gupta, learned counsel for the Respondent No.1 and Respondent No.2 respectively. We have deeply gone through the evidence and other material available on record including the impugned order and written submissions filed on behalf of the parties.

5. Now, we deal with the submissions made by the rival parties in this Appeal. The following submissions have been advanced on behalf of the Appellant:

- (a) that the Appellant, inter-alia, operates and maintains cell site/mobile towers, which primarily comprises of Base Transceiver Station (BTS) Towers apart from feeder cables and ancillary equipments. The same are owned and operated distinct of the mobile exchanges/switches and corporate offices.
- (b) that the BTS Towers have a well defined technical and commercial meaning and are used for last mile connectivity to the mobile phones. The BTS Towers are numerous in number and spread over the state, not confined to any one location or office as in the case of mobile exchanges/switches, corporate offices etc.. Hence, it is not possible to club the BTS Towers with an office or mobile exchange or switch and club all of these activities in the same category.
- (c) that on the proposal of the Discoms including Respondent No.2, in the year 2007, the State Commission, vide order dated 31.8.2007, while accepting the proposal of the Discoms, decided to place all the telecom services under the Mixed Load category (ML/LT-7) under the tariff schedule and accordingly, the Respondent No. 2-Distribution Licensee on 24.9.2007 amended the tariff schedule providing for the detailed categorization of the consumers and specific categories governing each consumer clause. The Respondent No.2, in its

amended tariff schedule issued on 24.9.2007 specifically placed the BTS towers of the Appellant under the mixed load category. In fact Radio/TV stations were also part of the same category which were more akin to the BTS Towers, both being towers used for transmission purposes.

- (d) that the order dated 24.9.2007 came into effect from Nov., 2007 and for billing since Nov., 2007 for BTS Towers connections, the correct tariff schedule to be applied was schedule ML/LT-7 and MN/ST-4 and not non-domestic tariff schedule.
- (e) that since by the State Commission's order dated 31.8.2007 and in pursuance thereof, the amended tariff schedule issued on 24.9.2007 by the Respondent No.2, the BTS Towers of the Appellant were placed under mixed load category, there was no question of raising any issue during the hearing of matter before the learned State Commission on behalf of the BTS Towers because there was no proposal for change of the category of BTS towers from mixed load category to non-domestic service category.
- (f) that in the year 2011, the Respondent No.2 - Distribution Licensee proposed a change in some of the tariff categories. There was however, no mention whatsoever of any change for BTS Towers by the Distribution Licensee. In the circumstances, there was no occasion for the Appellant who is concerned with BTS Towers to represent before the State Commission or to have any grievance with regard to the proposal of the Distribution Licensee.
- (g) that based on the proposal of the Distribution Licensee, the State Commission, by order dated 8.9.2011, changed the category for telephone/mobile exchanges/switches including attached offices from the Mixed Load category to Non-Domestic Services (NDS) category. Even in the State Commission's order dated 8.9.2011, there was no mention of BTS Towers as no

proposal was made by the Distribution Licensee with regard to BTS Towers.

- (h) that pursuant to the State Commission's tariff order dated 8.9.2011, the Distribution Licensee on 11.9.2011 published the tariff schedule to the consumers. In this tariff schedule also, there was no mention of BTS Towers being part of the NDS category. However, based on this tariff schedule dated 11.9.2011, the Respondent No.2 - Distribution Licensee started to bill the Appellant for BTS Towers under the non-domestic service category as against the Mixed Load category earlier billed.
- (i) that aggrieved by the action of Distribution Licensee - Respondent No.2, the Appellant filed a petition being Complaint Case No. 332 of 2012 before the State Commission seeking directions against the Distribution Licensee for wrongful levy of tariff contrary to the categorization of BTS Towers under the tariff schedule.
- (j) that in the meantime, during pendency of the above petition being Complaint Case No. 332 of 2012, the Distribution Licensee/Respondent No.2 filed the proposal before the State Commission in the year 2012 for specifically including the BTS Towers under the NDS category as against the Mixed Load category stating that due to representation of certain consumers, the BTS Towers were not specifically provided for in the proposal for change in categorization. By the time of filing proposal by the Distribution Licensee before the learned State Commission in the year 2012, the Distribution Licensee understood and acknowledged that BTS Towers were not specifically mentioned in the tariff schedules, though the same ought to have been done.
- (k) that the State Commission's impugned order dated 11.12.2012 holding that the action of the Distribution Licensee in levying

the NDS category tariff on the BTS Towers is justified, is wrong and contrary to law.

- (l) that the State Commission's findings in the impugned order, that BTS towers are included in the telecom categories, is contrary to law because BTS towers were specifically mentioned in the tariff schedule for the year 2007 and also 2009 which were made available to the consumers and also there was no mention of BTS towers in the tariff proposal for the year 2011 or in the tariff schedule by the Distribution Companies in the year 2011, there was no occasion or question authorizing change in the category of BTS towers by implication from mixed load category to non-domestic service category. These facts vitiate the impugned order and the impugned order results in the serious breach of the principles of natural justice to the consumers being BTS consumers though they have never been given opportunity to represent their case before the State Commission at a relevant time particularly, when the category of BTS towers was being changed from mixed load category to non-domestic service category.
- (m) that this Appellate Tribunal in various judgments has held that the categorization of any consumer cannot be changed without notice to the consumers. The effect of the impugned order dated 11.12.2012 of the State Commission is that in the year 2011 itself, the BTS towers category was changed to non-domestic service category even though the tariff proposal of the Distribution Licensee in the year 2011 did not propose any change in the category from mixed load category to non-domestic service category while the previous tariff schedule of the Distribution Licensee provided for BTS towers specifically.
- (n) that in any event, the State Commission having come to the conclusion that the Distribution Licensees have committed an error in mentioning BTS Towers in the tariff schedule earlier

and not mentioning it subsequently, there was no occasion for the State Commission to then place a burden on the BTS Towers for payment of higher tariff under the NDS category. The consumers like BTS towers cannot be penalized or asked to pay higher tariff by implying change in category for an error committed by the Distribution Licensee.

- (o) that the findings in the impugned order dated 11.12.2012 of the State Commission, that BTS towers are to be included in the same category as that of telephone/mobile exchange without recording a finding that BTS towers need to be placed in the same category as they are similarly situated like telephone/mobile exchange, is against the evidence on record and also contrary to law.
- (p) that the learned State Commission in the impugned order, failed to examine on merits the nature of the BTS towers whether they are akin to mobile switch, etc.
- (q) that in any event, BTS towers are different and distinct from telephone/mobile exchanges/switches. BTS towers, in fact may be more akin to Radio/TV stations and BTS towers cannot be included in the category of telephone/mobile exchanges or switches because the BTS towers are spread over the large area and have to be individually placed to provide last mile connectivity to mobile phones and are not the same as mobile exchanges/switches which do not have to be spread over large area and also have different purpose and non-consideration of these aspects by the State Commission in the impugned order, makes the impugned order unjust and contrary to law.
- (r) that lastly, the impugned order of the State Commission to place BTS towers, by implication, in the non-domestic service category from mix load category for the year 2011-12 is incorrect and liable to be set-aside.

6. **Per contra**, the learned counsels for the Respondents have taken the following pleas:-

- (a) that prior to Tariff Order dated 17.12.2004 of the learned State Commission, the non-domestic service category tariff was applicable both in respect of mobile telephone exchanges or private telecom operators as well as BSNL/MTNL (Govt. entities) without any distinction.
- (b) that vide order dated 17.12.2004, the learned State Commission shifted BSNL's exchanges/switches, including attached offices to mixed load category, whereas their exclusive offices continued under non-domestic service category. By virtue of the said order, the private telecom service providers continued to be subjected to tariff of non-domestic service category (except exclusive offices which continued in non-domestic service category).
- (c) that vide order dated 31.8.2007 of the State Commission, all telecom operators, without any distinction of ownership, were placed in the tariff category of mixed load (ML/LT-7) as far as telephone/mobile exchanges/switches including attached offices are concerned. Pursuing to the order dated 31.8.2007 of the State Commission, the Discoms amended the tariff vide their internal order dated 24.9.2007 and mixed load category was revised. The Discoms incorporated the word BTS Towers in the amended tariff schedule dated 24.9.2007, despite the tariff order dated 31.8.2007 of the State Commission not classifying BTS towers as a separate title.
- (d) that candidly, the amended tariff schedule dated 24.9.2007 issued pursuant to the State Commission's order dated 31.8.2007 was somewhat at variance with the State Commission's order dated 31.8.2007, the deviation was not material as BTS Towers continued to be in the same category as

that of telephone/mobile exchanges/switches, including attached offices.

- (e) that in the tariff petition for the revision of tariff for FY 2011-12, the Discoms proposed for inclusion of telephone/mobile exchanges/switches, including attached offices under non-domestic service category and the same was accepted by the State Commission vide its order dated 8.9.2011. Neither the proposal of Discoms nor the Tariff Order dated 8.9.2011 of the State Commission mentioned the words “BTS Towers”.
- (f) that though the Appellant – M/s Bharti Hexacom did not file any comments/objections on the tariff petition for FY 2011-12 filed by the Respondent No.2, the Appellant filed a petition under Section 142 read with Section 146 of the Electricity Act, 2003 being Complaint No.332/2012 alleging violation of the Tariff Order dated 8.9.2011 of the State commission by the Respondent No.2 – Distribution Licensee in charging tariff of non-domestic service category in respect of their BTS towers on the ground that BTS towers were not included in the Tariff Proposal of the Discoms. The State Commission has rightly dismissed the complaint/petition filed by the Appellant, by the impugned order dated 11.12.2012.
- (g) that the Appellant’s submission to the effect that the State Commission has erred in holding that there was no violation of tariff order dated 8.9.2011 by the Respondent No.2 – Distribution Licensee, is misconceived and untenable because the State Commission in its various tariff orders never treated BTS towers as a separate category. In all the tariff orders it used the word “Telephone/Mobile Exchanges/Switches including attached offices and the telecom operators had been paying the tariff for the BTS towers at the same rate as applicable to “Telephone/Mobile Exchanges/Switches”. The State Commission has rightly observed in the impugned order

that BTS towers are an integral part of mobile telecom system and do not require any separate classification.

- (h) that with regard to the reliance by the Appellant on the inclusion of the word “BTS Towers” in the order dated 24.9.2007 issued by the Discoms, the said inclusion was without authority as the said words did not find place in the State Commission’s Tariff Orders. However, the said inclusion appears to have been clarificatory in nature as stated by the Respondent No.2 in para 6 of its reply before the State Commission.
- (i) that BTS towers are an integral part of the mobile/telephone system and do not require any separate classification for the tariff purposes.
- (j) that the IT Policy and other policies issued by the Government of Rajasthan and classification made by the State Government for providing incentive under its various programmes, do not have any role in tariff determination process because the State Commission determines the tariff in accordance with the provisions of the Act, Tariff Policy and Regulations.
- (k) that the inclusion of BTS Towers in the Discoms’ tariff schedule dated 24.9.2007, cannot alter or override the tariff order passed by the State Commission.
- (l) that M/s Tata Tele Services challenged the validity of the main order dated 8.9.2011 passed by the State Commission in Appeal No. 88 of 2012 before this Appellate Tribunal regarding change in their categorization and the Appeal was dismissed vide judgment dated 20.5.2013 by this Tribunal. The similar petition being Petition No. 319/2012 as regards to the applicability of tariff for BTS Towers filed by M/s Tata Tele Services was also disposed of by the common impugned order dated 11.12.2012.

- (m) that, in the order dated 8.9.2011 issued by the Discoms – Respondent No.2 clarified it as being part of the Telephone Exchange. In the year 2011, the State Commission by retaining the same classification only ordered that BTS Towers may now be billed under non-domestic service category.

7. The following issues require our consideration in the instant Appeal:-
- A. whether the BTS Towers of mobile telephone operators are subject to the same tariff as that of “Telephone/Mobile Exchanges/Switches” including attached offices?
 - B. whether BTS Towers are in a separate category of tariff under the Tariff Order dated 8.9.2011 of the learned State Commission?
 - C. whether BTS Towers can be simply equated with mobile switches/exchanges without considering the nature of the BTS Towers?
 - D. whether the State Commission was justified in holding that there was no non-compliance of the applicable tariff categorization and levy of tariff by the Respondent No. 2 in charging Non-Domestic tariff to the BTS Towers of the Appellant?

8. Issue-wise considerations are as follows:

8.1 **ISSUE NO. A, B & C**

8.1.1 Since, issues nos. A, B & C are interconnected, we are taking them and deciding them together.

8.1.2 The main contention of the Appellant-petitioner that since in the applicability clause of non-domestic service schedule in Part-II of Tariff for Supply of Electricity – 2011 ordered by the Respondent No.2, there was no mention of the BTS towers, it clearly indicated that BTS towers of the Appellant were not intended to be included in the non-domestic service category and BTS towers were preferred to be kept under its then existing

mixed load category, cannot be countenanced because of the following reasons:

- (a) that the impugned order dated 11.12.2012 clearly discloses that prior to the State Commission's Order dated 31.8.2007, the private DISCOM operators were subject to tariff of NDS category whereas Govt. agencies (BSNL/MTNL) were in Mixed Load category except their exclusive offices. The distinction between private telecom operators and Govt. entities (BSNL/MTNL) in respect of tariff was done away with by the learned State Commission's order dated 31.8.2007 and the Commission then directed the licensee to amend the tariff schedule accordingly. The Discoms, in pursuance to the learned State Commission's order dated 31.8.2007, amended the tariff schedule vide order dated 24.9.2007 and the Mixed Load tariff schedule for Radio/TV Stations and their transmitters, all telephone exchange/switches, BTS towers including attached offices was revised. The BTS towers continued to be in the same category as that of telephone/mobile exchange/switches, including attached offices and BTS towers earlier also were being subjected to the same tariff as applicable to telephone/mobile exchange/switches. The words used in tariff classification in the State Commission's order dated 8.9.2011 are similar to that of Commission's order dated 31.8.2007. After the learned State Commission's order dated 31.8.2007, the BTS towers moved from non-domestic service category to mixed load category though nothing was mentioned in the State Commission's tariff order dated 31.8.2007 in respect of the BTS towers.
- (b) that since, the State Commission, in any previous tariff orders, has not mentioned BTS tower as a separate class or category, the Distribution Licensee namely, the Respondent No.2, had no power to add or delete anything in its tariff schedule published after the State Commission's tariff order. If the insertion in the amended tariff schedule of the Discoms is against the tariff order of the

State Commission, the same can legally not be given any effect. Since the State Commission has never mentioned BTS tower as a separate category in any of the previous tariff orders and the Appellant has been taken the benefit thereof during the previous period, it is not open to the Appellant to raise the said point. It is clearly evident from the evidence/material on record and also from the impugned order that prior to the tariff order dated 17.12.2004 passed by the learned State Commission, the non-domestic service category tariff was applicable both to mobile telephone exchanges or private telecom operators as well as BSNL/MTNL (Government entities) without any distinction. It was for the first time that the State Commission vide Tariff Order dated 17.12.2004, shifted the BSNL's exchanges/switches including attached offices to mixed load category from non-domestic category, whereas, their offices were continued under non-domestic service category. Thus, by the Tariff order dated 17.12.2004, the private telecom service providers continued to be subjected to tariff of non-domestic service category (except exclusive offices which continued in non-domestic service category).

- (c) that the learned State Commission vide next Tariff Order dated 31.8.2007, placed all the telecom operators, without any distinction of ownership in the tariff category of mixed load. Thus, the Discoms vide their internal order dated 24.9.2007, in pursuance of Tariff Order dated 31.8.2007 of the State Commission, revised the mixed load category and at that time in the amended tariff schedule dated 24.9.2007 incorporated the words 'BTS Towers', despite the fact that the Tariff Order dated 31.8.2007 of the learned State Commission did not classify BTS Towers as a separate category.
- (d) that in the tariff petition for revision of tariff of FY 2011-12, Discoms including the Respondent No.2, proposed for inclusion of telephone/mobile exchange/ switches including attached offices

under non-domestic service category which proposal was accepted by the learned State Commission vide its order dated 8.9.2011. The learned State Commission, even in its Tariff Order dated 8.9.2011 did not specify any separate category for tariff of BTS Towers. Thus, it is clear established from record and is also manifestly clear that till the learned State Commission's Tariff Order dated 8.9.2011, the Appellant's BTS Towers availed the the tariff under the same category of telephone/mobile exchanges/ switches including the attached offices and availed the benefit of tariff under the mixed load category. Because of non-mentioning of BTS Towers as a separate category or class in any of the previous tariff orders passed by the learned State Commission and the Appellant taking the benefit of the absence of BTS Towers in the earlier tariff orders, the Appellant cannot make the claim now that BTS Towers have to be treated separately from telephone/mobile exchanges.

- (e) that prior to the State Commission's Tariff Order dated 31.8.2007, BTS Towers were being billed by the Discoms under non-domestic service category treating them as integral part of the category of telephone/mobile exchanges/switches including attached offices. Even though in the tariff order dated 31.8.2007, the BTS tower was not specifically mentioned under the category of telephone/mobile exchanges/switches including attached offices, the Appellant appears to have availed of the tariff under the mixed load ML/LT-7 category till the time the order dated 8.9.2011 was passed by the State Commission. This shows that the Appellant also considered the BTS towers as included in the aforesaid category of telephone/mobile exchanges/switches including attached offices. Thus, it is manifestly clear that till the time, the State Commission's order dated 8.9.2011 was passed, the Appellant's BTS towers availed the tariff under the same category of telephone/mobile exchanges/switches including attached offices and till the order dated 8.9.2011, the Appellant has availed

the tariff under mixed load category without any separate class or category having been assigned to BTS Towers at that point of time.

- (f) that the allegation regarding the fact that the Appellant particularly is being charged differently is incorrect. All service providers are paying according to non-domestic charge from the year 2011 and are being charged as per the State Commission's order and the impugned petition has correctly been dismissed by the impugned order. By the Order dated 31.8.2007 of the State Commission, the State Commission has only removed the distinction and ownership and therefore, taking benefit of the tariff order, the Appellant from 1.10.2007 were billed under the mixed load category and the State Commission has not classified anything as BTS Towers which were treated to be an integral part of telephone exchange and they were being given benefit and the said benefit have been availed by the Appellant till the period of 2011, when again the State Commission by retaining the same classification, vide order dated 8.9.2011, directed that whatever changes were made in the year 2007, they are reversed and the persons who were given benefit in the year 2007 were now to be billed again under the non-domestic service category.
- (g) that at the time of determination of tariff for FY 2011-12, the Respondent No.2 and other Distribution Companies had proposed to change the categorization of all telephone service operators, telephone/mobile exchanges/switches including attached offices from mixed load category to non-domestic category as telephone companies are run on commercial basis. The State Commission finding force in this proposal allowed change of category to non-domestic on the basis of the proposal of the Distribution Companies. As the BTS Towers form part of the same business this reason for change of category will also apply to BTS Towers.

8.1.3 After the above discussions, we come to the conclusion that the BTS Towers of the Appellant have rightly been subjected to the same tariff as applicable to telephone/mobile exchanges/switches including the attached offices and BTS Towers cannot be treated in a separate category of tariff. In the Tariff Order dated 8.9.2011 of the learned State Commission, the BTS Towers have rightly been equated with the mobile exchanges/switches by the learned State Commission after considering the nature and functioning of the BTS Towers. After careful analysis of the whole material on record, we agree to all the findings/observations made by the learned State Commission in the impugned order dated 11.12.2012 and we do not find any convincing or cogent reason to upset or reverse any of the findings recorded in the impugned order. **All these issues namely, Issue No. A, B & C, are decided against the Appellant.**

8.2 ISSUE NO. D

8.2.1 We have also considered the impugned order of the learned State Commission that in the year 2004, 2007 and even 2011, while determining the tariff, there was no classification as BTS Towers and thus, the appellant cannot claim any separate classification as BTS Towers and since it always being part of telephone exchange as worded by the State Commission, therefore BTS Towers cannot be classified as a separate category and thus there is no violation of any of the orders passed by the State Commission. Hence, the petitioner is not entitled to any relief under the provisions of section 142 read with Section 146 of the Electricity Act, 2003 and therefore, the appeal is worthy of dismissal. The facts on record fully justify the findings on this issue recorded in the impugned order and we are also of the view that there is no violation of any of the orders passed by the learned State Commission and there seems to be no reason to interfere with the findings recorded on this issue in the impugned order. **This issue is also decided against the Appellant.**

9. **SUMMARY OF FINDINGS**

9.1 The learned State Commission has not committed any illegality or perversity in holding that the BTS Towers of the Appellant are liable to be subjected to the same tariff as that of telephone/mobile exchanges/ switches as BTS Towers are an integral part of the mobile/telephone system. Since, the BTS Towers of the Appellant have never been specified in any particular class or category in any of the tariff order of the learned State Commission, the learned State Commission has rightly observed that the BTS Towers have never been allotted a separate category of tariff in the tariff order.

9.2 The facts and material on record clearly establish that there is no violation of any of the orders of the learned State Commission and the learned State Commission has rightly observed so in the impugned order dated 11.12.2012 and has rightly dismissed the petition/complaint of the Appellant moved under Section 142 read with Section 146 of the Electricity Act, 2003.

10. In view of the above discussions, we do not find any merit in the submissions made by the learned Counsel for the Appellant. All the aforementioned issues are decided against the Appellant as the findings recorded by the learned State Commission in the impugned order dated 11.12.2012 did not reflect any infirmity, illegality or inconsistency. There is no sufficient cause or any error on record to assail the said findings of the State Commission. Accordingly, this Appeal is dismissed since it has no merits and the impugned order dated 11.12.2012 is hereby affirmed. No order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 11TH DAY OF APRIL, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ **REPORTABLE/NON-REPORTABLE**

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