IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 337 OF 2016 & IA NO. 730 OF 2016 & IA NOS. 58, 711 & 951 OF 2017
APPEAL NO. 342 OF 2016 & IA NOS. 750 & 751 OF 2016 & IA NO. 199 OF 2018 & IA No. 1176 OF 2019
APPEAL NO. 28 OF 2017 & IA NOS. 28 & 30 OF 2017
APPEAL NO. 29 OF 2017 & IA NOS. 42 & 44 OF 2017
APPEAL NO. 30 OF 2017 & IA NOS. 755 & 756 OF 2016
APPEAL NO. 33 OF 2017 & IA NOS. 62, 64 & 589 OF 2017
APPEAL NO. 57 OF 2017 & IA NO. 102 OF 2017
APPEAL NO. 77 OF 2017 &
IA NOS. 207, 209 & 972 OF 2017, IA No.1259 OF 2018 & IA No. 357 of 2019
APPEAL NO. 221 OF 2017 & IA NOS. 456, 505 & 457 OF 2017
APPEAL NO. 353 OF 2017 & IA NOS. 881, 882 & 883 OF 2017
APPEAL NO. 370 OF 2017 & IA NOS. 980, 979 & 982 OF 2017
APPEAL NO. 394 OF 2017 & IA NOS. 1091, 1092 & 1093 OF 2017
APPEAL NO. 236 OF 2018 & IA NOS. 964, 963, 965 & 966 OF 2018
APPEAL NO. 237 OF 2018 & IA NOS. 1074, 1073, 1075 & 1076 OF 2018
AND
APPEAL NO. 299 OF 2018 & IA NOS. 1289, 1288 & 1290 OF 2018

Dated: 12th February, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

APPEAL NO. 337 OF 2016 & IA NO. 730 OF 2016 &
IA NOS. 58, 711 & 951 OF 2017

In the matters of:

Bharti Airtel Ltd.
The Authorised Signatory
Circle Office
Interface Building- 7,

7th Floor, Malad Link Road,
Malad (West), Mumbai- 400064

.... Appellant(s)

Versus

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

2. Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051 **....** Respondent(s)

Counsel for the Appellant(s)	:	Mr.Anand K. Ganesan Ms.Swapna Seshadri
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1 Mr. Ravi Prakash, Mr. Samir Malik for R-2

APPEAL NO. 342 OF 2016 &
IA NOS. 750 & 751 OF 2016, IA NO. 199 OF 2018 & IA No. 1176 of 2019

Tata Teleservices (Maharashtra) Ltd.
D-26, TTC Industrial Area,
MIDC Sanpada, P.O. Turbhe,
Navi Mumbai, Dist. Thane-400703 **....** Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission & Ors.
World Trade Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 400 005

2. Maharashtra State Electricity Distribution Company Ltd
Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051

.... Respondent(s)

: Mr. Ajay Kumar

Counsel for the Appellant(s)		Mr.Shailesh K. Kapoor Ms.Suruchi Thapar
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1 Mr. R.S. Prabhu Mr. Ravi Prakash, Mr. Samir Malik Mr.G. Sai Kumar, Mr. Krishna Singh & Ms. Somya Saikumar for R-2 Mr.Sharat Kapoor & Mr. K.R.Sasiprabhu for Impleader

APPEAL NO. 28 OF 2017 & IA NOS. 28 & 30 OF 2017

Idea Cellular Ltd.
5th Floor, Windsor, Off CST Road,
Near Vidyanagari, Kalina,
Santacruz(East), Mumbai- 400098 **....** Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission &Ors.
World Trade Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 400 005

2. Maharashtra State Electricity Distribution Company
Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051

3. Torrent Power Ltd.
Torrent House, Ashram Road, Ahmedabad,
Gujarat – 380009 **.....** Respondent(s)

Counsel for the Appellant(s)	:	Mr. Sudhir Makkar, Sr. Adv. Mr. Raghav Pandey, Mr. Shamik Bhatt & Mr. Mahesh Agarwal
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1 Mr. Ravi Prakash, Mr. Samir Malik, Mr.Varun Agarwal, Mr.Raheel Kohli

Mr. Nitish Gupta & Ms. Rimali Batra for R-2

APPEAL NO. 29 OF 2017 & IA NOS. 42 & 44 OF 2017

Vodafone India Ltd.
Peninsula Corporate Park, Ganpatrao Kadam Marg,
Lower Parel, Mumbai – 400013 **....** Appellant(s)

Versus

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

2. **Maharashtra State Electricity Distribution Company Ltd.**
Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051 **....** Respondent(s)

Counsel for the Appellant(s)	:	Mr. Raghav Pandey, Mr. Shamik Bhatt Mr. Mahesh Agarwal & Ms. Shally Bhasin
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1 Mr. Ravi Prakash, Mr. Samir Malik, Mr.Varun Agarwal, Mr.Raheel Kohli Mr. Nitish Gupta & Ms. Rimali Batra for R-2

APPEAL NO. 30 OF 2017 & IA NOS. 755 & 756 OF 2016 & 1312 OF 2019

1. **Unitech Wireless (West) Pvt. Ltd. & Anr.**
The Authorised Signatory
Unit No. 302, World Trade Tower,
Barakhamba Lane, Connaught Place
New Delhi - 110001

2. **Bharti Airtel Ltd.**
The Authorised Signatory

Circle Office Interface Building- 7,
7th Floor, Malad Link Road,
Malad (West) Mumbai- 400064 ....Appellant(s)

Versus

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

2. Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051 ....Respondent(s)

Counsel for the Appellant(s) : Mr. Shailesh K.Kapoor, Mr. Ajay Kumar
Ms. Suruchi Thapar

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms.Stuti Krishn, Mr. Raunak Jain for R-1
Mr. Ravi Prakash,& Mr. Samir Malik for R-2

APPEAL NO. 33 OF 2017 & IA NOS. 62, 64 & 589 OF 2017

Vodafone Mobile Services Ltd.
C-48, Okhla Industrial Area Phase-II,
New Delhi- 110020 **....** Appellant(s)

Versus

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

2. Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Raghav Pandey, Mr. Shamik Bhatt
Mr. Mahesh Agarwal & Ms. Shally Bhasin

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan

Ms.Stuti Krishn, Mr. Raunak Jain for R-1

Mr. Ravi Prakash, Mr. Samir Malik,
Mr.Raheel Kohli
Mr. Nitish Gupta & Ms. Rimali Batra for R-2

APPEAL NO. 57 OF 2017 & IA NO. 102 OF 2017

1. Reliance Communication Ltd. & Anr.
"H" Block, Dhirubhai Ambani Knowledge City,
Koparkhairne, Navi Mumbai- 400710

2. Reliance Infratel Limited
"H" Block, Dhirubhai Ambani Knowledge City,
Koparkhairne, Navi Mumbai- 400710 .... Appellant(s)

Versus

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

2. Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Hasan Murtaza & Ms. Divya Anand

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms.Stuti Krishn, Mr. Raunak Jain for R-1
Mr. Ravi Prakash, Mr.Raheel Kohli
Mr. Nitish Gupta & Ms. Rimali Batra for R-2

APPEAL NO. 77 OF 2017 & IA NOS. 207, 209 & 972 OF 2017, 1259 OF 2018 & 357 of 2019

1. ATC Telecom Infrastructure Pvt. Ltd. &Ors. (ATC TIPL)
Plot 14-A, Sector 18,
Maruti Industrial Complex,
Gurgaon – 122015, Haryana

2. ATC Tower Company of India Ltd. (ATC TCI)
Unit No. 303-304, Mayfair Towers,
Pune-Mumbai Road, Wakdewadi,
Shivajinagar, Pune- 411005

3. ATC India Tower Corporation Pvt. Ltd. (ATC ITC)
Unit No. 303-304, Mayfair Towers,
Pune-Mumbai Road, Wakdewadi,
Shivajinagar, Pune- 411005

4. ATC Telecom Tower Corporation Pvt. Ltd. (ATC TTC)
Unit No. 303-304, Mayfair Towers,
Pune-Mumbai Road,Wakdewadi,
Shivajinagar, Pune-411005 **...** Appellant(s)

Versus

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

2. The Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Anant Kanhekar Marg,
Plot No G-9, Bandra (East)
Mumbai-400051 …Respondent(s)

Counsel for the Appellant(s)	:	Mr. Ajay Kumar & Mr. Shailesh K.Kapoor
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1
		Mr. Ravi Prakash, Mr.Raheel Kohli Mr. Nitish Gupta & Ms. Rimali Batra for R-2

APPEAL NO. 221 OF 2017 & IA NOS. 456, 505 & 457 OF 2017

Aircel Limited
Opus Centre, 47 Central Road,

Opposite Tunga Paradise MIDC, ... Appellant(s)
Andheri East, Mumbai- 400 093

Versus

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

2.The Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Anant Kanhekar Marg,
Plot No G-9, Bandra (East)
Mumbai-400051 ... Respondent(s)

Counsel for the Appellant(s)	:	Mr. Raghav Pandey, Mr. Shamik Bhatt Mr. Mahesh Agarwal & Ms. Shally Bhasin
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1 Mr. Ravi Prakash, Mr.Raheel Kohli Mr. Nitish Gupta & Ms. Rimali Batra for R-2

APPEAL NO. 353 OF 2017 & IA NOS. 881, 882 & 883 OF 2017

1. GTL Infrastructure Ltd. & Anr.
3rd Floor, "Global Vision", ESII,
MIDC TTC Industrial Area,
Mahape, Navi Mumbai 400 710, Maharashtra

2. Chennai Network Infrastructure
The Assistant Manager
Door No. 34/1 DL, New No. 403/L, Samsom Tower,
7th Floor, Pantheon Road, Egmore, Tamilnadu
Chennai – 600008, ... Appellant(s)

Versus

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

2. The Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Anant Kanhekar Marg,
Plot No G-9, Bandra (East) **…**Respondent(s)
Mumbai-400051

Counsel for the Appellant(s)	:	Mr.Sandeep Deshmukh Mr.Vasim Siddiqui
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1 Ms.Rimali Batra & Ms.Shruti Awasti for R-2

APPEAL NO. 370 OF 2017 & IA NOS. 980, 979 & 982 OF 2017

Tower Vision India Pvt. Ltd.
Plot No. 356, UdyogVihar,
Phase-IV, Gurgaon-122015 **..** Appellant(s)

Versus

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

2.The Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Anant Kanhekar Marg,
Plot No G-9, Bandra (East)
Mumbai-400051 **…**Respondent(s)

Counsel for the Appellant(s)	:	Mr. Ajay Kumar & Mr. Shailesh K.Kapoor
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn, Mr. Raunak Jain for R-1 Ms.Rimali Batra & Ms.Shruti Awasti for R-2

APPEAL NO. 394 OF 2017 & IA NOS. 1091, 1092 & 1093 OF 2017

Indus Towers Limited
Bharti Crescent, 1 Nelson Mandela Road,
Vasant Kunj, Phase- II New Delhi- 110070 **…** Appellant(s)

Versus

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

2. **The Maharashtra State Electricity Distribution Company Ltd.**
   Prakashgad, Anant Kanhekar Marg,
   Plot No G-9, Bandra (East)
   Mumbai-400051 Respondent(s)

Counsel for the Appellant(s) : Mr. Raghav Pandey, Mr. Shamik Bhatt
Mr. Mahesh Agarwal & Ms. Shally Bhasin

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms.Stuti Krishn, Mr. Raunak Jain for R-1
Ms.Rimali Batra & Ms.Shruti Awasti for R-2

APPEAL NO. 236 OF 2018 & IA NOS. 964, 963, 965 & 966 OF 2018

M/s ASCEND Telecom Infrastructure Pvt. Ltd.
House No. 37-2, Plot No. 332, Mani Mansion,
Defense Colony Sainikapuri, Secunderabad- 500094 **…** Appellant(s)

Versus

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

2. **The Maharashtra State Electricity Distribution Company Ltd.**
   Prakashgad, Anant Kanhekar Marg,
   Plot No G-9, Bandra (East)
   Mumbai-400051 Respondent(s)

Counsel for the Appellant(s) : Ms.Neha Bhatia

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms.Stuti Krishn, Mr. Raunak Jain for R-1

Mr.Raheel Kohli , Mr. Varun Agarwal, Mr. Nitish Gupta, Ms.Rimali Batra & Ms.Shruti Awasti for R-2

APPEAL NO. 237 OF 2018 & IA NOS. 1074, 1073, 1075 & 1076 OF 2018

M/s Unity Telecom Infrastructure Ltd.
No. 46th 4th Floor, Free Press House
Free Press Journal Marg, Nariman Point ... Appellant(s)
Maharashtra, Mumbai

Versus

1. **Maharashtra Electricity Regulatory Commission**
   World Trade Centre No.1, 13thFloor,
   Cuffe Parade, Colaba,
   Mumbai – 400 005

2. **The Maharashtra State Electricity Distribution Company Ltd.**
   Prakashgad, Anant Kanhekar Marg,
   Plot No G-9, Bandra (East)
   Mumbai-400051

... Respondent(s)

Counsel for the Appellant(s) : Mr. S. K. Nanda

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms.Stuti Krishn, Mr. Raunak Jain for R-1
Ms.Rimali Batra & for R-2

APPEAL NO. 299 OF 2018 & IA NOS. 1289, 1288 & 1290 OF 2018

Airkonnect Networks Pvt. Ltd.
G4, Gera Plaza, Bund Garden Road
Pune-411 00 1 ... Appellant(s)

Versus

1. **Maharashtra Electricity Regulatory Commission**
   World Trade Centre No.1, 13thFloor,
   Cuffe Parade, Colaba,
   Mumbai – 400 005

2. The Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Anant Kanhekar Marg,
Plot No G-9, Bandra (East)
Mumbai-400051

... Respondent(s)

Counsel for the Appellant(s)	:	Ms.Kiran Singh Mr.Amit Nagar
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms.Stuti Krishn for R-1 Ms.Rimali Batra R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. These Appellants herein questioning the legality, validity and propriety of the impugned order dated 03.11.2016 passed by the Respondent No. l (hereinafter referred to as the 'State Commission') in Case No. 48 of 2016 relating to determination of Final True up for Financial Year 2014-15, Provisional True up for Financial Year 2015-16 and Multi- Year Tariff Determination for the 3'd Control Period Financial Year 2016-17 to Financial Year 2019-20. The State Commission has, vide the impugned order, inter alia, reclassified the industries using power for mobile/telecommunication towers, etc., who were being charged under Industrial category since 2004, into Commercial category, unless the same are specifically included in the Information Technology (hereinafter referred to as 'IT') and Information Technology Enabled

Services (hereinafter referred to as '!TES') Policy of the Government of Maharashtra for coverage under the Industrial category.

2. Brief Facts of the case(s):

The brief facts of the case(s) are as follows:-

2.1 The Appellants in the batch of Appeals are incorporated under the provisions of the Companies Act, engaged in the business of telecommunications which provides voice and data services to end customers.

2.2 Mahrarashtra Electricity Regulatory Commission (Respondent Commission/ State Commission) is the Electricity Regulatory Commission for the State of Maharashtra exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

2.3 Other Respondents are the distribution licensees and transmission companies operating in the State of Maharashtra and are Government of Maharashtra undertakings.

3. QUESTIONS OF LAW

The following questions of law have been raised in the batch of appeals:-

3.1 Whether the State Commission is justified in changing the categorisation of the Mobile Towers from Industrial Category to Commercial Category for towers not falling within Government of Maharashtra Policy on IT/ITES?

3.2 Whether the registration certificate under Government of Maharashtra Policy is a relevant consideration and criteria for categorization of mobile towers?

3.3 Whether the nature of activity of mobile towers would change to commercial activity for the only reason of not being registered under the Government of Maharashtra Policy on IT/ITES?

4 All the above Appeals arise from the Common Order dated 03.11.2016 (Impugned Order) passed by the Maharashtra Electricity Regulatory Commission in Case No. 48 of 2016 and the issues involved in all these appeals are common in nature, therefore, we decide to adjudicate the batch of appeals by a common judgment.

5. <u>Learned Counsel, Mr. Anand K. Ganesan appearing for the Appellant has made following arguments/ submissions in Appeal No. 337 of 2016 for our consideration:-</u>

5.1 In the Impugned order the State Commission has for the first time purported to clarify and hold since the year 2008, the Mobile and Broadcasting Towers of the Telecommunication will fall under the Industrial Category only if the same is covered under the Government of Maharashtra Policy on IP/ITEL and not otherwise.

5.2 The above has been done abruptly and contrary to the fact that the State Commission had for more than 10 years consistently held in the Tariff orders decided that Mobile and Broadcasting Towers is to be

classified under the Industrial Category for the purpose of retail supply tariff specifically stating that the State Commission will not get into the classification of such towers by the Government of Maharashtra Policy. Contrary to the above the State Commission has purported to clarify that only if the Mobile/Broadcasting Towers are registered under the Government of Maharashtra Policy on IT/ITES would they be covered under the Industrial Category.

5.3 The Appellant is engaged in the business of Telecommunication providing voice and data service in 23 circles in India. Such services are provided by the Appellant throughout India through Mobile Towers/Cell Sites which broadly comprise of Antenna Based Trans Receiver Station, Feeder Cable and Microwave Radio Equipment besides land, tower shelter, air conditioning equipment, diesel generator, battery electrical supply equipment etc. The Appellant's business is a public utility service.

5.4 The Appellant and other similarly placed entities were consistently categorised under the Industrial Category in the following orders:

(a) Tariff Order dated 17/08/2009 in Case No. 116 of 2008 relating to the year 2009-10. The relevant extract of the said Order is reproduced below:

> "*As regards MSEDCL's proposal to classify certain telecom towers, etc., under commercial category, irrespective of whether they were covered under the IT & ITES Policy of the Government of Maharashtra, no rationale has been submitted by MSEDCL for this specific proposal. The Commission had consciously included IT and IT enabled Services (IT & ITES) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT & ITES category continues to be charged under industrial tariffs. In the existing*

Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission has included IT & ITES category under industrial category. ***Hence, the Commission does not agree with MSEDCL's proposal in this regard and rules that IT &ITeS will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT &ITeS***."

(emphasis supplied)

(b) Order dated 12/10/2010 in which the State Commission reiterated its views in tariff order dated 07/08/2009 regarding categorization of mobile towers under the Industrial Category held as under:

"The Commission had consciously included IT and IT enabled Services (IT &ITeS) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT &ITeS category continues to be charged under industrial tariffs. In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission has included IT &ITeS category under industrial, as reproduced below:

"5. LT V: LT- Industrial Applicability,

Applicable for industrial use at LT voltage, excluding Agricultural Pumping Loads. This Tariff shall also be applicable to IT Industry & IT enabled services (as defined in the Government of Maharashtra policy)."

"1. HT I : HT- Industry Applicability

This category includes consumers taking 3-phase electricity supply at High Voltage for industrial purpose. This Tariff shall also be applicable to IT Industry & IT enabled services (as defined in the Government of Maharashtra policy)."

In view of the above, the Commission rules that IT &ITeS will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT &ITeS."

(emphasis supplied)

(c) Tariff Order dated 16/09/2012, the State Commission categorised the Mobile Towers under HT-II Commercial Category instead of

HT-I Industrial Category. This Order was challenged before this Tribunal. By order datted 7.11.2012 passed in Appeal Nos 234, 235 etc. of 2012, the Order of the State Commission was set aside with the following decision:

> *10. As indicated by the Learned Counsel for the Appellants, Mobile Towers, etc., prior to passing of the impugned order were categorized under the Industrial category and in fact the State Commission in the tariff order for the FY 2009-10, rejected the specific proposal of the distribution licensee for change in category from Industrial to Commercial.*
>
> *11. Despite this, the impugned order dated 16.8.2012 has been passed by the State Commission changing the consumer category of the Appellants into Commercial without any discussion or reasonings and without hearing the Appellants. Thus, we notice that the principles of natural justice have been violated in the present case.*
>
> *12. We, therefore, deem it fit to set aside the portion of impugned order dated 16.8.2012 regarding re-categorisation of Mobile Towers, Micro Wave Towers, Satellite Antennas used for communication activity to HT/LT Commercial Category from HT/LT Industrial Category prevailing prior to the date of the impugned order. Accordingly the same is set aside.*
>
> *13. However, the distribution licensee (R-2) is given liberty to file a fresh petition containing the proposal regarding re-categorisation of the Appellants in appropriate tariff category before the State Commission which in turn shall consider the same and pass the appropriate orders in accordance with law after hearing all the concerned parties.*

(d) Subsequent to the above decision dated 07.11.2012 of the Tribunal, the distribution licensee issued a circular dated 15.12.2012 placing the Mobile Towers under the Industrial Category; Further, there was no proposal of the distribution licensee for change in categorisation from Industrial to commercial.

(e) Order dated 26.6.2015 passed by the State Commission in regard to MYT 2013-14 to 2015-16, inter alia, holding as under:

> *24.4 The Commission, in its Order in Case No. 116 of 2008 dated August 17, 2009, had discussed the categorisation of Mobile Towers in detail as follows:*
>
> *"As regards MSEDCL's proposal to classify certain telecom towers, etc., under commercial category, irrespective of whether they were covered under the IT & ITES Policy of the Government of Maharashtra, no rationale has been submitted by MSEDCL for this specific proposal. The Commission had consciously included IT and IT enabled Services (IT & ITES) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT MYT Order of MSEDCL for the period from FY 2013-14 to FY 2015-16 Case No. 121 of 2014 Page 247 of 381 & ITES category continues to be charged under industrial tariffs. In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission has included IT & ITES category under industrial category. Hence, the Commission does not agree with MSEDCL's proposal in this regard and rules that IT &ITeS will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT &ITeS."*
>
> ***The Commission is of the view that the rationale and ruling of its earlier Order in Case No. 116 of 2008 should continue to apply. In other words, the Industrial tariff will apply to Mobile Towers or other activities cited by MSEDCL only if they are covered as IT/ ITES and the provisions of GoM's Policy apply to them.***
>
> ***(Emphasis Supplied)***

5.5 Even under the above order, the Mobile/Broadcasting towers were classified only as Industry and the classification was not changed to Commercial. The above order was understood and implemented to maintain the same position as was prevalent in the past. The monthly bills raised by the distribution licensee placed the Mobile/Broadcasting towers only under the Industrial Category without going into the issue

whether they are covered by the Government of Maharashtra Policy or not.

RE: THE STATE COMMISSION HAS ERRED IN CHANGING THE CLASSIFICATION WHICH WAS PREVALENT OVER THE YEARS

5.6 Till the passing of the impugned order, the distribution licensee had duly understood and implemented the tariff orders as categorising the Mobile and broadcasting towers under the Industrial category. There was no doubt whatsoever on the interpretation and application of the tariff orders over.

5.7 It is not open to the licensee or the State Commission to now claim that the interpretation and application of the tariff orders prior to the impugned order are different. Reference in this regard may be hand to the decision of the Hon'ble Supreme Court in the case of Indian Metals and Ferro Alloys v. Collector of Central Excise, 1991 Supp (1) SCC 125, (para 14 and 15), which reads as under:

> ***"14. However, even assuming that there could have been some doubt as to the intention of the legislation in this regard, the matter is placed beyond all doubt by the revenue's own consistent interpretation of the item over the years.*** *It has been pointed out that prior to March 1, 1975, residuary Item 68 was not in the schedule. If the revenue's contention that these poles are not pipes and tubes is correct then they could not have been brought to duty at all before March 1, 1975. But the fact is that transmission poles have been brought to duty between 1962 to 1975, and that could only have been under Item 26-AA (for there was no residuary item then). This is indeed proved by the fact that this very assessee was thus assessed initially and also by the issue of notifications of exemption from time to time which proceed on the footing that these poles were assessable to duty under Item 26-AA but were entitled to an exemption if certain conditions were fulfilled. Indeed, the assessee also applied for and obtained relief under one of those exemption notifications since 1964.*

> ***15.*** *It is contended on behalf of the department that this earlier view of the department may be wrong and that it is open to the department to contend now that the poles really do not fall under Item 26-AA. In any event, it was submitted since the poles were exempted from duty under one notification or other, it was not very material prior to March 1, 1975 to specifically clarify whether the poles would fall under Item 26-AA or not.* ***This argument proceeds on a misapprehension. The revenue is not being precluded from putting forward the present contention on grounds of estoppel. The practice of the department in assessing the poles to duty (except in cases where they were exempt as the condition in the exemption notifications were fulfilled) and the issue of notifications from time to time (the first of which was almost contemporaneous with the insertion of Item 26-AA) are being relied upon on the doctrine of contemporaneoexpositio to remove any possible ambiguity in the understanding of the language of the relevant statutory instrument:*** *see K.P. Varghese v. TTO [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : (1982) 1 SCR 629] , State of Tamil Nadu v. Mahi Traders[(1989) 1 SCC 724 : 1989 SCC (Tax) 190 : (1989) 1 SCR 445] , CCE v. Andhra Sugar Ltd.[1989 Supp (1) SCC 144 : 1989 SCC (Tax) 162] and Collector of Central Excise v. Parle Exports P. Ltd. [(1989) 1 SCC 345 : 1989 SCC (Tax) 84] Applying the principle of these decisions, that a contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument, we think the assessee's contention that its products fall within the purview of Item 26-AA should be upheld."*

5.8 Thus, the State Commission has consciously with full application of mind and consistently categorised the Mobile Towers and Broadcasting Towers under HT-I Industrial Category for the purpose of retail supply tariff to be charged from the Appellant under the Tariff Orders issued by the State Commission. The above categorisation of Mobile/Broadcasting Towers was on the clear premise that the classification under the Electricity Act is not governed by the classification adopted by the State Government under its Policy regarding incentivisation of specific industries and such classification by the State Government is not a determinative test for tariff classification under the Electricity Act.

5.9 The State Government policy on IT/ITES does not deal with electricity classification at all, neither can the State Government deal with the issue of electricity classification.

5.10 The change in the stand taken by the State Commission after consistently holding to the contrary from 2008, is hit by the principles of stare decisis. In number of decisions of the Hon'ble Supreme Court, it has been held that a Judge made change in law rarely takes place when the law is clearly settled.

5.11 In the case of **Shankar Raju v Union of India, (2011) 2 SCC 132 9(Para 10 to 17)**it has been held that "*the doctrine of stare decides is expressed in the maxim stare decisis et non quieta movere, which means "to stand by decisions and not to disturb what is settled".....The underlying logic of this doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible*"

5.12 It has been held by the Hon'ble Supreme Court that a long-standing view should ordinarily be adhered to and not disturbed. In **Rajarai Pandey v Sant Prasad Tiwari,** (1973) 2 SCC 35 ((Para 10), the Hon'ble Supreme Court held that a decision of long standing on the basis of which many persons will in the course of time have arranged their affairs should not likely be disturbed by a superior court not strictly bound itself by the decision. A different view would not only introduce an element of uncertainty and confusion, it would also have the effect of

unsettled transaction which might have been entered into in faith of these decisions.

5.13 In **Mishrilal v Virendranath (1999) 4 SCC 11**(Para 16) it was held that "*Taking recourse to the doctrine would be an imperative necessity to avoid uncertainty and confusion. The basic feature of law is its certainty and in the event of there being uncertainty as regards the state of law — the society would be in utter confusion the resultant effect of which would bring about a situation of chaos — a situation which ought always to be avoided. "*

5.14 Reference may also be made to the cases of **Union of India v Azadi BachaoAndolan (2004) 10 SCC 1**, para 33and 34; (b)**State of Gujarat v Mirzapur Moti Kuresh**(2005) 8 SCC 534 Para 111**;** and **Maganlal Chaganlal v Municipal Corporation of Greater Bombay (1974) 2 SCC 402**(**Para 22**).

5.15 In terms of the above, when the State Commission has since the year 2008 taken a conscious view that the Mobile/Broadcasting Towers would be placed under the Industrial category without going into whether they would fall under the Government of Maharashtra Policy or not, the said position has held forth for a very long time namely more than 10 years and there is no change whatsoever in the factual or legal position, the above principle of law applies squarely.

5.16 The scope, purpose and objective of the classification by the State Government under the IT/ITES Policy of the State Government is distinct and separate as compared to the tariff classification under the

Electricity Act for the purpose of retail tariff to be undertaken by the State Commission. In the earlier years, there was no proposal even for classification of Mobile/Broadcasting Towers under a category other than the HT Industrial.

5.17 It is also a well settled principle that a consistent practice followed should not be changed. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in **Indian Metal and Ferro Alloys Ltd v Collector of Central Excise 1991 SUPP (1) SCC 125.**

5.18 This has also been reiterated by the Tribunal in the case of **Spencers' Retail Limited v MERC, Appeal No. 146 of 2007** decided on 19.12.2007, that regulatory certainty is to be maintained and there should not be any increase in cross-subsidy in the system.

5.19 Even in cases of tax where the principle of res judicata does not apply, a view taken over the years, in the absence of any change in the factual or legal position, has been held to be binding which cannot be changed in the future. In this regard, the Hon'ble Supreme Court in the case of **Radhasoami Satsang, v. Commissioner of Income Tax, (1992) 1 SCC 659** has held as under:

> ***"16.*** *We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*

> ***17.*** *On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter — and if there was no change it was in support of the assessee — we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under Sections 11 and 12 of the Income Tax Act of 1961."*

5.20 The above applies on all fours to the present case. When the State Commission has given a dispensation for all these years and fully accepted by the licensee, there being no change in the factual or legal position, there was no occasion for the State Commission to hold to the contrary.

5.21 Interestingly, the contention of the State Commission and MSEDCL in the present appeal are contradictory. It is the contention of the State Commission that there has been no change in the position since the year 2008 and it is MSEDCL which has erred in levy of industrial tariff over these years. This contention is also erroneous for the following reasons:

(a) The clear wordings of the Orders since 2008 is that telecom towers are under industrial category, irrespective of whether they are covered by the Government of Maharashtra Policy;

(b) In the year 2012, when the category was sought to be changed to commercial, the position stated before the Tribunal was that the telecom towers are industrial earlier. There was no contention that

only the towers registered under the Government of Maharashtra Policy would be industrial.

(c) MSEDCL has specifically proposed classification to commercial earlier, which was rejected.

5.22 As against the contention of the State Commission, MSEDCL has sought to contend that there should be a shift from the previous decisions and the telecom towers should not be classified as commercial.

RE: STATE COMMISSION BY CHANGE OF CLASSIFICATION CANNOT ACHIEVE WHAT CANNOT BE DONE DIRECTLY

5.23 The Telecom Towers were classified under the Industrial category and charged the tariff for the industrial category, prior to the passing of the impugned order. The industrial category is a subsidizing category and pays tariff higher than the cost of supply.

5.24 The mandate under the Electricity Act in Section 42(2) – Proviso is to reduce the cross-subsidy over the years. The National Tariff Policy also provides that the cross-subsidies should not be increased, but gradually reduced. Therefore, the State Commission could not have increase the cross-subsidy and tariff for the industrial category of consumers, as this would be hit by the principles and provisions of the Electricity Act.

5.25 To get over the above restriction, the State Commission has changed the category of the telecom towers, thereby increasing the tariff payable by the telecom towers and consequently the cross-subsidy contribution.

This has been done indirectly by change of classification, which could not have been done directly by increasing the tariff.

5.26 The change in classification by the State Commission is hit by the basic principle of law that what cannot be done directly cannot be sought to be done indirectly. There is no other rationale for change in classification and increase in tariff at this stage, except to increase the tariff for the telecom towers, which is erroneous.

RE: CLASSIFICATION UNDER SECTION 62(3) OF THE ELECTRICITY ACT, 2003

5.27 The classification of electricity consumers is provided for in Section 62(3) of the Electricity Act, which 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."*

5.28 Firstly, Section 62(3) of the Electricity Act exhaustively provides for the criteria for classification of consumers. There is no residuary criteria of classification on factors as deemed fit by the State Commission, but the classification can only be based on the specified criteria. This is unlike Section 49 of the Electricity (Supply) Act, 1948 which provided for a residuary provision for classification of consumers.

5.29 Therefore, under the Electricity Act, classification of consumers such as new industries and old industries is not permissible. The contention of

the Respondents that the nature and purpose of supply would cover the classification in question is misconceived.

5.30 Irrespective of whether there is registration under the State Policy, the nature of the activity of the telecom towers remains the same. There is no change either way.

5.31 Similarly, the purpose for which the supply is required is also the same, namely, telecom towers. The registration under the State Policy is also irrelevant for considering the purpose of supply.

5.32 Therefore, the criteria in the impugned order that telecom towers registered under the State Government policy would be classified as Industry and other telecom towers would be classified as commercial is contrary to Section 62(3) of the Electricity Act and is bad in law. The nature of activity and purpose of supply being the same, all the telecom towers are entitled to the industrial categorisation, as earlier.

5.33 It is well settled that there has to be a rationale for classification under Section 62 (3) of the Electricity Act, 2003. This Tribunal has set aside the categorisation of Mumbai Airport under HT – II Commercial Category considering the nature of service rendered by the Airport (**Reference Mumbai International Airport Pvt Limited v MERC Appeal No. 195 of 2009 decided on 31.5.2009).** Similarly, hospitals have been held to be not falling under HT Commercial Category (**Association of Hospitals v MERC Appeal No. 110/2009 decided on 20.10.2011).**

5.34 In the present case, there has been no change either in the factual or legal position from 2009 till date when the electricity classification for the Mobile/Broadcasting Towers has been on Industrial basis.

RE: BASIS OF INDUSTRIAL OR COMMERCIAL CATEGORISATION – SECTION 62(3)

5.35 The Section 62(3) does not provide for industrial or commercial categorisation in itself. The decision on which consumers would fall within industrial or commercial classification is a judicious discretion to be exercised by the State Commission.

5.36 Firstly, it is for the State Commission to create categories with the nomenclature of industry, commercial, mixed load consumers, non-residential consumers, public utility consumers etc. The nature of the consumers who fall within each particular category is to be specified by the State Commission, subject to the condition that similarly placed consumers ought to fall within the same category.

5.37 For example, the basis of classification of consumers in industrial category or commercial category in one state could be based on manufacture. If the process involved amounts to manufacture, the consumers could be classified as industry, otherwise as commercial.

5.38 However, other State Commissions may have different basis for classification of consumers as industrial or commercial. Like in the present case, the basis of classification by the State Commission of Industrial consumers is not on manufacture.

5.39 The reliance by the Respondents on the decision in the case of *BSNL Ltd* is misconceived. The issue that was raised was whether telecom activity amounts to manufacture or service, which was decided to be not manufacture. However, the issue whether would be Industry or not is not dependent upon whether the activity amounts to manufacture. The decision in the said case was only on the touchstone of manufacture, which does not arise in the present case.

5.40 The Respondents have further contended the Tribunal has previously held Telecom Towers to be "*commercial*" in two different Judgments. In this regard, the reliance on these Judgments by the Respondents is misplaced. The Judgments relied on by the Respondents were from different State Commissions, wherein the criteria for Industrial Tariff was Manufacture.

5.41 While certain State Commission have made "Manufacture" as the pre-requisite for being Industrial, the Maharashtra State Commission does not adhere to this requirement. The activity being manufacture is not a precondition for the applicability of the industrial tariff.

5.42 In fact, in the impugned order, the State Commission has categorized many activities such as cold storages, LPG/CNG bottling plants etc. to be industrial, which are clearly not manufacturing activities.

5.43 Further, in the impugned order, the State Commission has itself recognised that the telecom sector amounts to industrial activity. It is not that all Mobile/Broadcasting Towers are categorised as commercial. The

only criteria for the differentiation by the State Commission is the registration under the IT/ITES Policy of the Government of Maharashtra. This is misconceived for the purposes of electricity classification, for the following reasons:

(a) The classification is based on the nature of the activity and the purpose for use of the electricity, which is not affected by registration under the Government of Maharashtra Policy.

(b) The nature of the activity, whether registered under the Government of Maharashtra Policy or not continues to be the same. It is this nature of activity that governs the classification under Section 62(3) of the Electricity Act.

5.44 The **Appellant is registered under the IT/ITES Policy**. Sample certificates have been produced with the rejoinder of the Appellant. What the distribution licensee is now insisting is a separate certificate for each of the 18000 odd towers of the Appellant and in the absence of certificate for each tower, the classification would be on commercial basis. This principle is misconceived and is liable to be set aside.

5.45 Without prejudice to the submissions made hereinabove even one certificate of registration under the IT/ITES Policy is sufficient for the classification of Mobile/Broadcasting Towers as Industrial category. It will be preposterous to either require each tower to obtain registration so as to get classified as industrial category for the purpose of electricity Tariff or to say that one tower which is registered shall be classified and another Tower of the same company which is not registered will fall

under different category. What is important is that there is recognition under the Government of Maharashtra Policy also that Mobile/Broadcasting Towers is classifiable as Industrial category.

5.46 In view of the above, the primary contention of MSEDCL that Telecom Towers do not fall under IT & ITES services does not sustain. MSEDCL has sought to rely on certain definitions of IT Hardware and IT Software under the 2015 IT & ITES Policy to argue that Telecom Towers do not fall under IT/ITES, but only perform the function of transporters of information. The contention in this regard is completely misconceived. Not only is the 2015 IT/ITES Policy of the Govt. of Maharashtra not relevant for the purpose of this Appeal, the reliance on the 2015 Policy is also contrary to the submission of the submission of the Respondents that the same view has consistently been taken by the State Commission since 2008.

RE: TELECOM HAS INFRASTRUCTURE STATUS AND IS TO BE CONSIDERED AS INDUSTRY

5.47 Even independent of the previous decisions of the State Commission, the telecom sector cannot be termed to be commercial but has industrial status having been accorded infrastructure status.

5.48 All the decisions relied on by the Respondents, apart from being on a different basis of classification by the State Commission for industrial consumers, are prior to 2013. The Government of India has, since the year 2012 and 2013 given particular focus to the telecom sector and has given infrastructure industry status.

5.49 The mobile communication is the back bone of the economy and has been instrumental in the economic development of the country. This includes both for voice communication as well as data communication. The mobile and data tariffs in the country is the lowest in the world. This is primarily in view of the infrastructure status granted by the Government of India and considering the telecom industry as a primary sector for development in the country.

5.50 The legal provisions in this regard are as under:

(a) **DEPARTMENT OF TELECOMMUNICATIONS – ADVISORY GUIDELINES FOR STATE GOVERNMENTS FOR ISSUE OF CLEARANCE FOR INSTALLATION OF MOBILE TOWERS (Effective from 01.08.2013)**

> *"B. Action by State government/Local body*
> *……*
> ***III. Telecom towers have been give infrastructure status by Government of India vide gazette notification no. 81 dated 28.03.2012. All benefits, as applicable to infrastructure industry, should be extended. Electricity connection may be provided to BTS site on priority***

(b) **Ministry of Finance (Department of Economic Affairs) (Infrastructure Section) Notification dated 27/03/2012**

Harmonised Master List of infrastructure sub-sectors

……..

4.	*Communication*	• *Telecommunication (Fixed network)* • *Telecommunication towers*

5.51 The National Telecom Policy, 2012 notified by the Government of India, inter-alia, provides as under:

> "***III. OBJECTIVES***
>
> ***23. Recognize telecom as Infrastructure Sector to realize true potential of ICT for development."***

5.52 The National Telecom Policy of 2012 also recognises telecommunication for socio economic development of the country. The telecom sector is a public utility service under Section 22 A (b) of the Legal Services Authorities Act, 1987. Telecom services are essential services under Section 2 (a) (i) of the Essential Services Maintenance Act, 1968 and Section 2 (n) of the Industrial Disputes Act, 1947.

5.53 In the circumstances mentioned above, there can be no doubt of the industrial status of the telecom towers. Even de-hors the past practice of the State Commission to classify the telecom towers as industrial, the telecom towers in line with the legal position and the Government of India policies, would fall within the industry definition and ought to be treated under the industrial category for electricity tariff classification.

5.54 In the circumstances, the impugned order to the extent it treats certain telecom towers as commercial is bad in law and is laible to be set aside. The telecom towers ought to be treated under the industrial category for the purpose of electricity classification.

6. Learned Counsel, Mr. Shailesh Kumar appearing for the Appellant in Appeal No. 342 of 2016, 30 of 2017, 57 of 2017, 77 of 2017, 370 of 2017 has made following arguments/ submissions for our consideration:-

Factual:

6.1 The mobile telecommunication network of the Appellant comprising of Mobile Towers, Base Station Controllers and Mobile Switching Centers is a computer network. These installations and the value added mobile telecommunication and data/internet services derived from the operation of the same come under the field of IT/ITeS. Purpose of use of electricity by such installation is therefore for purpose of IT/ITeS.

6.2 The operation of the said telecommunication network and its aforesaid installations are otherwise also in the nature of an industrial activity involving usage of electricity for the purposes of processing voice and data signals for the purpose of receiving, transmitting and delivering the same.

6.3 The above said installation and operations of the appellant are also included under the definition of IT/ITeS under the IT/ITeS policy of the State of Maharashtra. Under the said policy the State of Maharashtra declared that IT and ITES Units will be entitled for supply of power at industrial rates under the MERC tariff orders and that these units will be categorized as a separate group of consumers through the MERC. The Respondent No 2 has never disputed this position before the Respondent No 1 Commission till date.

6.4 Accordingly the Mobile Towers and related installations of the Appellant have been included under the industrial category of tariff under the tariff schedules of the Respondent No. 2 as approved under various tariff orders passed by the Respondent No. 1 State Commission from time to time since 2004 by treating these as industrial activities in the nature of IT/ITeS.

6.5 MERC passed an Order dated 10.03.2004 in case No. 2 of 2004 (Ref Pg. No. 3 of Reply of MERC) referring to the IT/ITES policy announced by the Government of Maharashtra and the stated philosophy of the commission in its previous orders. MERC thereby included IT Industry and IT enabled Industry (as defined in the Government of Maharashtra Policy of the year 2003) in the Industrial Category. The Commission however, did not agree to create a separate new category for IT/ITES Sector. The IT/ITES policy 2003 was examined by the MERC under the said order only and the categorization and the categorization was made by adopting the definition of IT/ITES stated in the said policy. Since then Industrial Tariff has been applied to IT/ITES including Mobile Towers.

6.6 The State Commission has repeatedly rejected the change proposal initiated by the respondent No. 2 for conversion of the tariff category applicable to Mobile Towers and related installations from industrial to commercial since 2009. The Change was sought on the ground that the activities were to be considered commercial as these were done with profit motive, irrespective of the fact that these were admittedly covered under the IT/ITeS policy of the State of Maharashtra. The same was firstly rejected by the order dated 17th of August 2009 of the State

Commission, again on 12.09.2010 which position was lastly confirmed by the order dated 26th of June 2015 of the State Commission acknowledging that the consideration for categorization of these installations under the industrial category had not changed since 2004 when the first MERC order was passed.

6.7 There was no change in nature and purpose of usage of electricity by these installations since the above-mentioned orders. There was also no specific change proposal moved under the Tariff Petition, case No. 48 of 2016 and no justification for change of categorization of these installations were mentioned in the said petition.

6.8 That till November, 2016, MSEDCL has continued to apply industrial tariff to Mobile Towers without requirement of any permanent registration as IT/ITeS.

Reference:

A. Conversion Notice

B. Mobile Tower Electricity Bill October 2016

C. Mobile Tower Bill for December 2016.

6.9 However, by the impugned order dated 3rd of November 2016 the State Commission, without disclosing any rationale reasoning or basis, has converted the tariff category of Mobile Towers and related telecommunication installations of the Appellant Company from industrial to commercial. It also added a stipulation in the tariff schedule whereby applicability of industrial tariff was sought to be restricted only

to IT/ITeS units having certificate of registration as IT/ITeS from the concerned department of the State of Maharashtra.

6.10 From December, 2017, MSEDCL has converted electricity Connections of Telco's to Commercial in view of impugned Order dated 3rd of November 2016 the State Commission

6.11 In passing the impugned order the State Commission did not consider any of the relevant factors stipulated under Section 62(3) of the Indian Electricity Act. It also did not consider or decide whether the installations/operations in question fell under the category of IT/ITeS and whether these were covered under the IT and ITeS Policy of the State of Maharashtra or not. No finding was recorded in this regard. It was also not considered whether the same was otherwise also in the nature of industrial use or in the nature of public service and what ought to be the correct tariff category in which these ought to be included.

6.12 The mobile telecommunication and data services provided by the appellant are essential public utility services and the installations comprising in the mobile telecommunication network have been declared and recognized as part of the infrastructure industry. As such even if these for some reason were not to be included under the industrial category these were liable to be considered for inclusion under the category of "public service" which relates to similar essential public services and infrastructure industry.

6.13 The impugned order dated 3rd of November 2016 is being challenged to the extent that it converts the tariff category as applicable to Mobile Towers (BTS) and related installations of Base Station Controllers (BSC)

and Mobile Switching Centers (MSC) comprising in the composite telecommunication network of the appellant from industrial category to commercial category. Also to the extent that it seeks to make applicability specifically of industrial tariff to IT/ITeS contingent upon and subject to it being included under the definition of IT/ITeS under the IT and ITeS Policy of the State of Maharashtra and upon the issuance of permanent registration certificate for the same by the State Government.

Re: Impugned Order is in Violation of the mandatory procedure under the Indian Electricity Act andMERC MYT Regulation 2015

6.14 The Respondent No. 1 State Commission has violated the principles of natural Justice in passing the impugned order dated 3rd of November 2016 by changing the tariff category applicable to Mobile Towers, and related installations of the mobile operators, from industrial to commercial without any specific proposal for such change being made in the Multi-Year Tariff Petition, being case No. 48 of 2016.

6.15 The Procedure followed by the Respondent No. 1 State Commission is contrary to the mandatory provisions of MERC MYT Regulation 2015 by which it is bound. The Regulation does not permit such re-categorization without the proper proposal in the Tariff Petition, without proper notice to the affected parties and without considering the financial impact of such re-categorization on the Aggregate Revenue Requirements, Sales Projections and the Cost of Services.

6.16 In the present case all the relevant matters for determination of tariff i.e. ARR, Sales Projections and Cost of Services as submitted in the Tariff Petition of MSEDCL (Respondent No 2) were based on including Mobile Towers under the Industrial Category as Bills of Industrial Category were admittedly being raised on them till November, 2016. As such re-categorization of Mobile Tower without corresponding impact analysis on the Aggregate Revenue Requirements, Sales Projections and the Cost of Services is illegal and ultra-vires the provisions of the Indian Electricity Act and the MERC MYT Regulation, 2015.

6.17 The relevant aspects of category and tariff determination as provided under Section 62(3) of the Electricity Act and the MERC MYT Regulation, 2015 has not been considered at all by the MERC.

6.18 The Category and Tariff as determined in such manner cannot be regarded as tariff determined in accordance with the Electricity Act and the MERC MYT Regulation, 2015 and is therefore illegal and without jurisdiction.

6.19 The same will result in unjust enrichment of MSEDCL contrary to the Electricity Act and the MERC MYT Regulation, 2015 and will result in a tariff shock to the Appellant.

Re: Impugned Order is Self-Contradictory & a result of non-application of mind. :

6.20 The impugned order is a result of non-application of mind, perverse and self-contradictory in as much as though it purports to rely upon the

earlier orders dated 17th of August 2009 and 26th of June 2015 passed by the State Commission whereby industrial tariff was held to be applicable to Mobile Towers but at the same time without disclosing any logic, reasoning or rationale has issued diagonally opposite directions by changing the tariff category applicable to mobile towers from industrial to commercial.

Re: Impugned Order is in Violation of Section 62(3) of the Indian Electricity Act andMERC MYT Regulation 2015:

6.21 The impugned order is in violation of the provisions of section 62 (3) of the Indian Electricity Act inasmuch as none of the relevant factors for determination of the tariff category of mobile towers, or change thereof, were considered while passing the said order.

6.22 The mobile towers and related installations (BSCs and MSCs) comprising in the telecommunication network of the appellant actually falls under the category of IT/ITeS and cannot be discriminated in matters of such categorization for purposes of Electricity Tariff.

Reference/Judgements:

a) Anthony Phillip Witek Vs Deputy Commissioner of Income Tax [Income Tax Appellate Tribunal] 2008 (110) ITD 148 Delhi.(Para 8 at Pg. 4 & 5 of Judgement Compilation)

b) In Re: Amar Zai Sangin [Authority for Advance Ruling] MANU/AR/0002/1997. (Para 16 to 21 on Pg. 7 & 10 of Judgement Compilation)

c) Syed Asifudin & Ors. Vs The State of Andhra Pradesh & Anr. [High Court of Andhra Pradesh] Cri. Petn. Nos. 2601 and 2602 of 2003. (para 17 to 19 on Pg. No. 17 & 18 of Judgement Compilation)

6.23 The definition of IT/ITeS under the IT and ITeS Policy of the State of Maharashtra is an inclusive and incremental definition which includes all usages in the nature of IT/ITeS. Moreover it is the obligation of MERC under Section 62(3) to determine categories based on purpose of supply on a non-discriminatory basis. As such as long as Mobile Towers are in substance a use for purpose of IT/ITeS, these cannot be discriminated and removed from such Category.

6.24 A usage truly and actually for the purpose of IT/ITES could not be discriminated and excluded from consideration under such category even if it was not specifically included under the definition of the said expression in the IT and ITeS Policy of the State of Maharashtra when such definition had not even been formulated having regard to the relevant considerations of tariff categorization under section 62 (3) of the Indian Electricity Act.

Re: The State Commission has abdicated its functions of determination of tariff category to the State Government which is illegal and impermissible

6.25 The State of Maharashtra has no powers to determine tariff category under the provisions of the Indian Electricity Act. The State of Maharashtra also cannot restrict application of industrial category of tariff only to IT/ITeS as defined and registered by it under its IT and ITeS

Policy as the same would amount to abdication of function of MERC under Section 62(3) of Electricity Act to the State Government.

6.26 The State Commission by restricting the application of industrial tariff to IT/ITeS as defined and registered and specified under the IT and ITeS Policy of the State of Maharashtra has abdicated its function to determine tariff category in accordance with the provisions of section 62 (3) of the Indian Electricity Act to the State Government and its Machinery.

6.27 The IT and ITeS Policy of the State of Maharashtra does not and cannot restrict the MERC to provide that industrial tariff should apply only to IT/ITeS as defined in its policy and not to other usage generally in the nature of IT/ITeS. These are matters in the exclusive domain of MERC under Section 62(3) of the Electricity Act.

6.28 The State Commission by restricting the application of industrial tariff to IT/ITeS as defined and registered under the IT and ITeS Policy of the State of Maharashtra has given precedence to the said policy over and above the provisions of section 62 (3) of the Indian Electricity Act which is illegal.

6.29 The State Commission while passing the impugned order has not examined the IT/ITES Policy of the State of Maharashtra. The policy was only examined in the year 2004 with the definition of IT/ITES Industry as mentioned in the IT/ITES Policy in the year 2003 was

approved and adopted by the MERC to include such category for the purpose of Industrial Tariff. The matter has never been re-examined.

6.30 MSEDCL has never raised an issue before the State Commission either that Mobile Tower are not IT/ITES or that these are not covered by the Policy.

6.31 The relevant exercise under the provisions of section 62 (3) of the Indian Electricity Act has not been undertaken by the State Commission in converting the tariff category of mobile towers from industrial to commercial.

6.32 The State Commission is obliged to consider the application of uniform tariff to all usage in the nature of IT/ITeS irrespective of the definition of the said expression under the IT and ITeS Policy of the State of Maharashtra on ground of parity and in view of the provisions of section 62 (3) of the Indian Electricity Act.

Re: Mobile Towers are otherwise also covered under Industrial Tariff as per general definition of the said Category.

6.33 Even otherwise the operation of the telecom network of the appellant comprising of Mobile Towers, Base Station Controllers (BSCs) and Mobile Switching Centers (MSC's) is an industrial liable to be covered under Industrial Tariff.

6.34 The general criteria for applicability of Industrial Tariff under the tariff schedule of Respondent No. 2, as approved by Respondent No. 1, i.e. "electricity for Industrial use……for purposes of ……. processing" include the industrial activity undertaken by the Mobile Towers, and

other network installations of the Appellant, which are in the nature of processing of information, signals and data for the purpose of receiving, transmitting and delivering the same across the network.

6.35 The following judgements are being relied upon:

a) Commissioner of Income Tax Vs Vinay Kumar Sigtia [High Court of Orissa] Special Jurisdiction Case NO. 1 of 1994] - Data Processing equated to industrial manufacturing:

b) Commissioner of Income Tax Vs Shaw Wallace and Co. Ltd. [High Court of Calcutta] Income Tax Reference No. 132 of 1987 - Data Processing equated to Industrial Manufacturing:

6.36 As such, the Mobile Towers, and related installations of Appellant, would come under the industrial category of tariff irrespective of whether these are defined and included under the IT and ITeS Policy of the State of Maharashtra.

6.37 That even otherwise Mobile Towers, and related installations of Appellant, are also liable to be considered under the tariff category of "public service" when such installations are in the nature of essential public utility services and also declared to be part of the infrastructural industry.

REJOINDER SUBMISSIONS OF THE APPELLANT.

6.38 It is first and foremost submission of the Appellant that assuming and accepting the position of the Respondent that nothing has changed in the matter of application of industrial tariff to IT/ITES industry since the

year 2004, it needs to be clearly understood as to what is the true nature, import and meaning of the tariff order dated 10.03.2004 passed by the MERC.

6.39 Reference in this regard to be made to the following extract of the order dated 10.03.2004 of MERC which is most relevant for the purpose of the present determination. The same is extracted as under:

"***1.11.3 Commission's Ruling***

The consumer in the Information Technology (IT) and Information technology Enabled Services (ITES) sector are currently classified under the commercial category and charged accordingly. As the commercial category is a subsidizing category, the tariffs are high for these categories. The Commission has been receiving applications from such consumers requesting that they should be classified under LT industrial category, for the purpose of tariff determination. ***In July, 2003, the GoM announced the IT and ITES Policy, 2003 for promoting business and enterprise in the IT industry, to make Maharashtra the most favored destination for investments in the IT and ITES industry. In the context of the infrastructure support to the IT and ITES sector, the Policy specifies under Clause 4.2 (h) that, "Levying of power charges on IT and ITES unites at industrial rates and notifying IT and ITES unites as a separate category of consumers through MERC".***
*In line with the IT and ITES Policy announced by the GoM****and the stated philosophy of the Commission in the previous Orders****,* ***the Commission has included the Low Tension IT Industry and IT enabled services (as defined in the GoM Policy) in the LTP-G category, for purposes of tariff determination****. The Commission has decided against creation of a new category for IT and ITES sector, in line with its stated philosophy of reducing the number of consumer categories and consumption slabs, over a period of time."*

Without prejudice to the other submissions made before this Tribunal, it is the submission of the Appellant that a reference to the above extract of the Order will show that the State Commission did not simply accept the decision of the Govt of Maharashtra to extend the industrial tariff to the IT/ITES units as covered by the policy of the State of Maharashtra.

Instead ,the State Commission has only considered the recommendations of the State Govt. and, after duly and consciously considering the classification/definition of IT/ITES units(i.e. IT Industry and IT enabled services) as defined in the said Policy of the GoM and finding it in line with its own stated philosophy, i.e. of determining tariff categories on the basis of principle set out in Section 62(3)of the Indian Electricity Act, it has accepted and incorporated this definition into its tariff order as the class of IT/ITES Industry to which the Industrial Tariff would apply. In other words on findings this definition of IT/ITES industry in the Policy of GoM to be of such nature as meeting the requirements of the provisions of Section 62(3), the State Commission had decided to incorporate the said definition of IT/ITES industry in its tariff Order treating it as a part of the consumer category to which industrial tariff would be extended under the said tariff Order. It is respectfully submitted that the expression used in the tariff Order is"IT Industry and IT enabled services (as defined in the GoM Policy)"& not "IT Industry and IT enabled services (as defined in the GoM Policy *from time to time*)".

6.40 MERC did not leave the tariff categorization to be done by the Govt. of Maharashtra by generally adopting its policy for the purpose of application of industrial tariff to IT/ITES industry as may be defined from time to time by the State Government but only incorporated the definition of IT Industry & IT enabled services units as defined in the said Policy of the GoM of the year 2003 by reference into the MERC tariff Order. This is an incorporation of the said definition by reference. In doing so the MERC has in effect bodily lifted and transposed this definition into the said tariff order which thereby became a part thereof.

6.41 Had the MERC left the matter of extending industrial tariff to any category of IT/ITES to be defined by the Policy of the State of Maharashtra from time to time then it would be clearly abdicated its functions of defining tariff classifications/categories under Section 62(3) of the Indian Electricity Act to the State Government, which it has not done. This was never the intention of the MERC which has clearly taken a conscious decision only to incorporate the definition of IT/ITES industry "as defined in the GoM policy", i.e. the IT and ITES Policy of the GoM of the year 2003 (which was the only policy considered by it), into its tariff Order after finding the same to be in line with the provisions of Section 62(3) the Indian Electricity Act.

6.42 As admitted by the Counsel for the Respondent, as also evident from the later tariff Order which have consistently held that the ruling and rationale of the 2004 tariff Order will continue to apply, that the definition of IT/ITES units as incorporated by reference in the tariff Order of 2004 continues to apply as on date.

6.43 The IT/ITES policy of the Govt. of Maharashtra of the year 2003 was placed before the MERC at the time of passing the tariff order dated 10.03.2004.At no other time has any subsequent Policy of the GoM has ever been placed before the MERC or examined by it. The matter of reclassification of the category of IT/ITES in the light of any subsequent

policy has never been considered or ruled upon by the MERC at any stage. Hence also, there is no question of any subsequent definition of IT/ITES in any subsequent being adopted by MERC having never been subject of any such examination by it at any stage.

6.44 The law of subject of incorporation of such definitions by reference is also well settled in various judgements of the Hon'ble Supreme Court of India whereby it is held that when provisions of one statute/document incorporated by reference to another statute/document then even if the statute/document by reference to which the incorporation is made is subsequently amended or even repealed, the provisions as originally incorporated in the other statute/document by reference will continue to remain unaffected and unchanged and continue as before. Hence, even if the IT/ITES Policy of the State of Maharashtra may, or may not, have subsequently changed with reference to the definition of IT/ITES industry but for the purpose of the tariff Order of MERC, the definition of IT/ITES policy of the State of Maharashtra of the year 2003 will continue to apply. In this regard reference is made on the following judgements.

a. Bharat COOP. Bank (Mumbai) Ltd. Vs COOP. Bank Employees Union [2007] 4 SCC 685. [refer Para 15 to 21 on Pg. 8 & 9 of the Compilation of Judgements filed by Appellant on 17.07.2019 referred hereinafter as Judgment Compilation]

b. Mahindra and Mahindra Ltd. Vs UOI &Ors. MANU/SC/0391/1979. [Refer to Para 22 to 24 of the Judgement Compilation]

c. Ram Sarup &Ors. Vs Munshi &Ors. AIR 1963 SC 553. [Refer Para 12 & 13 on Pg. No. 42 & 43 of Judgement Compilation]

The relevant extract of the judgement of Bharat Coop. Bank is also reproduced as under:

> *"Legislation by incorporation is a common legislative device where the legislature, for the sake of convenience of drafting incorporates provisions from an existing statute by reference to that statute instead of verbatim reproducing the provisions, which it desires to adopt in another stature. Once incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute. On the contrary, in the case of a mere reference or citation, a modification, repeal or re-enactment of the statute, that is referred will also have effect on the stature in which it is referred. Unless a different intention clearly appears, the reference would be construed as a references to the provisions as may be in force from time to time in the former statue."*

6.45 These submissions are made without prejudice to the other submissions of the Appellant that the definition IT/ITES in the subsequent policy of the State of Maharashtra continues to include& treat installation of mobile tower (Cellular)as part of IT/ITES unit as regulated by such policies. There is specific references to mobile towers and expedited permissions from local authorities for the same in these policies as in the policy of 2003 (Clause 4.6(e) and Clause 11.1(f). Mobile Phones, related hardware and mobile antennas etc. (which comprise mobile towers) find specific reference in the Schedules annexed with all these policies.

6.46 However, as already submitted, the correct interpretation of the Order dated 10.03.2004 would be that the definition of IT Industry & IT Enabled Services as defined in the GoM Policy of the year 2003 (the only policy considered and examined by the State Commission) has been incorporated in the said Order as the classification and definition of the tariff category of IT/ITES units to which industrial tariff was made

applicable in the year 2004 and to which it continues to apply. The said definition which is in the IT and ITES Policy, 2003 of the State of Maharashtra is reproduced as under:

*"5. **Definitions:***

In the context of the policy, the Information technology industry consist of IT Software, IT Hardware, IT Services and IT Enabled Services as defined below:

IT Taskforce of Government of India has defined IT software as follows:

*(a) **IT Software***

IT Software is defined as any representation of instruction, data, sound or image, including source code and other object code, recorded in a machine readable form and capable of being manipulated or providing interactivity to a user, with the means of a computer.

*(b) **IT Hardware:***

IT Hardware covers approximately 150 IT products notified by Directorate of Industries (APPENDIX I).

*(c) **IT Services and IT Enabled Services:***

These include various IT Services and are defined by the IT Task force of the Government of India as follows:

"IT Service including IT Enabled Service is defined as any unit that provides services, that result from the use of any IT Software over a Computer System for realizing any value addition".

The Directorate of Industries has prepared and published an illustrative list of such IT Enabled Services (Appendix II) which is updated from time to time."

6.47 The illustrative list as mentioned above is also reproduced as under:

"The list of activities registrable as IT Services and IT enabled Services is amended as follows:

1) Data conversion, data mining, digitisation, data entry, data processing, data warehousing.
2) Digitisation of spoken material (e.g. legal and medical transcription)
3) Computerized call Centres
4) Geographic Information Systems mapping/services
5) Web designing/ Web content development services
6) Computer Added/CAD/CAM services
7) E-mail, data, Internet fax service provider
8) ISP Services (Communication channels like V-eat, Optical fiber not included)
9) Computerised Desk Top Publishing
10) Web service providers, including web hosting and web management
11) USDN service providers
12) Computer System AMC holders

13) Multimedia development units (including, e.g. animation and special effects video and photo digitisation)
14) IT Solution Providers/ implementers (such as and including server/ data banks, Application Service Providers, Internet/Web-based e-commerce services providers, Smart Card customization service providers, systems integration service providers)
15) Cyber cafe/cyber kiosk/cyber parlours and video conferencing centres/ parlours
16) Back Office Operations relating to computerised data
*17) **Other services provided with the intensive use of computers** (such as and including telemedicine services, remote access cyber services, remote diagnostic and repair services)."*

6.48 It is clear by the reference to the above definition that the installation of Mobile Tower which is part of the cellular notice telecommunication network of the Appellant and subject matter of the present appeal come under the definition of IT/ITES units or defined by the IT & ITES Policy of the Government of Maharashtra. Further reference to Clause 4.6(e) and 11.1(f) of the said policy would also show that there is clear and specific reference to mobile towers in the said policy. Hence, there can be no doubt that Mobile Tower are covered under the definition of IT/ITES as defined in the policy of the State of Maharashtra for the year 2003 (as also in subsequent policy where similar provisions are reiterated).

6.49 The fact that the mobile tower and related installation of Appellant were treated and covered in the definition of IT/ITES under the various policies of the State of Maharashtra will also be evident from the Registration Certificate issued by Govt. of Maharashtra for the said installations of the Appellant right since the year 2004.

6.50 That Reference is also made to the unified license dated 14.11.2003 granted to the petitioner. Reference to Clause No. 2.2(b)(i), 7(ii), 74 and

1 of the said would also show that the said license was issued to provide services of the exact nature which are mentioned in the definition of IT/ITES units in the policy of the State of Maharashtra as mentioned above.

6.51 The above mentioned the Registration Certificate issued by State of Maharashtra (refer para 13 above) also show that the Govt. of Maharashtra acknowledged that the installation of Petitioner used to provide internet services and that telecommunication services were also as part of IT/ITES units under the aforesaid definition of IT/ITES Industry by the Govt. of Maharashtra which has continued these registrations till the year 2012.

6.52 The Appellant also relied on the following judgements in support of the contentions that the telecommunications services are part and were a subset of the field of information technology. These judgments as set out under:

- Anthony Philip Witek Vs. Commissioner of Income tax. 'Income Tax Appellate Tribunal] 2008 110ITD 148 Delhi (2008) 113 TTJ Delhi 740
- Amir ZaiSangin [Authority for Advance Ruling] MANU/AR/0002/1997
- Syed Asifuddin and ORs. Vs. The State of Andhra Pradesh and Anr. [High Court of Andhra Pradesh] Cri Petn. Nos 2601 and 2602 of 2003.
-

6.53 It is also further submitted by the Respondent that the contentions of the Appellant that the MERC was bound to follow the directions issued by the Govt. of Maharashtra under the IT/ITES policy and that there was nothing wrong for the MERC to do so is absolutely misconceived,

incorrect and untenable. As mentioned above MERC has not followed the directions of the Govt. of the State of Maharashtra when it passed the tariff Order dated 10.03.2004 and it has not simply extended the industrial tariff to any category of IT/ITES left to be decided by the State of Maharashtra but instead it has examined the definition of IT/ITES in the IT/ITES Policy of the State of Maharashtra for the year 2003 and, on finding the said definition to be in line with the relevant factors applicable for tariff categorization as provided under Section 62(3) of the Indian Electricity Act, it has adopted and incorporated this definition of IT/ITES units in its tariff Order for extending the industrial tariff to the same. This is an independent and conscious exercise of its power under Section 62(3) of the Indian Electricity Act. It was not the object of the MERC while passing its tariff Order for the year 2004 to leave such matter of categorization of the said tariff category to the Govt. of State of Maharashtra to be decided by them from time to time. It was not left open to the Govt of Maharashtra to keep defining the category of IT/ITES unit from time to time and extending industrial tariff to such a changing category of consumers. Such an action would actually amount to abdication of the power of the State Commission under the provisions of the Indian Electricity Act and would be clearly illegal.

6.54 The authority of the State Governments to issue directions to the State Electricity Regulatory Commission have been discussed in detail by the Hon'ble APTEL in its judgements in the case of Polyplex Corporation Ltd. Vs. Uttarakhand Electricity Regulatory Commission. The relevant extract of the said judgement is reproduced as under:

"19. On the basis of these contentions urged by the Learned Counsel for the parties, the following questions may arise for conclusion:

(1). Whether the policy directions issued by the State Government on 25.09.2009 for mere consideration are binding on the State Commission while discharging its statutory finding on the determination of tariff under Section 62 of the Electricity Act, 2003 read with the Regulations framed there under?

……..

26. The grievance of the Appellant is that the conclusion arrived at by the State Commission, as referred to above, was not on the basis of independent consideration but was purely based upon the directions issued by the State Government which is not a correct approach as the said directions are not binding upon the State Commission as laid down by this Tribunal and the Hon'ble Supreme Court.

27. Let us now analyse this point.

28. It cannot be debated that the determination of tariff is one of the core functions of the State Commission which is to be done in an independent manner. These functions have to be discharged by the State Commission by following the provisions of the Electricity Act, 2003 and the Regulations made there under. It is settled law that the State Commission alone has the powers to determine the tariff. In this context, a reference may be made to the Statement of Objects and Reasons of Electricity Act, 2003 for the purpose of appreciating the legislative scheme. The same is as follows:

> *1.3 Over a period of time, however, the performance of the State Electricity Boards has deteriorated substantially on account of various factors. For instance, powers to fix tariffs vest with such Electricity Boards, they have generally been unable to take decisions on tariff in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross subsidies have reached unsustainable levels. To address this issue and to provide for distancing of Government from determination of tariffs, the Electricity Regulatory Commission Act was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which State Governments can create a State Electricity Regulatory Commission....*
>
> *"3 With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the Regulatory Commission, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998, in a new selfcontained comprehensive legislation arose...."*

Thus, the main object and reason of the reform legislation was to distance the role of the Government in fixation of tariff and to allow tariff determination by an independent regulatory authority which will follow a transparent process. This is at the very core of the reform legislation.

……..

32. In terms of the above sections, there is a statutory policy that occupies a field, i.e. electricity tariff. There is no scope for the State Government to issue policy

directions on tariff matters. The Parliament has allocated such powers to the Central Government which is to issue the policy. While preparing these statutory policies under Section 3 of the Act, the legislature has provided for consultation with the State Governments. Thus the State Government's power to issue independent policy directions on tariff matters stands exhausted. All that the State Government can do, is to give its views on the tariff matters during the consultation process with the Central Government.

……..

36. Let us now quote those decisions rendered by this Tribunal as well as the Hon'ble Supreme Court. They are as follows.

37. This Tribunal in its judgment dated 18.08.2010 Appeal No. 5/09 has analysed this issue and gave the following findings:

(A) It is settled law as laid down by this Tribunal as well as by the Hon'ble Supreme Court, that all the policy directions are not binding on the State Commission since the State Government cannot curtail the powers of State Commission in the matter of determination of tariff ".

…….

38. The legal propositions that emanate from the above various decisions with regard to this point as referred to above are given below:

1. *The State Commission is an independent statutory body. Therefore, the policy directions issued by the State Government are not binding on the State Commission. The State Government by issuing direction to State Commission cannot curtail the power of the State Commission in the matter of determination of tariff.*
2. *The State Commission has the powers to determine the tariff and to pass orders under Sections 61 and 62 of the Act relating to the tariff. These orders are binding on the State Government.*

   …….
4. *The State Government is not above the law. It is bound to respect the mandate of the legislature. Otherwise, the tariff determination will not be in consonance with the various factors and parameters specified in Section 61.*

   ……
6. *It is true that the Government has to cater to the popular demands in order to earn its legitimate favour giving any such policy direction but it should be under permissible limit. While exercising the power of determination of tariff, the policy directions issued by the Government may also be taken into consideration by the State Commission which has statutory duty to perform under the Act but so long as the policy directions issued by the Government are consistent with the provisions of the Act, it may be open to the State Commission to either to accept them or not. Thus, it is purely discretionary on the part of the State Commission with regard to the acceptability of the directions issued by the State Government in the matter of determination of tariff.*

6.55 The above will clearly show that the State Commission is not bound by any directions of the State Govt. and only if the directions in the matter of tariff categories are in line with the requirements of the provisions of the Electricity Act, only then the State Commission, in its discretion, may adopt and incorporate such decisions as part of its own independent will/action in such matter. Hence, submission of the Counsel of the Respondent there is nothing wrong for the MERC to simply adopt any directions of the State Govt. for the sole purpose of providing incentives to any category of consumers as the State Government chooses to promote is absolutely wrong, misconceived and untenable.

6.56 It is also incorrect on part of the Respondent to allege that the MERC has not treated Mobile tower as part of IT/ITES. In fact, MSEDCL has also itself treated mobile tower is falling under the definition of IT/ITES policy of the Govt. of Maharashtra which was incorporated in the tariff Order dated 10.03.2004. In this regard it is further submitted as under.

6.57 Reference is made to Internal Circular dated 26.06.2009 of MSEDCL. By this circular MSEDCL tried to withdraw all the earlier letters directed/issues from HQ's pertaining to applicability of industrial tariff to mobile towers "(being covered under the IT and IT Enabled Services)". This letter clearly shows that industrial tariff was being applied to mobile tower under the earlier letters and directives issued by MSEDCL as these installations were admittedly being treated as covered under IT and IT Enabled Services as per the IT Policy of the Govt. of Maharashtra.

6.58 The said circular was stayed by the Order dated 17.08.2009 of Bombay High Court. This order in fact shows that MSEDCL was in fact challenging the role of both the State Government or the State Electricity Regulatory Commission in making tariff categorization and claiming that it was the power of the Discom (MSEDCL) itself to classify such categories which was not agreed by the Bombay High Court.

6.59 Accordingly, in view of the Stay by the Bombay High Court, by letter dated 28.04.2010 of MSEDCL the status of mobile tower for levy of industrial tariff was restored by them by continuing to treat them as part of IT/ITES as per the definition in the Policy of the GoM.

6.60 Reference is also made to the APRP Tariff Petition of MSEDCL i.e. Respondent No 2 filed before the MERC for FY 2008-09 whereby proposal was made to exclude the Mobile tower from the category of IT and IT Enabled Industry and to convert/classified it in commercial category. Reference is made to extract of the said Petition with specific reference to Clause (i) and Para 4 of Appellant. This Petition shows clear admission of MSEDCL that mobile tower were being treated as covered under the IT and IT Enabled industry and were sought to be converted to commercial.

6.61 Reference is also made in letter dated 17.08.2009 of MERC whereby application for change of tariff category of mobile tower as made in abovementioned Tariff Petition/Proposal of Respondent No.2 was rejected by the State Commission holding that:“as regards MSEDCL’s proposal to classify certain telecom towers. etc., under commercial category, irrespective of whether they were covered under the IT & ITES

Policy of the Government of Maharashtra, no rationale has been submitted by MSEDCL for this specific proposal. **The Commission had consciously included IT and IT enabled Services (IT & ITES) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT & ITES category continues to be charged under industrial tariffs.** In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission had included IT & ITES category under industrial category. Hence, the Commission does not agree with MSEDCL's proposal in this regard and rules that IT & ITES will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITES.

6.62 The above mentioned order of MERC clearly notes that the Commission had consciously included IT & IT Enabled Services under the installation category in 2004 and since then the said category continues to be charged under the industrial tariff. The Respondent No.2 wanted category of mobile tower changed from industrial to commercial irrespective of the fact the they were covered as IT/ITES ad per the definition of the said category under the IT and ITES policy of the GoM. It was the admitted position of Respondent No. 2 that mobile tower was covered by the said policy and only therefore such conversion was sought irrespective of the said policy. The later observations of the State Commission that it was not "getting into details of whether mobile tower of all other similar activities and covered under the Govt. of Maharashtra

policy of IT & ITES" does not show or suggest that mobile tower were not covered by the said policy but only shows that such issues was not raised before the Commission at all since the Respondent No.2 had made application for conversion by itself admitting the applicability of the said policy to mobile tower, i.e. application of conversion was made irrespective of the policy, giving no occasion for the Commission to get into such issue at all and this is the only thing which is reflected from its observations and nothing more.

6.63 The fact that the Respondent No.2 admitted that the IT/ITES policy of the Govt. of Maharashtra covered mobile tower as IT/ITES units is also evident from the next tariff Order dated 12.09.2010 passed by the MERC. Under this tariff Order policy a similar request was made by Respondent No. 2 to change tariff category of mobile tower and other IT/ITES units such as Computerized Call Centers, IT Solution Providers etc. from the industrial to commercial category on the ground that though these services were covered as IT & IT Enabled services under IT & ITES policy of GoM but their activities were actually commercial as per the Respondent No. 2. The Respondent No 2 was in fact and substance challenging the authority of the MERC as also the Policy of the State Government to make such Tariff Classification and Categorization. The admission to this effect is found in the extract of the Order dated 12.09.2010 of the MERC. The Commission observed that the "similar issue" was raised in the previous APR Petition in Case No. 116 of 2008 and rejected the said proposal for change of categories of mobile towers and other installations covered by the definition of IT/ITES under the Policy of the GoM by reiterating and reaffirming its Order

dated 17.08.2009 in the said case. The said order clearly shows that the Respondent No. 2 had itself acknowledged that mobile tower fall under the definition of IT/ITES as per the policy of GoM which was incorporated by reference in the tariff Order dated 10.03.2004 and the rationale and ruling of which was held as continuing to apply in the tariff Order dated 17.08.2009 as also in the tariff Order dated 12.09.2010. It also shows that the same position was also acknowledged and accepted by the MERC also which treated Mobile Towers as covered under the said definition of IT/ITES to which industrial tariff was applied since 2004.

6.64 The same position has also been reiterated in the subsequent tariff Order dated 26.06.2015. However, the said order also stated that the ruling and rationale of the 2008 order of MERC will continue to apply. The 2008 order only reiterates the 2004 Tariff order. It was however additionally mentioned in the 2015 order that:

"The commission is of the view was that the rationale and ruling of its earlier order in case number 116 of 2008 should continue to apply*. In other words, the industrial tariffs will apply to mobile towers or other activities that stated by MSEDCL only if they are covered as IT/ITES and the provisions of GoM's policy apply to them.*"

Reading the 2015 order as a whole it cannot be said that any different order from earlier order of the year 2008 in which the MERC order of year 2004 was reiterated and extended has been passed. Reading this order as a whole and with reference to the 2008 and 2004 orders the expression "*only if they are covered as IT/ITES and the provisions of GoM's policy apply to them"* can only be understood to mean that

industrial tariff will apply to Mobile Towers if they are covered in the definition of IT/ITES as incorporated in the tariff order of the year 2004 by reference to the then IT/ITES Policy of the GoM(2003) as then considered by the MERC in its order dated 10.03.2004 and nothing more or different.

6.65 However, the impugned multi-year tariff Order dated 3.11.2016 though it purportedly uphold same Orders but in fact has passed self-contradict observations which have the effect of negating and reversing the earlier tariff Order. Though on the one hand it has held that rationale and ruling of Order dated 17.08.2009 which simply hold that the tariff Order in the year 2004 will continue to governed IT/ITES industry but at the same time it has for the first time held in total contradiction of the earlier Orders that Commercial tariff would apply to Mobile Tower unless specifically included as IT/ITES in the Policy of the Govt. of Maharashtra. It is not understood what is meant by specifically included. Mobile Towers are included in the definition of IT/ITES as included by reference in the first order of 2004 which is reiterated to continue in the order of 2008 as also in the order of 2015. Hence, there is no basis for their arbitrary exclusion in such manner and that to when there was no such proposal before the MERC by the Respondent No 2 as submitted in detail in the earlier written submissions filed by the Appellant which may be referred to and are relied upon.

6.66 The reference to the impugned tariff order also shows that though the MSEDCL had proposed the tariff categorization as “IT and IT Enabled Services(ITES) as defined in the Government of Maharashtra Policy prevailing from time to time” the same was changed by the MERC while

approving the tariff to "IT and IT Enabled Services(ITES) as defined in the applicable IT/ITes Policy of the Government of Maharashtra". The applicable policy is the one which was referred in the 2004 tariff order which has be held to continue to apply in the later tariff orders till date.

6.67 The reliance of Respondent on the judgement of the APTEL in the case of TTSL VS Rajasthan Regulatory Commission & Bharat Sanchar Nigam Limited Vs Punjab State Electricity Board is also misconceived as those judgements are easily distinguishable. Firstly these judgements do not refer to electricity usage mobile tower at all. These judgments have reference to mixed user made by telecom companies in the context of usage by telephone exchanges having connected commercial offices of the telecom companies from a common-premises, using the same electricity connection for mixed usage for its industrial and commercial usage. Unlike in Maharashtra where there is no such mixed user category, in these states there is a separate category categorization for mixed user in the context of which such judgment were delivered with reference to mixed user by telecom companies. These Judgments would have no application to in the context of Maharashtra and to the issue at hand which does not relate to such mixed usage at all.

6.68 In this regard it is explained that in the State of Maharashtra there is no mixed load category and the installation of mobile towers and telephone exchange are dealt with different manner as reflected by letter dated 3.5.2012 and 21.7.2012 of the Respondent No. 2. Reference to the same will show that Respondent No. 2 had itself decided in relation to mixed loads that:

"As communicated in the letter, if there is any kind of mixed load then the separate connection should be issued to telecom towers and its associated accessories which are a must for operation of the telecom towers treating it as industrial load. Rest of the load should be treated as commercial load and accordingly separate connections may be issued."

6.69 Hence, it would be seen that there is no comparison between the tariff categorization and principles which have been followed in the State of Maharashtra and those in the State for which judgements have been relied upon by the Respondent.

6.70 Appellant relies on the other submission as already made in their Written Submissions dated 21.02.2019.

7. <u>Learned Counsel, Mr. Raghav Pandey appearing for the Appellant in Appeal Nos. 28,29, 33 & 221 of 2017 has made following arguments/ submissions or our consideration:-</u>

(a) <u>The impugned order dated 3.11.2016 is violative of the principles of natural justice.</u>

7.1 The Appellant submits that no notice had been issued by MERC to the Appellant before deciding Case No.48 of 2016 filed by MSEDCL. Even in the public notice and the executive summary in respect of the said Case No.48 of 2016, there is no mention of the proposed recategorization of mobile towers. Even the petition filed by MSEDCL does not reflect its proposal for such recategorization. In the circumstances, the Appellant was not in a position to know that MSEDCL had sought recategorization of mobile towers, as alleged.

7.2 Thus, the impugned order dated 3.11.2016 has been passed by MERC without notice to the Appellant and without affording an opportunity of hearing to the Appellant. In the circumstances, the impugned order dated 3.11.2016 is violative of principles of natural justice.

7.3 This Tribunal by its order dated 7.11.2012 passed in Appeal No.215 of 2012 had set aside the portion of the tariff order dated 16.8.2012 regarding recategorization of mobile towers in view of violation of the principles of natural justice. This Tribunal had granted liberty to MSEDCL to file a fresh petition proposing recategorization of mobile towers, and had specifically directed MERC to pass appropriate orders after hearing all the concerned parties.

7.4 In spite of such clear directions of this Tribunal, MERC did not hear the Appellant before passing the impugned order dated 3.11.2016. In the circumstances, the impugned order dated 3.11.2016 is not only violative of the principles of natural justice, but is also in breach of the order of this Tribunal dated 7.11.2012.

7.5 It may be pertinent to note that neither MERC nor MSEDCL in their respective replies have disputed the said submissions of the Appellant. In support of its aforesaid submissions, the Appellant relies upon the following judgments:

(i) Uma Nath Pandey and others v/s State of Uttar Pradesh and another, reported in (2009) 12 SCC 40 (paragraph 3)

(b) *<u>MERC could not have recategorized mobile towers in absence of prayers seeking such recategorization</u>*

7.6 A perusal of the petition filed by MSEDCL, more particularly the prayers sought in Case No.48 of 2016 would make it clear that no prayers seeking recategorization of mobile towers were made in Case No.48 of 2016.

7.7 The Appellant submits that in absence of specific prayers seeking recategorization of mobile towers, MERC could not have passed the impugned order dated 3.11.2016 to the extent it recategorizes mobile towers into Commercial tariff category in absence of coverage under the relevant IT and ITES Policy of the Government of Maharashtra. In the circumstances, to the aforesaid extent, the impugned order dated 3.11.2016 is bad in law, and is required to be set aside.

7.8 Even otherwise, no case has been made out by MSEDCL in its petition for seeking recategorization of mobile towers. In support of its aforesaid submissions, the Appellant relies upon the following judgment:

(i) Bhagwati Prasad v/s Chandramaul, reported in AIR 1966 SC 735 (paragraphs 10 and 15)

(c) *The impugned order dated 3.11.2016 does provide any reasons in support of recategorization of mobile towers*

7.9 The Appellant submits that there is not an iota of reasoning behind the impugned order dated 3.11.2016 passed by MERC. In fact, in the past MERC has rejected the proposals of MSEDCL for reclassification of mobile towers from Industrial tariff category to Commercial tariff category. Even in the impugned order dated 3.11.2016, MERC has reproduced excerpts of its earlier tariff order dated 17.8.2009, wherein it

had categorically stated that MSEDCL had failed to provide any rationale for recategorization of mobile towers into Commercial tariff category.

7.10 Without prejudice to the foregoing submissions, it is submitted that neither has MSEDCL provided any rational for the proposed recategorization and nor has MERC provided any reasons for directing recategorization of mobile towers in its order dated 3.11.2016. In the circumstances, the impugned order dated 3.11.2016 is bad in law and required to be set aside.

7.11 In support of its aforesaid submissions, the Appellant relies upon the following judgment:

(i) Kranti Associates (P) Limited v/s Masood Ahmed Khan, reported in (2010) 9 SCC 496 (paragraphs 15, 47, and 48)

(d) <u>There are no change in facts or circumstances warranting recategorization of mobile towers, and in absence of any change in facts or circumstances the very petition seeking recategorization is barred by the principles of res judicata</u>

7.12 Section 62 of the Act provides powers to a State Commission to determine tariff. As per Section 62(3) of the Act, a State Commission may differentiate between consumers while determining tariff on the basis of consumer's load factor, power factor, voltage, total consumption of electricity, the nature of supply and the purpose for which supply is required.

7.13 It is submitted on the basis of the aforesaid factors, mobile towers were being covered under Industrial Tariff category. Thus, the question of recategorization of a consumer would arise in the following situations:

(i) Where a new tariff category is created by MERC or the definition of a tariff category is altered by MERC under Section 62 of the Actleading to a situation where a consumer ceases to satisfy the definition of its existing category or falls within the definition of any other category specified by the Commission; or

(ii) Where the consumer alters the purpose of usage of supply received from the distribution licensee, resulting into a change in the aforesaid factors, and thereby requiring reclassification under a new tariff category as per its altered usage.

7.14 In the present case, charges were being recovered under Industrial Tariff Category for the electricity supplied to the mobile towers. It is submitted that neither has the MERC created a new tariff category or redefined a tariff category, nor has the Appellant altered its usage of the electricity supplied by the distribution licensees to the mobile towers. Thus, there is no change in facts or circumstances, warranting recategorization of mobile towers into Commercial tariff category.

7.15 Neither has MSEDCL cited any change in circumstances, nor has MERC found any change of facts or law warranting such recategorization. In the circumstances, there was no reason for the MERC to depart from its earlier orders rejecting such recategorization. In fact, in absence of any material change, the very petition of MSEDCL was barred by res-judicata.

7.16 In support of its aforesaid submissions, the Appellant relies upon the following judgments:

(i) M/s. Radhasoami Satsang SaomiBagh v/s Commissioner of Income-Tax, reported in (1992)1 SCC 659 (paragraphs 16 and 17)

(ii) Municipal Corporation of City of Thane v/s Vidyut Metallics Ltd. and Anr., reported in (2007) 8 SCC 688 (paragraphs 18, 22, and 25)

(e) MSEDCL has suppressed material facts in the proceedings before the MERC

7.17 MSEDCL has failed to disclose the facts pertaining to its earlier circulars dated 26.6.2009 and 20.4.2010, as well as the interim order of the Hon'ble Bombay High Court in Writ Petition No.6702 of 2009. It is submitted that in light of the aforesaid circular dated 20.4.2010, the Appellant executed necessary indemnity bond in favour of MSEDCL. By the aforesaid circular dated 20.4.2010 MSEDCL clearly gave an impression that the issue of reclassification would only be dealt with by the Hon'ble Bombay High Court.

7.18 It is submitted that none of the aforesaid facts were brought to the notice of MERC by MSEDCL. MSEDCL suppressed the aforesaid material facts from MERC in the proceedings, which culminated into the impugned order dated 3.11.2016. Further, MSEDCL has also not disclosed the fact about the pendency of various writ petitions before the Hon'ble Bombay High Court in respect of challenge to reclassification of Data centres.

7.19 The complete exercise/procedure adopted by MSEDCL smacks of malafides and makes it evident that MSEDCL has suppressed material facts from MERC. In the circumstances, the impugned order dated 3.11.2016 is required to be set aside.

(f) <u>MERC has erred in presuming that the condition of coverage under IT & ITES Policy was present in its earlier tariff orders</u>

7.20 In its reply dated 13.2.2017 in the present appeal, it is the stand of MERC that it had ruled that only the units covered under the IT and ITES Policy would be covered under Industrial tariff category, and that it was upto MSEDCL to verify the coverage of mobile towers under the aforesaid IT and ITES Policy. The said stand is not only bad in law, but is also factually incorrect.

7.21 In its earlier tariff order dated 17.8.2009, MERC had clearly held that

> "*As regards MSEDCL's proposal to classify certain telecom towers, etc. under commercial category, irrespective of whether they were covered under the IT & ITES Policy of the Government of Maharashtra, no rationale has been submitted by MSEDCL for this specific proposal.*" Thus, as MSEDCL had failed to provide for reclassification of mobile towers, MERC had rejected the reclassification of mobile towers. It is submitted that even in the subsequent years, MSEDCL has failed to demonstrate its rational for the proposed reclassification.

7.22 Without prejudice to the aforesaid, assuming that MERC had left it to MSEDCL to verify the coverage of mobile towers under the aforesaid IT and ITES Policy and in turn delegated the question of coverage of mobile towers under Industrial tariff category, the same would amount to delegation of statutory powers. It is submitted that MERC is not empowered under the Act to delegate its power of tariff determination and recategorization of consumers in tariff categories to distribution

licensees. In the circumstances, the stand of MERC is also arbitrary and bad in law.

(g) The impugned order is bad in law in as much as it determines tariff category on the basis of registration under a policy instead of the parameters set out under Section 62(3) of the Act.

7.23 The fact that the electricity supplied to the mobile towers of the Appellant is consumed for IT/ITES activities is not disputed. It is submitted that the Appellant has been granted an ISP (Internet Service Provider) Licence under the provisions of the Information Technology Act, 2000. The said fact further goes on to reinforce the stand of the Appellant that it undertakes IT/ITES activities through its mobile towers. Hence, once it is established that the usage of electricity by the mobile towers of the Appellant is for IT/ITES activities, the Appellant is entitled to be treated at par with other IT/ITES consumers, who are covered under Industrial Tariff Category.

7.24 Section 43 read with Section 45 of the Act, clearly provide that the price to be charged by the Distribution Licencee for supply of electricity to any occupier / owner of any premises has to be in accordance with the tariff fixed. Thus, the emphasis is clearly to the effect, that the tariff has to be fixed in relation to each premises to which electricity supplied and it is obviously based on the nature of user of the said premises. The nature of use is not dependent upon any registration/certificate to be issued by the State Government Authority and such requirement is clearly beyond the scope of statutory provisions under the Act. The distribution licensee

is obliged to and can charge for electricity supply only in accordance with the tariff fixed by MERC.

7.25 Section 62 of the Act, further requires the Appropriate Commission to determine the tariff in accordance with the provisions of the Act, and as per the parameters set out under Section 62(3) of the Act. Hence, classification of consumers into a particular tariff category cannot be on the basis of certificate to be issued by the State Government Authority.

7.26 In the circumstances, it is submitted that coverage of mobile towers under the Industrial Tariff Category cannot be dependent on registration with a State Government Authority, when other consumers consuming electricity for same activity are covered under Industrial Tariff Category. It is submitted that MERC in its impugned order dated 3.11.2016 has failed to point out the intelligible differentia between IT/ITES consumers having registration with the State Government Authority and those IT/ITES consumers who do not have registration with the State Government Authority, while making categorization dependent on such registration. Therefore, the impugned order of MERC does not make at rational classification and is arbitrary.

(h) Mobile towers are in any case required to be covered under Industrial tariff category

7.27 Assuming while denying, that the electricity consumed by the mobile towers of the Appellant is not for IT/ITES activities, it is submitted that the Appellant and other mobile tower companies provide essential

services to the public at large through mobile towers, and thus they cannot be placed along with other consumers in Commercial Category.

7.28 It is not disputed that the electricity that is consumed by the mobile towers of the Appellant is in turn utilized for providing essential services. As submitted hereinabove, while categorizing a consumer, the parameters under Section 62(3) of the Act are required to be seen. One of such crucial parameters is the 'purpose for which the supply is required'. The real meaning of expression 'purpose for which the supply is required' as used in s. 62(3) of the Act does not merely relate to the nature of the activity carried out by a consumer but has to be necessarily determined from the objects sought to be achieved through such activity. It is submitted that clearly the object of the Appellant is to cater to the requirements of the public at large.

7.29 Even MSEDCL has recognized the aforesaid in its additional submissions in Case No.121 of 2014, wherein it prayed for recategorization of mobile towers in a separate sub-category of 'Service Industries' under Industrial Category.

7.30 It is submitted that the failure on the part of the State Commission to properly exercise the discretion vested under s. 62(3) of the Act not only is violative of the said section but also violative of Art. 14 of the Constitution. As a matter of fact, the Appellant being treated equal with malls, restaurants, and other commercial establishments would amount to treating unequals as equals.

7.31 In support of its aforesaid submissions, the Appellant relies upon the following judgments:

(i) APTEL's decision dated 31.5.2009 in the case of Mumbai International Airport v/s MERC and another (paragraphs 67 to 78)

(ii) APTEL's decision in the case of Association of Hospitals v/s MERC (paragraphs 26, 30, and 37)

(iii) Bangalore Water Supply & Sewarage Board v/s A. Rajappa and others, reported in (1978) 2 SCC 213 (paragraph 140)

In light of the aforesaid submissions, the prayers sought by the Appellant in present Appeal No.28 of 2017 may be granted.

ADDITIONALWRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT

7.32 It is stated that during the pendency of the aforesaid appeals before this Tribunal, and pursuant to the sanction of a Scheme of Arrangement by the Hon'ble National Company Law Tribunal, Mumbai Bench and the Hon'ble National Company Law Tribunal, Ahmedabad Bench, the Appellants in Appeal No. 29 of 2017 (i.e. Vodafone India Limited) and Appeal No.33 of 2017(i.e. Vodafone Mobile Services Limited) have amalgamated with the Appellant in Appeal No.28 of 2017 (i.e. Idea Cellular Limited). Further, Idea Cellular Limited has been renamed as Vodafone Idea Limited. It is stated that written submissions in the aforesaid appeals have already been filed on behalf of the Appellant on 12.10.2017 in Appeal No.28 of 2017, on 13.7.2018 in Appeal No.29 of 2017 and on 13.7.2018 in Appeal No.33 of 2017.

7.33 The present additional written submissions are being filed on behalf of Vodafone Idea Limited in the aforesaid Appeal No.28 of 2017, Appeal No.29 of 2017, and Appeal No.33 of 2017 in respect of the oral submissions made in rejoinder during the course of hearing of the said appeals before this Tribunal, and also to counter the new submissions made in the written submissions filed by Respondent No.2 – Maharashtra State Electricity Distribution Company Limited ('MSEDCL') in its written submission dated 5.8.2019.

I. *There has been no proposal/prayer in the petition filed by MSEDCL before the Maharashtra Electricity Regulatory Commission ('MERC') seeking recategorization of mobile towers from Industrial Tariff Category to Commercial Tariff Category.*

7.34 During the course of oral arguments, the Respondents have placed reliance upon a schedule to the petition (Case No.48 of 2016) produced at Pg.1164 in Appeal No.29 of 2017 to contend that the MSEDCL had proposed recategorization of mobile towers. However, a perusal of the said schedule makes it evident that the proposal was limited to cover such IT/ITES units under Commercial Tariff Category, which have not received permanent registration certificate under the applicable Government of Maharashtra Policy. In fact, perusal of the entire petition would reveal that the words "mobile tower" are not featured at any place. Inspite of the said fact, MERC in the impugned order at Para. 8.23 has specifically dealt with "Tariff for Telecommunication Towers".

II. *The categorization of mobile towers under the Industrial Tariff Category by MERC since 2004 is not on the basis of its coverage under the applicable IT/ITES Policy alone.*

7.35 It is submitted that there is no finding by the MERC in any of the tariff orders that mobile towers are to be covered under the Industrial Tariff Category only owing to its coverage under the applicable IT/ITES Policy. In fact, the MERC has consistently held:

> *"As regards MSEDCL's proposal to classify certain telecom towers, etc., under commercial category, irrespective of whether they were covered under the IT & ITES Policy of the Government of Maharashtra, no rationale has been submitted by MSEDCL for this specific proposal.… the Commission does not agree with MSEDCL's proposal in this regard and rules that IT & ITeS will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITeS."* *(emphasis supplied)*

7.36 From the foregoing it becomes evident that mobile towers have been treated as Industrial Category consumers, even independent of its coverage under the applicable IT/ITES Policy. It is only in the impugned order that MERC for the first time has ruled that the mobile towers would be covered under the Commercial Tariff Category unless they are covered under the applicable IT/ITES policy of the Government of Maharashtra, and that too without assigning any reasons for such a shift in its earlier consistent position.

III. *The distinction sought to be made by MSEDCL between 'Telecommunication' and 'Information Technology' is untenable.*

7.37 MSEDCL has sought to contend that "*Information Technology and Telecommunication industry are altogether different*". The said contention is not only untenable but also contrary to the MSEDCL's own claim that the mobile towers were being covered under Industrial Tariff Category upto the date of the impugned order owing to its coverage under the applicable IT/ITES Policy of the Government of Maharashtra at the relevant point of time. In fact, it is the case of the Respondents that the mobile towers would cease to be covered under the Industrial Tariff Category only because of lack of a registration certificate under the prevalent IT/ITES Policy of the Government of Maharashtra.

7.38 Moreover, it is a fact that the data centres of the telecommunication companies as well as mobile towers in some of the cases have been given registration certificates under the prevalent IT/ITES Policy of the Government of Maharashtra.

IV. *The contention of MSEDCL in its written submissions dated 5.8.2019 that since some of the mobile towers are rented or leased, the same are commercial consumers, is untenable*.

7.39 At the outset, it is submitted that the aforesaid argument of MSEDCL has been canvassed for the first time in its written submissions dated 5.8.2019. It is submitted that neither in the pleadings nor during the course of oral arguments has MSEDCL made the aforesaid argument. In the circumstances, such arguments made as an afterthought may not be considered by this Tribunal.

7.40 Without prejudice to the foregoing, it is submitted that for classification of consumers into a tariff category as per Section 62(3) of the Electricity Act, 2003, the relevant State Commission is required to categorize consumers, inter alia, on the basis of the purpose for which the electricity supply is required. It is submitted that irrespective of whether the mobile towers are leased/rented or used for captive use, the electricity supply to the mobile towers is for the purpose of providing essential service of telecommunication.

7.41 It is an unpalatable argument that since some of the mobile towers may be leased/rented to telecommunication companies, the electricity supply to such mobile towers cease to be covered within the Industrial tariff category. To illustrate: A residential unit, which is leased/rented by the owner to a tenant would not cease to covered under Residential tariff category and be covered under Commercial tariff category. In any case, as far as the present Appellant is concerned, it is a telecommunication service provider and not an infrastructure company.

V. The service provided by the Appellant through its mobile towers is an essential service, and the mobile towers are required to be covered under Industrial tariff category irrespective of whether it is an IT/ITES unit.

7.42 The Department of Telecommunication, Ministry of Communications & Information Technology, Government of India in its Advisory Guidelines for State Governments effective from 1.8.2013 has clearly identified that services provided through mobile towers are essential services. The relevant portion of the said Advisory Guidelines state as follows:

"*…III. Telecom towers have been given infrastructure status by Government of India vide gazette notification no 81 dated 28.03.2012. All benefits, as applicable to infrastructure industry, should be extended. Electricity connection may be provided to BTS site on priority.*

IV. Telecom installations are lifeline installations and a critical infrastructure in mobile communication. In order to avoid disruption in mobile communication, ***an essential service****, sealing of BTS towers/disconnection of electricity may not be resorted to without the consent of the respective TERM Cell of DoT in respect of the EMF related issues…*" (emphasis supplied)

7.43 MSEDCL has itself submitted and prayed in its additional submissions in Case No.121 of 2014 that mobile towers may be recategorized in a separate sub-category of 'Service Industries' under Industrial Categoryalong with Telephone Exchanges, Telecom industries, IT/ITES Industries, Data Centres.

8. Learned Counsel, Mr. Sandeep Deshmukh appearing for the Appellant in Appeal No. 353 of 2017 has made following arguments/ submissions for our consideration:-

8.1 Three policies declared by the State of Maharashtra, being in 2003, 2009 and 2015. All policies specifically provide that, "incentives" are required to be provided to IT/ITES. Hence electricity has to be supplied at "Industrial" rate (and not commercial). So the policy maker has been clear with the fact that, this relevantly new industry of IT/ITES has to be provided with certain incentives as a policy to encourage the new advancement of technology.

8.2 Four (4) times the Respondent MSEDCL made L.m successful attempts to re-categorise the IT/ITES qua electricity tariff and sought to apply

"commercial" tariff, which is contrary to the State policy that has been consistent since 2003. Order dated 07.11.2012 passed by the MERC, struck down fourth attempt to re-categorise and granted liberty to MSEDCL to approach the appropriate forum for re-categorisation.

8.3 Impugned order dated 03.11.2016, allows the petition by MSEDCL, takes a view contrary to all earlier orders passed by Commission and APTEL from time to time. The order passed by MERC is without any appropriate reasons to ratify the change in tariff. The process of re-categorization by MSEDCL is completely Violative of the public policy promulgated by the State of Maharashtra from 2003 to 2015. The State of Maharashtra has dominion power to issue policy and neither the wings/arms of State Government, which includes various departments, nor the MERC has any power prevailing over the same. Thus, it is within domain of State of Maharashtra to issue a policy so as to grant various benefits in the nature of "incentives" and once the said policy is promulgated, none other than the State of Maharashtra can bring any variation in the same.

8.4 The State Commission (MERC) is constituted in terms of provision of Section 82 of Electricity Act, 2003 and the functions are detailed under Section 86 therein. On perusal of the said functions it is apparent that, the State Commissioner is not empowered either to frame a "Policy" qua providing "incentives" to any sector consuming the electricity nor to lay down further eligibility criteria so as to enable the industries to avail the "incentives" enumerated under the state policy. The State Commission can at best determine the tariff, prompt co- generation, adjudicate disputes between the licencees and generating companies, levy fees,

specify or enforce standards with respect to quality, continuity and reliability of service by licencees, fix trading margins, facilitate intra state transmission and such other functions as may be assigned under the Act. The Act nowhere permits the State Commission to either lay down an exhaustive Policy qua providing incentives to industrial units of any nature or type nor does it permit the State Commission to lay 'down eligibility criteria for the beneficiaries of State Policies to avail the benefits under State Policy. As a matter of fact, even if liberty was granted in favour of MSEDCL to apply the appropriate forum for the purpose of 're-categorization vide order dated 07.11.2012, the said liberty has been wrongly availed by the MSEDCL. Since, decision to apply "industrial" tariff to IT/ITES is a policy decision by the State of Maharashtra, it is the State of Maharashtra which ought to have been moved by the MSEDCL and not the MERC which neither has any competence nor jurisdiction to consider the said issue. It is also for the reason that it is the State of Maharashtra whose policy is sought to be intervened by its instrumentality, without any power and authority.

8.5 The impugned order wherein the State Commission (MERC) directs the Appellant to produce various registration certificates for being avail to avail the benefit of "incentives" under the State Policies is completely without jurisdiction and is in fact, over reach of powers and functions vested with it.

8.6 The impugned order is also bad on account of violation of Section 62(3) of Electricity Act, 2003 for not considering the same before deciding to

re-categorize the industrial tariff applicable to the Appellants.

9. <u>Learned Counsel, Mr. Gaurav Mitra appearing for the Appellant / Reliance Jio Infocom Ltd. in the batch of Appeals has made following arguments/ submissions in the batch of Appeals for our consideration:-</u>

9.1 The Impugned Order arises out of a petition filed by the Respondent No.2, being Case No. 48 of 2016. Also, being aggrieved by the Impugned Order, Reliance Jio Infocomm Ltd. ('**RJIL'**) had filed an impleadment application by way of I.A. 940 of 2017 ("**Impleadment Application**"), and the Tribunal had been pleased to allow such impleadment by its order dated 08.11.2017. Thereafter, pursuant to a composite scheme of arrangement, all assets and liabilities of Reliance Jio Infocomm Ltd. pertaining to its Tower Infrastructure, including but not limited to its wireless and broadcast towers and sites, that host or assist in the operation of plant and equipment used for transmitting telecommunication signals have been transferred to Reliance Jio Infratel Pvt. Ltd. and accordingly Reliance Jio Infratel Pvt. Ltd sought impleadment in addition to RJIL by way of I.A. 1176 of 2019.

9.2 The telecom service providers, including RJIL, in the present batch of appeals are aggrieved by the Impugned Order of the Respondent No.1 requiring such telecom service providers to get specific certification for their mobile/ telecom towers under the IT/ITES Policies of the Government of Maharashtra to avail industrial tariffs and in the absence thereof, such telecom service providers are to be charged at commercial tariffs.

9.3 The IT/ITES Policies of the Government of Maharashtra are issued by the Department of Industries, Energy and Labour for the purposes of providing fiscal benefits to IT/ITES Industries and cannot be used to supplant tariff orders of the Respondent No.1. It is to be emphasized that the Electricity Regulatory Commission has to independently exercise its mind in classification as per the mandate led down under the Electricity Act, 2003. Registration under the Maharashtra IT/ITES policy has no relevance and cannot supplant the independent exercise of power by the Commission.

9.4 It is pertinent to note that the Respondent No.1 has consistently held, in its previous orders, that telecom towers are to be charged at industrial rates irrespective of the IT/ITES Policies of the Government of Maharashtra.

9.5 In fact, Respondent No.2 has on multiple occasions sought re-categorization of telecom towers from 'industrial' to 'commercial' and the such requests of the Respondent No.2 have been declined by the Respondent No.1.

9.6 The Respondent No.2, by its circular dated 26.06.2009 had sought to charge telecom service providers commercial tariffs instead of industrial tariffs. However, the same was challenged by TATA Teleservices (Maharashtra) Ltd. by way of writ petition, being WP. 6702 of 2009 and the Hon'ble High Court of Bombay was pleased to grant a stay of the operation of the circular dated 26.06.2009 issued by Respondent No.2. Thereafter, the Respondent No.2 issued a circular dated 20.04.2010

restoring the status of mobile/ telecom towers as industrial undertaking and charging them at industrial rates.

9.7 The Respondent No.2 again sought re-categorization of mobile/ telecom towers from industrial tariff to commercial tariffs by its petition, being Case No. 116 of 2008 for the years 2009-10. The prayer of Respondent No.2 seeking such re-categorization was rejected vide order dated 17.08.2009.

9.8 The Respondent No.2 again sought re-categorization of mobile/ telecom towers from industrial to commercial by its petition, being Case No. 111 of 2009 for the years 2010-11. The Respondent No.1 was pleased to reject such request of Respondent No.2 by its order dated 12.09.2010. While rejecting the request for re-categorization made by Respondent No.2, the Respondent No.1 had re-iterated its rationale for denying such re-categorization as stated in its previous order dated 17.08.2009.

9.9 In fact, Respondent No.2 has in communications and circulars dated 03.05.2012 has stated that mobile/ telecom towers are to be categorized as in the industrial category.

9.10 Even though, by their own circulars (in paragraph 6 above), the Respondent No.2 has sought to categorize mobile/ telecom towers in the industrial category, it again sought to bring mobile/ telecom towers under the category of LT-II Commercial or HT-II Commercial by its petition, being Case No. 19 of 2012 for the financial year 2012- This request for re-categorization by the Respondent No.2 was approved by the Respondent No.1 by its order dated 16.08.2012. Against the order of

the Respondent No.1 dated 16.08.2012, Appeal nos. 234, 235, 211 and 215 of 2012 were filed before the Appellate Tribunal for Electricity ("**APTEL**"). Upon hearing the appeals, APTEL set aside order of the Respondent No.1 dated 16.08.2012 .

9.11 Thus, it is demonstrated from the aforementioned paragraphs that ever since 2004, the Respondent No.1 has categorized mobile/ telecom towers in the industrial category and has rejected repeated requests of the Respondent No.2 to re-categorize mobile/ telecom towers from industrial to commercial. Furthermore, even when the Respondent No.1 sought to permit such re-categorization, the same was set aside by the APTEL by its order dated 16.08.2012. It is to be emphasized that Respondent No.1 has consciously and independently applied its mind in categorising mobile/ telecom towers in the industrial category and expressly rejecting any attempt to link such categorisation with Government of Maharashtra IT/ITES policy.

9.12 Thereafter, the Respondent No.2 sought to create a separate category for the telecom industry and IT/ITES Industry by its petition, being Case No. 121 of 2014 for the years 2013-14 to 2015-16. The Respondent No.1 passed order dated 26.06.2015, wherein it reiterated the rationale of its previous order dated 17.08.2009 but still added an additional paragraph stating "*…only if they are covered as IT/ITES and the provisions of GoM's Policy apply to them.*" It is important to highlight that even subsequent to the order dated 26.06.2015, the telecom industries continued to be charged industrial tariffs.

9.13 The Impugned Order, while re-iterating its rationale in order dated 17.08.2009, the Respondent No.1 added a paragraph stating "*Telecommunication towers shall be covered under the Commercial category, unless specifically included in the IT and ITES Policy of the Government of Maharashtra for coverage under the Industry category.*"

9.14 It is submitted that Paragraph 8.23 of the Impugned Order of the Impugned Order, nowhere gives any reasons for such additional language which requires that mobile/ telecom towers are to be specifically included in the IT/ITES Policy of the Government of Maharashtra to be able to get the benefit of industrial tariffs.

9.15 On the contrary the Impugned Order re-iterates its earlier order dated 17.08.2009, wherein the Respondent No.1 has held that "*The Commission has consciously included IT and IT enabled Services (IT and ITES) under the industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT & ITES category continues to be charged at industrial tariffs. In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June, 2009, the Commission has included IT & ITES category under industrial category. Hence, the Commission does not agree with MSEDCL's proposal in this regard and rules that IT & ITES will be charged at industrial rates (HT and LT as applicable**<u>***), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITES.***</u>" Thus, it can be seen from the aforementioned that

the Respondent No.1 holds that telecom/ mobile towers should be charged industrial tariffs regardless of whether such activities are covered under the IT/ITES Policy of the Government of Maharashtra.

9.16 It is submitted that Respondent No.1 has incorrectly averred that the Respondent No.1 does not apply and is not required to apply its mind to preparation of tariff orders. However, it is an admitted position that the Respondent No.1 has rejected multiple requests of the Respondent No.2 for re-categorization of mobile/ telecom towers from industrial to commercial by way of its reasoned orders dated 17.08.2009 and 12.09.2010. Therefore, the Respondent No.1 has applied its mind and given reasoned order as to mobile/ telecom towers to be charged at industrial tariffs instead of commercial tariffs.

9.17 Furthermore, it is submitted that in the Impugned Order, the additional language in the order requiring specific coverage under the IT/ITES Policy so as to get the benefit of industrial tariffs has not been prayed for or sought by the Respondent No.2. Thus, RJIL and other interested telecom service providers were not given any notice of such change and therefore did not have the opportunity to discuss/ debate the feasibility of the requirement of being necessarily covered under the IT/ITES Policy of the Government of Maharashtra. A perusal of the Impugned Order itself makes it evident that there was no reasoned proposal/ specific prayer on behalf of Respondent No.2, no discussion and/or reason by Respondent No.1 and no opportunity to any stakeholders. On the other hand a complete 360 degree change requiring registration under the Government of Maharashtra fiscal policy, as required by the Impugned

Order, shows total abdication of responsibilities by the Respondent No.1.

9.18 It is submitted that Section 62(3) of the Electricity Act, 2003 ("**Act**") gives the 'Appropriate Commission' the power for tariff determination and even states that such commission (in this case Respondent No.1) can 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.***"Furthermore, Section 61 and 86(1)(a) also require the Commission to determine tariff independently. Therefore, it has been incorrectly argued by the Respondent No.1 that it does not apply its mind to tariff determination as it is required to do so under the Act.

9.19 Following are the submissions as regards caselaw provided by Respondent no.1:-

(i) **BSNL v Union of India - reported as (2006) 3 SCC 1**

a. The captioned judgment deals with whether provision of mobile connections to consumers is a manufacturing activity or not. It was held the provision of mobile connections is not a manufacturing activity and therefore is not an industrial activity and therefore no sales tax can be levied.

b. In the instant appeal, the ratio of the above captioned judgment does not apply as the present appeal does not deal with the provision of mobile connections but as regards the levy of commercial tariffs as opposed to industrial tariffs on mobile/

telecom towers. The same is not related to whether mobile/ telecom towers are to be considered to be manufacturing activity or not as the Respondent No.1 has repeatedly held that mobile/ telecom towers are to be charged industrial tariffs by virtue of being an IT/ITES Industry.

(ii) **BSNL v PSERC – being Appeal No. 116 of 2006 before the APTEL**

a. The above captioned judgment of the APTEL is factually distinct from the present batch of appeals. This judgment deals with telephone exchanges not being industrial and therefore is not applicable to the facts of the instant appeal.

b. In fact, Paragraph 6 of the judgment holds that "*… The arguments of the learned counsel that the offices and telephone exchanges of the appellant should be treated as an industry, in view of the provisions of the Finance Act, Industrial Disputes Act, Factories Act and Employees' State Insurance Act, cannot be accepted. The categorization, as already pointed out, depends upon the factors which are relevant to the Electricity Act, 2003 particularly, subsection (3) of Section 62. It is possible that the appellant may fall under the category of 'Industry' on applying the meaning of term 'Industry' as it is found in the other Statutes but that cannot be the basis to determine whether the appellant is to be charged tariff by treating it as an industry. The appellant has not shown any violation of the Electricity Act, 2003 or the Regulations framed thereunder in charging the tariff from it under the non-residential supply category.*"

c. Furthermore, Paragraph 7 of the judgment holds that "*it will not be correct to borrow the definition of 'industry' from 'other statutes' for*

the purpose of holding that the appellant ought to be billed as per Industrial Tariff".

d. Therefore, it is apparent that the above quoted paragraphs of the judgment require the Respondent No.1 to take independent decisions as regards categorization of consumer and cannot abdicate its responsibility, as is required under Section 62(3) of the Act, to other legislations or policies such as the IT/ITES Policy. The Impugned Order, on this ground, is liable to be set aside

(iii) **Tata Teleservices Limited v RERC – being Appeal No. 88 of 2012**

a. The above captioned judgment in Paragraph 42 holds that "*The learned Counsel for the Appellant relies upon the Clause 2.9.4 of the IT and ITES policy, 2007 wherein the State Government has changed the applicable category of tariff from commercial to low tension industrial category for IT and ITESunits"*

b. The above captioned judgment in Paragraph 43 holds that "*IT Policy and other policies issued by the State Government and classification made by the State Government for providing incentives under various programmes etc., do not have any role in tariff determination process. It cannot be denied that the jurisdiction for change of categorization is of the State Commission and not the State Government*".

c. The above captioned judgment in Paragraph 48 holds that "*In regard to the reliance of the IT Policy issued by the State Government, the learned Counsel for the State Commission has correctly pointed out that this Tribunal in a number of cases has held that even the directions of the State Commission u/s 108 of the*

Electricity Act, 2003, are not binding on the State Commission while determining the tariff"

d. The above captioned judgment in Paragraph 49 holds that "*In view of the settled position of law, it has to be observed that the policy of the State Government is not binding on the State Commission and it has to determine the tariff in accordance with the Act and Regulations framed therein."*

e. In light of the above, the State Commission, being Respondent No.1 cannot abdicate its responsibility of making tariffs determination to policies of the State Government and therefore must apply its own mind and make an independent decision as regards tariff categorization. On this ground alone the Impugned Order is liable to be set aside.

9.20 In the present appeal, the Impugned Order does not independently take a conscious decision to treat mobile towers as commercial and not industrial on the reasoned finding that there is no manufacturing activity. No such exercise is carried out by the Commission either to classify mobile towers as industrial or commercial. The Impugned Order simply displays a simple abdication by the Commission of responsibilities and duties under the Electricity Act, 2003. The challenge to the Impugned Order is premised on the ground that instead of any independent classification done by the Commission, the Appellants are relegated to registration under Government of Maharashtra fiscal policy in order to decide whether one will be treated commercial or industrial tariffs which cannot be countenanced in law.

9.21 Therefore, for the reasons set out above, the Impugned Order must be set aside to the extent it requires mobile/ telecom towers to be registered under the IT/ITES Policy of the Government of Maharashtra to be able to avail of industrial tariffs.

10. <u>Learned Counsel, Mr. Buddy A. Ranganadhan appearing for the Respondent NO.1 / Maharashtra Electricity Regulatory Commission and Mr. G. Sai Kumar for MSEDCL have made following arguments/ submissions in the batch of Appeals for our consideration:-</u>

10.1 It is contended on behalf of the Appellants that the Respondent Commission in its Order dated 3 November, 2016 has wrongly categorized Telecommunication Towers under Commercial category, unless specifically included in the Information Technology (IT) and Information Technology Enabled Services (ITES) Policy of the Government of Maharashtra (GoM) for coverage under the Industrial category.

10.2 The principal argument of all the Appellants is that the Commission has, in the impugned order, taken a complete U-turn and treated **<u>telecom towers</u>** as "commercial" when they were hitherto being treated as "industrial". One or two instances of such argument are extracted below:

<u>Bharti Airtel Written Submissions</u>:

"Till the passing of the impugned order, the distribution licensee had understood and implemented the tariff orders as categorising the Mobile and broadcasting towers under the Industrial Category.."

<u>Tata Teleservices Written Submissions</u>

*"…the state commission without disclosing rationale, reasoning or basis **<u>has converted</u>** the tariff category of mobile towers and related telecommunications instalments of the Appellant Company from industrial to commercial.."*

'*This decision of the Respondent Commission* ***<u>is completely contrary to its previous Orders and the classification existing from more than 10 years</u>*** *wherein it was specified that the Industrial category is made applicable to Mobile and Broadcasting Towers irrespective of whether such towers are covered by the Government of Maharashtra Policy*.'

10.3 The aforesaid argument is entirely incorrect, inter alia, on account of the following:

(i) In all its previous orders including in the current Impugned Order the Commission had not classified "**<u>Telecom Towers</u>**" as "Industrial".

(ii) The dispensation always considered by the Commission from 2007 till the current Impugned Order is that an **<u>activity which is covered by the IT and ITES policy</u>** of the Government of Maharashtra would be charged an Industrial Tariff.

(iii) The Commission had never given a finding as to whether the "Telecom Towers" were in fact covered by the IT and ITES policy or not. In fact, the Commission holds, that it has not gone into the issue as to what activities are covered by the IT and ITES policy or not.

(iv) If the Telecom Towers were covered by the IT and ITES policy, they would be charged Industrial Tariff and all they had do was to show the distribution licensee that they were covered by the IT and ITES policy of the Government of Maharashtra .

(v) The very same dispensation which was brought in year on year was continued from 2004 till the Impugned Order as well and the Commission has not made any change at all.

a. MERC order dated 10.3.2004 (Case No. 2 of 2003)

10.4 On the issue of considering IT industries and ITES under the Industrial category for the purpose of electricity tariff of the Maharashtra State Electricity Distribution Co. Ltd (MSEDCL) :

1.11.3 Commission's Ruling

"*The Consumers in the Information Technology (IT) and Information Technology Enabled Services (ITES) sector are currently classified under the commercial category and charged accordingly. As the commercial category is a subsidizing category the tariffs are high for these categories. The Commission has been receiving applications from such consumers requesting that they should be classified under LT industrial category, for the purposes of tariff determination. In July 2003, the GoM announced the IT and ITES Policy,2003 for promoting business and enterprise in the IT industry, to make Maharashtra the most favoured destination for investments in the IT and ITES industry. In the context of the infrastructure support to the IT and ITES sector, the Policy specifies under Clause 4.2 (h) that "Levying of power charges on IT and ITES units at industrial rates and notifying IT and ITES units as a separate category of consumers through MERC."*

'In line with the IT and ITES Policy announced by the GoM and the stated philosophy of the Commission in the previous Orders, the ***Commission has included the Low Tension IT industry and IT enabled services (as defined in the GoM Policy) in the LTP-G category for the purposes of tariff determination.*** *The Commission has decided against creation of a new category for IT and ITES sector, in line with its stated philosophy of reducing the number of consumer categories and consumption slabs, over a period of time.*'

From this Order onwards, the Respondent Commission has categorized IT industries and ITES, as covered in IT and ITES Policy of GoM under the Industrial tariff category.

b. MERC order dated 17.8.2009 (Case No. 116 of 2008)

10.5 In its Tariff Petition in Case No. 116 of 2008, MSEDCL had made the following proposal regarding the categorization of Mobile Towers:-

"MSEDCL is authorized to decide the tariff category of the consumer based on the usage of electricity. The IT and IT enabled industry is classified by the Industry Department. The mobile towers and the commercial broadcasting towers and all other similar activities are proposed to be classified under commercial category."

10.6 During the public consultation process on this Petition, the following objections were recorded in respect of the above suggestions of MSEDCL.

"*Bharti Airtel Limited (Airtel) submitted that MSEDCL's proposal to create a specific exemption for mobile towers and commercial broadcasting towers and all other similar activities, conveys MSEDCL's admission that the electricity consumption for such activities falls within the definition of industry as envisaged under IT and ITES Policy of Government of Maharashtra. Otherwise, there was no requirement for MSEDCL to seek a specific exception for the first time in 2009. Airtel submitted that MSEDCL has been wrongfully denying 'industry tariff' to this Objector, and illegally charging commercial tariff for mobile towers and commercial broadcasting and other similar activities and MSEDCL needs to refund all such illegal levies and excess collection."*

10.7 The Respondent Commission, in its Tariff Order dated 17 August, 2009, ruled on the above issue as follows:

"*As regards MSEDCL's proposal to classify certain telecom towers etc under commercial category, irrespective of whether they were covered under the IT & ITES Policy of the Government of Maharashtra, no rationale has been submitted by MSEDCL for this specific proposal. The Commission had consciously included IT and IT enabled Services (IT & ITES) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT & ITES category continues to be charged under industrial tariffs. In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission has included IT and ITES category under industrial category.* ***Hence, the Commission does not agree with MSEDCL's proposal in this regard and rules that IT & ITES will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITES****."*

10.8 While deciding on MSEDCL's proposal to categorize all Mobile Towers (irrespective of its covered under GoM's IT and ITES Policy) under Commercial category, the Respondent Commission in its Order reproduced above had **not dealt with the issue of which activities,**

including Mobile Towers, are covered under GoM's Policy. The Respondent Commission's above decision was only that **all activities covered under GoM's IT and ITES Policy should get the benefit of industrial tariff, as had also been decided by the Commission in its earlier Tariff Order dated 10 March, 2004 in Case No.2 of 2003.** It was upto MSEDCL to verify the coverage of activity under GoM's Policy before giving it the benefit of Industrial Tariff or otherwise.

10.9 It may be noted that the Commission **did not hold that "telecom towers" would be categorised as "industrial**". The Commission only held that "**all activities**" covered under the IT and ITES policy would be treated as "industrial". The Commission also clearly held that the above dispensation was "…***without getting into the details of whether mobile towers ….. and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITES…"***

c. MERC order dated 12.9.2010 (Case No. 111 of 2009)

10.10 MSEDCL had made the following prayers in its Tariff Petition in Case No. 111 of 2009.

"*k) Approve re-categorization of IT and ITES, Mobile Towers, BPO Centres, etc. under the Commercial category.*"

In support of its prayer, MSEDCL had made the following submissions in its Petition:

"*As per the Tariff Order, any office with intensive use of computers is commercial (being non-domestic). However, as per IT Policy, "Back Office operation relating to computerized data" and "other services provided with the extensive use of computers" is covered under IT services & IT enabled services and is eligible for industrial tariff. Actually, office operation is covered under commercial category. BSNL activity & the mobile based communication (GPRS & CDMA) and its allied cell sites (Towers) are also included under IT units as per amendment dated April 8,*

2005. Actually usage of phone and mobile at cost with interaction of consumers is a commercial activity but is covered under IT unit thereby enabling them to demand for industrial tariff."

"MSEDCL submitted that it is essential to review the activities eligible for registration as IT services & IT enabled services in IT & ITES Policy, as these activities will be eligible for industrial tariff as against their commercial activity."

"MSEDCL also submitted that the Mobile Towers are not declared under IT Policy to be Industries. Hence, MSEDCL has proposed that the Mobile towers be classified under commercial category."

"*MSEDCL is authorized to decide the tariff category of the consumer based on the usage of electricity. The IT and IT enabled industry is classified by the Industry Department. The mobile towers and the commercial broadcasting towers and all other similar activities are proposed to be classified under commercial category*".

10.11 The Respondent Commission in its Tariff Order dated 12 September, 2010 has ruled on above issue as follows:

Commission's Ruling

"A similar issue was raised by MSEDCL in its previous APR Petition in Case No.116 of 2008*. The Commission has ruled on this matter in the previous APR Order dated August 17, 2009. The relevant extract of the Commission's APR Order dated August 17, 2009 is reproduced below*:

'*The Commission has consciously included IT adn IT enabled Services (IT & ITeS) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then the IT & ITeS category continues to be charged under industrial tariffs. In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission has included IT & ITeS category under industrial, as reproduced below:*

5 LT V: LT-Industrial

Applicability

Applicable for industrial use at LT voltage, excluding Agricultural Pumping Loads. This Tariff shall also be applicable to IT Industry & IT enabled services (as defined in the Government of Maharashtra policy)."

1. HT 1: HT- Industry

Applicability

This category includes consumers taking 3-phase electricity supply at High Voltage for industrial purpose. This Tariff shall also be applicable to IT

Industry & IT enabled services (as defined in the Government of Maharashtra Policy).”

In view of the above, the Commission rules that IT & ITeS will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITeS.’

In case MSEDCL desires to modify the eligibility and applicability of the IT & ITES Policy itself, then MSEDCL may approach the appropriate forum for the necessary relief.”

In its above Tariff Order, the Respondent Commission continued its practice of categorizing the activities covered under GoM’s IT and ITES Policy in the Industrial category. The Respondent Commission had once again **not held that Mobile Towers were ‘Industrial**’.

d. MERC Order dated 16 August, 2012 in Case No.19 of 2012, APTEL Judgment dated 7 November, 2012 in Appeal No.234, 235, 211 and 215 of 2011

10.12 The MSEDCL in its Tariff Petition in Case No.19 of 2012, had proposed to categorize Mobile Towers under Commercial category. There was no objection to this proposal during the public consultation process, and the Respondent Commission in its Order dated 16 August, 2012 had categorized Mobile Towers under Commercial category. However, the rationale behind this decision was not explained in the Order. Aggrieved by the above Order of the Respondent Commission, various Telecom Operators filed Appeal Nos. 234, 235,211 and 215 of 2012 before this Tribunal. Vide its Judgment dated 7 November, 2012, the Tribunal has ruled on this matter as follows:

“9. *In spite of this, the impugned order has been passed without any discussion regarding change in the Appellants category. Though it is pointed out*

that the tariff schedule attached to the tariff order would indicate Mobile Towers, Micro Wave Towers, Satellite Antennas used for communication activity in the LT/HT Commercial Category there is no specific pleading or proposal in the petition.

10. As indicated by the Learned Counsel for the Appellants, Mobile Towers etc prior to passing of the impugned order, were categorized under the Industrial category and in fact the State Commission in the tariff order for the FY 2009-10 rejected the specific proposal of the distribution licensee for change in category from Industrial to Commercial.

11. Despite this, the impugned order dated 16.8.2012 has been passed by the State Commission changing the consumer category of the Appellants into Commercial without any discussion or reasoning and without hearing the Appellants. Thus, we notice that the principles of natural justice have been violated in the present case.

12. We, therefore, deem it fit to set aside the portion of impugned order dated 16.8.2012 regarding re-categorisation of Mobile Towers, Micro Wave Towers, Satellite Antennas used for communication activity to HT/LT Commercial Category from HT/LT Industrial Category prevailing prior to the date of the impugned order. Accordingly the same is set aside.

13. However, the distribution licensee (R-2) is given liberty to file a fresh petition containing the proposal regarding re-categorisation of the Appellants in appropriate tariff category before the State Commission which in turn shall consider the same and pass the appropriate orders in accordance with law after hearing all the concerned parties.

14. This order will apply to all the consumers coming under the specified category of telecommunication towers. We must make it clear that we do not want to go into the merits of the matter, and as such we are not giving any opinion on this issue. It is for the State Commission to decide the issue after considering the materials placed by the parties uninfluenced by the conclusion earlier arrived of."

10.13 It is important to note that in the above judgment, this Tribunal has set aside the Commission's Order only on account of denial of principle of natural justice. In point of fact there was no detailed finding on this issue had been conceded by the Commission in the above matter (para 9 of the judgment). Further, the Tribunal categorically stated that it has not given any opinion on merits of the matter.

10.14 Some of the Appellants have sought to argue that the Commission has, in the present impugned Order committed the same error that had been

corrected by this Tribunal in the above judgment. The said contention is entirely incorrect since:-

(i) The Impugned Order has **not** sought to change the classification that has been holding the ground since 2004. Hence the question of violation of natural justice cannot and does not arise.

(ii) The Impugned Order only repeats and reiterates word-by-word, the earlier Order of 26th June 2015 which was not challenged by anyone on this count. Hence, the Appellants are clearly estopped and barred from impugning the self-same dispensation in the impugned Order.

(iii) It has been held by this Tribunal in the Bihar Steel Manufacturers Assn Vs BERC Appeal No. 172 of 2010 judgment dated 18.5.2011that the principles of constructive res-judicata will apply even to tariff proceedings. Hence, if the Appellants had the opportunity of challenging the dispensation in the 2015 tariff Order and chose not to do so, they were estopped from impugning the same at this stage.

e. MERC Order dated 26 June, 2015 in Case No.121 of 2014

10.15 MSEDCL had made the following proposal in its Tariff Petition in Case No.121 of 2014.

"6.24.1 MSEDCL has submitted that, in the Tariff Order in Case No.19 of 2012, Mobile Towers and Telephone Exchanges were included in the Commercial Category. As per the ATE Judgment dated 7 November, 2012 on the Appeal filed by some telecom companies, the relevant part of the Tariff Order was set aside and MSEDCL was directed to charge the Industrial tariff to Mobile Towers w.e.f. 1 August, 2012. ATE also ruled that MSEDCL may file a fresh Petition regarding the appropriate tariff category for Mobile Towers, and the Commission may consider it same and pass appropriate Order after hearing all the concerned parties.

6.24.2 In its MYT Petition, MSEDCL has now submitted that Mobile Towers are devices which are used for transmitting telecommunication signals, and there is no manufacturing or industrial activity. Accordingly, MSEDCL has proposed that the

tariff for Mobile Towers should be as per the Commercial category only. MSEDCL has stated that it is purely a commercial activity and the Commission had correctly categorized it accordingly.

6.24. However, in its additional submission, subsequent to the Public Hearings, MSEDCL has proposed to include Mobile Towers in a newly created sub-category of Service Industries, under the main category of Industries, along with Telephone Exchanges, Telecom Industries, IT/ITES Industries, Date Centres, etc."

10.16 During the public consultation process the Respondent Commission received the following suggestions and objections on the above proposal of MSEDCL.

1.16.16 Mobile Towers: Shri Nilesh Ghape and Shri Rahul Kadu submitted that Commercial tariff should be applied to Mobile Towers.
1.16.17 Bharti Airtel Ltd submitted that the Telecom sector has been notified as an Infrastructure sector vide Government of India's Notification 8 of 2012. Other States, namely Andhra Pradesh and Rajasthan, have covered telecom loads under the Industrial category as per their Information Technology (IT)/ IT-enabled Services (ITES) Policies. Therefore, they ought to be classified as an industry as distinguished from entities performing purely commercial activities.
1.16.18 Vodafone Cellular Ltd and Idea Cellular Ltd in their letters dated 27 and 22 May 2015, respectively, objected to MSEDCL's proposal for reclassification of Mobile Towers from the Industrial category to the Commercial category. Such reclassification was sought by MSEDCL in its earlier Petition in Case NO.19 of 2012 and the Commission had allowed such reclassification in its Tariff Order. They stated that the Order was challenged before ATE. The ATE granted liberty to MSEDCL to file a fresh Petition, and the Commission was directed to pass an appropriate Order after hearing all the concerned parties. The two objectors have now submitted that they would be adversely affected by the reclassification proposed by MSEDCL and in accordance with the ATE Judgment, sought an opportunity to file their objections and to fix a date for hearing them."

10.17 The Respondent Commission ruled on the above issue in its Tariff Order dated 26 June 2015 as follows*:*

"Commission's Ruling

6.24.4 The Commission in its Order in Case No.116 of 2008 dated August 17, 2009, had discussed the categorisation of Mobile Towers in detail as follows:

> *'As regards MSEDCL's proposal to classify certain telecom towards, etc. under commercial category, irrespective of whether they were covered under*

*the IT & ITES Policy of the Government of Maharashtra, no rationiale has been submitted by MSEDCL for this specific proposal. The Commission had consciously included IT and IT enabled Services (IT & ITES) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT & ITES category continues to be charged under industrial tariffs. In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission has included IT & ITES category under industrial category. Hence, the Commission does not agree with MSEDCL'S proposal in this regard and rules that **IT & ITES** will be charged at industrial rates (HT and LT rates, as applicable) **without getting** into the details of **whether mobile towers** and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITES.'*

*"The Commission is of the view that the rationale and ruling of its earlier Order in Case No.116 of 2008 should continue to apply. **In other words** the **Industrial tariff** will apply to Mobile Towers or other activities cited by MSEDCL **only if they are covered as IT/ITES and the provisions of GoM's Policy apply to them.**"*

10.18 While continuing the practice of categorizing activities under GoM's IT and ITES Policy in the Industrial category, in its above Order the Respondent Commission has reiterated that the benefit of Industrial Tariff can be availed by Mobile Towers only if they are covered by GoM's Policy. It is pertinent to note that the above ruling of the Respondent Commission has not been challenged before this Tribunal and hence has, attained finality.
The current impugned Order does nothing more than repeat and reiterate the said 2015 Order.

f. MERC Order dt 3 November, 2016 in Case No.48 of 2016[Impugned order]

10.19 During the public consultation process on MSEDCL's Tariff Petition in Case No.48 of 2016, the Respondent Commission received the

following suggestions and objections regarding categorization of Mobile Towers.

"*VIA (Vidarbha Industries Association) stated that Mobile Tower operators are getting undue advantage of the cross subsidised Industrial Tariff meant for Micro and small-scale industry, Flour Mills and Welding Workshops i.e. Industries below 20 kW. The LT V(A) category has a Tariff below ABR. Therefore, due provision should be made to ensure that this category comes under LT V(B) by prohibiting such consumers from getting undue benefit of subsidy or by transferring them to the Commercial category. Shri Suhas Joshi also suggested that mobile towers should be classified under Commercial Tariff as they do not involve any manufacturing process.*

"Bharati Airtel Ltd stated that MSEDCL should charge Industrial Tariff for consumption by mobile towers. Base Station Controllers (BSC) and Mobile Switching Centres (MSC) requiring an Information Technology (IT) and IT-enabled Services (ITES) Registration Certificate. In the previous MYT Order, the Commission had rejected the proposal for categorization of mobile towers under the Industrial category. However, under GoI's Notification 8 of 2012, the Telecom sector has been notified as an infrastructure sector."

10.20 The Respondent Commission ruled on the issue of categorization of Telecommunication Towers in its impugned Multi Year Tariff Order dated 3 November, 2016 as follows:

'"8.23 Tariff for Telecommunication Towers:

The issue of tariff category applicable to telecommunications towers has been decided by the Commission in its previous MYT Order as follows:

"6.24.4.:The Commission in its Order in Case No.116 of 2008 dated August 17, 2009, had discussed the categorisation of Mobile Towers in detail as follows:

> *'As regards MSEDCL's proposal to classify certain telecom towers, etc., under commercial category, irrespective of whether they were covered under the IT & ITES Policy of the Government of Maharashtra, no rationale has been submitted by MSEDCL for this specific proposal. The Commission had consciously included IT and IT enabled Services (IT & ITES) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004. Since then, the IT & ITES category continues to be charged under industrial tariffs. In the existing Tariff Schedule of MSEDCL as well as the approved Tariff Schedule for the distribution licensees in Mumbai issued in June 2009, the Commission has included IT & ITES category under industrial category. Hence, the Commission does not agree with MSEDCL's proposal in this regard and rules that IT & ITES will be charged at industrial rates (HT*

and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITeS'.

"The Commission is of the view that the rationale and ruling of its earlier Order in Case No.116 of 2008 should continue to apply. In other words, the Industrial tariff will apply to Mobile Towers or other activities cited by MSEDCL only if they are covered as IT/ITES and the provisions of GoM's Policy apply to them."

'"Considering the above, Telecommunications Towers shall be covered under the Commercial category, unless specifically included in the IT & ITES Policy of the Government of Maharashtra for coverage under the Industry category."'

10.21 It is submitted that the Respondent Commission, in its ruling on categorization of Telecommunication Towers, has only reiterated and re-affirmed its earlier ruling in previous Tariff Order, i.e. that the benefit of Industrial Tariff can be availed by Mobile Towers only if they are covered by GoM's IT and ITES Policy. The Respondent Commission had further clarified that Telecommunication Towers if not specifically covered under the IT and ITES Policy of GoM, would be categorized under the Commercial tariff category.

10.22 The chronology of Orders summarized in the previous paragraphs reveals the following facts.

(i) In 2004, considering the objectives and context of GoM's IT and ITES Policy, the Commission categorized all the activities covered under GoM's IT and ITES Policy in the Industrial category for the purpose of electricity tariff. The Respondent Commission has continued this approach consistently in its all subsequent Tariff Orders.

(ii) The Commission has **never** categorized '**mobile towers**' as '**Industrial**'.The Commission has always held that all activities covered by the IT/ITES Policy would be billed as 'Industrial'.

(iii) The Commission has also made it clear that they were not going to get into what was and what was not covered by IT/ITES policy. The Respondent Commission has never ruled on which activity is or is not covered by GoM's Policy. It is left to the Distribution Licensees to put each consumer into the industrial category by applying the Commission defined criterion of coverage under the GoM's IT and ITES Policy for treating it in the Industrial Tariff category or otherwise. This is in accordance with the Clause 13 of the Maharashtra Supply Code,2005 which reads as under:

"*13. Classification and Reclassification of Consumers into Tariff Categories:*

*The Distribution Licensee may **classify or reclassify a consumer** into various **Commission approved tariff categories** based on the purpose of usage of supply by such consumer:*
*Provided that the Distribution Licensee **shall not create** any tariff category other than those approved by the Commission.*"

(iv) Whenever issues related to tariff categorization of Telecommunication Towers were raised before this Respondent Commission, the Commission has reiterated and reproduced the rulings in its earlier Orders, stating that all the activities covered under GoM's IT and ITES Policy are categorized in the Industrial tariff category, which means that Telecommunication Towers will get the benefit of the Industrial tariff only if they are covered under the IT and ITES Policy of GoM and would otherwise be covered under the Commercial tariff category.

(v) The impugned Order dated 3 November, 2016 is no different inasmuch as, the Respondent Commission has only clarified its old approach to tariff categorization of IT and ITES Industries and Telecommunication Towers set out above.

(vi) It is therefore clear that the main contention of all the Appellants that the Commission had hitherto classified "telecom towers" as industrial is entirely incorrect. The Commission had only always classified "all activities" falling within the IT and ITES Policy as "industrial".

10.23 It is submitted that the contentions made by the Appellant in its Appeal are not tenable, and the impugned Order passed by the Respondent Commission would not require interference by the Tribunal as the instant Appeal is devoid of any merit and that, in view of the above, it ought to be dismissed.

10.24 Vide their submissions made to this Tribunal as well as in the Written Submissions the Appellants have raised the following contentions. Given below are the main contentions of the Appellant and the response thereto:

RE: The State Commission has consciously with full application of mind and consistently categorized the Mobile Towers and Broadcasting towers under the HT-I Industrial Category for the purpose of retail supply tariff to be charged from the Appellants under the Tariff orders issued by the Commission :

10.25 The contention that the **Mobile Towers** were classified under the Industrial Category is wrong. The Respondent Commission has since

2004, in all its Tariff Orders reiterated that **all activities** covered under GoMs IT/ITES policy will get the benefit of the Industrial tariff category, which means that Telecommunication Towers will get the benefit of the Industrial tariff only if they are covered under the IT and ITES Policy of GoM and would otherwise be covered under the Commercial tariff category.

10.26 It is submitted that under the Supply Code, it was upto the MSEDCL to decide which consumer falls in which tariff category based on the usage of electricity. In case MSEDCL desires to modify the eligibility and applicability of the IT/ITES Policy itself then it may approach the appropriate forum for necessary relief.

10.27 In this regard, the reliance placed by the Appellants on the *doctrine of stare decisis* is irrelevant and irrational. The Commission has maintained its stance that Telecommunication Towers will get the benefit of the Industrial tariff only if they are covered under the IT and ITES Policy of GoM and would otherwise be covered under the Commercial tariff category. Since there is no change in dispensation by the Commission, the question of violating the principle of stare decisis cannot and does not arise.

10.28 The reliance placed by the Appellants on the judgments of this Tribunal in MIAL vs MERC (Appeal 295 of 2009 decided on 31.5.2011 and Association of Hospitals vs MERC (Appeal 110 of 2009 decided 20.10.2011) on the principle that there has to be a rationale for classification under Section 62(3) of the Electricity Act,2003 is entirely incorrect as the above two cases are not relevant to the present matter.

The categorization of IT/ITES industries under the Industrial Tariff category has been done by the Commission on the basis of the GOMs IT/ITES policy 2003.It was upto MSEDCL to verify the coverage of activity under GOMs Policy before giving it the benefit of Industrial Tariff or otherwise.

RE: Reliance on Telecom Policy, 2012 **:**

10.29 It is contended on behalf of the Appellants that the National Telecom Policy, provides 'infrastructure' status to the Telecom Sector. It is submitted that the contention of the Appellants is irrelevant and immaterial for the consideration of the present matter. As per the Objective Clause 6 National Telecom Policy, the Telecom sector has been recognised as an infrastructure sector. The relevant extract from the Telecom Policy,2012 is given below:

"*Recognize telecom as Infrastructure Sector to realize true potential of ICT for development*"

From the above extracted clause it can be clearly seen that there no mention of the Telecom Sector being "not commercial". It is humbly submitted that a mere mention of the term infrastructure would not lead to the categorization of the telecom sector as Industrial.

10.30 Since 2004, considering the objectives and context of GoM's IT and ITES Policy, the Commission has categorized all the activities covered under GoM's IT and ITES Policy in the Industrial category for the purpose of electricity tariff. The Respondent Commission has continued this approach consistently in its all subsequent Tariff Orders.

RE: Reliance on other Statues

10.31 It is contended on behalf of the Appellants that the telecom sector has been recognized as having a infrastructure status; a public utility service under Section 22A (b) of the Legal Services Authority Act; essential service under Section 2 (a)(i) of the Essential Services Maintenance Act,1968; and Section 2 (n) of the Industrial Disputes Act,1947.It is submitted that the contention of the Appellants is also equally immaterial and irrelevant for a consideration of the present matter.

10.32 It is submitted that this Tribunal in the judgment of BSNL vs PSERC (Appeal No 116 of 2006) has held that :

"..*It is possible that the appellant may fall under the category of 'Industry' on applying the meaning of the term 'Industry' as it is found it other statutes* ***but that cannot be the basis to determine whether an appellant is to be charged tariff by treating it as an industry****.."*

Therefore reliance placed by the Appellants on status of telecom towers under other statutes is immaterial for the present matter.

10.33 Additionally, it is also submitted that, in the Impugned Order the Commission has defined "industrial purpose" and has held that the categorization for the Industrial use is applicable wherein there is "manufacturing and processing" involved. Therefore for the purposes of the present matter, the question will not be whether telecom towers are "industry" under other statues but whether "telecom towers" would satisfy the definition of "industry" under the Impugned Tariff Order:-

"***HT –I :HT-Industry***

HT-I (A): HT-Industry-General

Applicability:

This tariff category is applicable for electricity for Industrial use, at Low/Medium Voltage, for purposes of manufacturing and processing, including electricity used within such premises……"

Therefore, the present categorization cannot apply to the Telecom towers and its ancillary industries as there is no manufacturing and processing involved in telecom towers.

***RE: Violation of Principles of Natural Justice* :**

10.34 It is contended on behalf of the Appellants that no notice had been issued by the Commission before deciding the Case No. 48 of 2016 filed by MSEDCL. It is submitted that the contention of the Appellants is denied. A public notice and an Executive Summary was published by MSEDCL inviting suggestions and objections on MSEDCL's petition for final true up for FY 2014-15,Provisional True Up for FY 2015-16 and MYT for FY 2016-17 to FY 2019-20 in Case No. 48 of 2016.

10.35 Both these documents clearly mentioned that the copy of the detailed petition (a voluminous document running into several hundred pages) was available on the website of the Commission as well as MSEDCL's website. In its prayer to the Commission MSEDCL has mentioned "*..to provide tariffs for individual categories as proposed by MSEDCL.*.".MSEDCL had made a proposal to the Commission regarding the classification of certain telecom towers, etc. under

commercial category, irrespective of whether they were covered under the IT/ITES Policy of the GoM.

10.36 It may also be mentioned that Bharti Airtel was also one of the objectors before the Commission and is a party in the present matter also (in Appeal 337 of 2016) and had categorically submitted as under:

"*Bharti Airtel Ltd. stated that MSEDCL should charge Industrial Tariff for consumption by Mobile Towers…..requiring an IT/ITES registration certificate.*.". Therefore, it is apparent that the status of telecom towers for tariff determination was a part of the process of public scrutiny and subjected to comments and suggestions in accordance with Section 64.

10.37 It is contended on behalf of the Appellants that there was no proposal on behalf of MSEDCL regarding the recategorization of the Telecom Towers. It is humbly submitted that there was, in fact, a proposal submitted by MSEDCL to classify certain telecom towers etc. under commercial category, irrespective of whether they were covered under the IT/ITES policy of the GOM. It was observed by the Commission that in this regard no rationale has been submitted by MSEDCL for this specific proposal.

10.38 It is contended on behalf of the Appellants that there is a lack of reasoning in the order regarding the recategorization of the Telecom towers. It is humbly submitted that there was no recategorization of telecom towers that was done by the Commission. Hence there can be no question of not giving reasons since no re-categorisation was done at

all. The Commission simply followed the rationale and ruling that was followed of its earlier order in Case No. 116 of 2008,i.e. the Industrial Tariff will be applicable to the Appellants only if they are covered as IT/ITES and the provisions of the GOMs policy apply to them.

A. RE: Parameters under Section 62(3) of the Electricity Act,2003, violation of Section 62(3) of the Electricity Act,2003 :

10.39 It is submitted that the Section 62(3) of the EA 2003 provides that the tariff for electricity is to be fixed by the Appropriate State Commission on the basis of various factors including the purpose for which the supply is required. In this regard reliance is placed upon the judgment of this Tribunal in BSNL vs PSERC (Appeal 116 of 2006) where it was held that it is for the State Commission to decide which category a consumer should fall under. The EA,2003 does not define "Industry". In the case of BSNL vs. UOI **(2006 3 SCC 1)** the Hon'ble Supreme Court held that the nature of transaction by which mobile phone connection is made available to the consumers, namely, whether it is carrying out manufacture of goods/supply of goods (and is an industry).The Apex Court held that it was simply rendering a service.

10.40 Mobile Towers are devices which are used for transmitting telecommunication signals, and there is no manufacturing or industrial activity.

10.41 The Appellants are not carrying out the process of manufacturing/supply of goods, they are simply rendering service to the customer. In this regard reliance may be placed upon the Judgment of the Hon'ble Supreme Court in the case of BSNL vs. Union of India and Ors. The

principal question to be decided was the nature of the transaction by which mobile phone connection is made available by the telecom company to the consumers, namely, is it sale or is it a service or is it both. Following the aforesaid matter this Tribunal in Appeal 116 of 2006 dated 4.10.2007 held that:

"*In view of the above mentioned decision of the Supreme Court, we cannot accept the argument that the appellant (BSNL) is an industry*."

10.42 In Appeal 88 of 2012(Tata Teleservices vs RERC) this Tribunal dated 20.5.2013 held that:

"**43.***IT Policy and other policies issued by the State Government and classification made by the State Government for providing incentives under various programmes etc., do not have any role in tariff determination process. It cannot be denied that the jurisdiction for change of categorization is of the State Commission and not of the State Government.* ***That apart, for the purpose of tariff determination by the State Commission, telecom services does not fall under the category of IT industry...***"

10.43 Additionally, it is also submitted that, in the Impugned Order the Commission has held that the categorization for the Industrial use is applicable wherein there is "manufacturing and processing" involved. However, the present categorization cannot apply to the Telecomtowers and its ancillary industries as there is no manufacturing andprocessing involved:

"***HT –I :HT-Industry***
HT-I (A): HT-Industry-General

Applicability:

This tariff category is applicable for electricity for Industrial use, at Low/Medium Voltage, ***for purposes of manufacturing and processing****, including electricity used within such premises……*"

RE: In Re:Categorization of mobile towers as industrial category:

10.44 It is submitted that the Respondent Commission since 2004 has reiterated and reproduced its rulings in its earlier orders as well that all activities covered under the GOMs IT/ITES Policy which means that Telecommunication Towers will get the benefit of the Industrial tariff only if they are covered under the IT and ITES Policy of GoM and would otherwise be covered under the Commercial tariff category.

10.45 In this regard as already stated above reliance may be placed on the decisions of this Tribunal in BSNL vs PSERC as well as Tata Teleservices vs RERC and others where it has been held that business of telecommunication services cannot be categorized as an Industry.

10.46 In point of fact in the Tata Telecommunications Vs RERC Judgment this Tribunal was pleased to hold further that even though Telecom Towers could be covered under the Rajasthan Governments IT and ITES Policy, telecom towers would still be treated as "commercial" and not "industrial".

RE: Conditions of coverage under IT/ITES was not there in previous orders :

10.47 It is submitted that whenever issues related to tariff categorization of Telecommunication Towers were raised before this Respondent Commission, the Commission has reiterated and reproduced the rulings in its earlier Orders, stating that all the activities covered under GoM's IT and ITES Policy would be categorized in the Industrial tariff category, which means that Telecommunication Towers will get the benefit of the Industrial tariff only if they are covered under the IT and ITES Policy of

GoM and would otherwise be covered under the Commercial tariff category.

10.48 The Respondent Commission has never ruled on which activity is or is not covered by GoM's Policy. It is left to the Distribution Licensees to classify consumers within Commission approved categories and obviously the Discom could do so only if telecom towers were so covered under GoM's IT and ITES Policy.

RE: Definition of IT/ITES Incorporation by reference in the tariff order of 2004

10.49 It is submitted that the contention of the Appellants regarding the Definition of IT/ITES being Incorporated by reference in the tariff order as well as the judgments relied upon by them are wrong. The Respondent Commission has never ruled on which activity is covered by the GoMs IT/ITES Policy. In that sense the Commission has never legislated in (whether reference or by incorporation) using the definition of IT/ITES services. It has been reiterated by the Respondent Commission in the Impugned Order as well as the previous orders passed by the Respondent Commission that Telecommunication towers would will get the benefit of the Industrial tariff only if they are covered under the IT and ITES Policy of GoM (without getting into the details of what is or is not covered by the policy) else they would otherwise be covered under the Commercial tariff category. In other words, if the Appellants are covered by the IT/ITES policy of the GoM,2003, then they will get the benefit of Industrial Tariff.

10.50 Secondly, it is submitted that, each tariff year in itself is a different unit and what may the dispensation in one year may not remain the same in another year. Therefore, the contention of incorporation by reference doesn't arise.This is especially so when the Commission has not gone into the question of the coverage of the IT & ITES Policy.

10.51 In terms of Clause 13 of the Maharashtra Supply Code,2005,itis the obligation of the Distribution Licensees to verify whether a particular consumer, in this case, each telecom tower is covered by the GoM's IT and ITES Policy for categorizing it in the Industrial Tariff category or not.

For all the aforesaid reasons it is prayed that the above appeals may be dismissed.

11. We have heard learned counsel appearing for the Appellants, learned counsel for the Respondent Commission and learned counsel for the Respondents at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the batch of Appeals for our consideration:-

Issue No.1: Whether the State Commission is justified in changing the categorization of the mobile towers from industrial category to commercial category for towers not falling within Govt. of Maharashtra policy on IT & ITES?

Issue No.2: Whether the impugned order has been passed by State Commission in accordance with law provided under

Electricity Act, 2003 and other policies of Govt. of India?

Issue No.3: Whether in the facts and circumstances of the case, the impugned order passed by the State Commission is violative of the principle of natural justice?

OUR CONSIDERATION & FINDINGS:-

12. Issue No.1:-

12.1 Learned counsel for the Appellants submitted that the State Commission abruptly, vide the impugned order, has inter-alia re-classified the agencies using power for mobile & tele-communication towers etc.. under commercial category who were being charged under industrial category since 2004 unless the same are specifically included in the IT & ITES Policy of the Govt. of Maharashtra for coverage under the industrial category. Learned counsel for the Appellants vehemently submitted that after the year 2004 order which was passed on the basis of Govt. of Maharashtra, 2003 IT/ITES policy, the State Commission has come out with subsequent tariff orders dated 17.08.2009 in Case No. 116 of 2008 relating to the year 2009-10, order dated 12.10.2010, tariff order dated 16.09.2012, order dated 26.06.2015 in regard MYT 2013-14 to 2015-16 holding that the mobile/tele-communication towers would be charged industrial tariff**.** Learned counsel was quick to point out that the said change in the classification considered by the State Commission in the impugned order has resulted into tariff shock to mobile/telecommunication operators.

12.2 Advancing their arguments, learned counsel for the Appellants further submitted that in all these orders, the State Commission has constantly rejected the MSEDCL's proposals for inclusion of mobile/tele-

communication towers under the commercial category. For ready reference, the conclusion part of various orders are reproduced hereunder:-

a) Tariff Order dated 17/08/2009 in Case No. 116 of 2008

Hence, the Commission does not agree with MSEDCL's proposal in this regard and rules that IT &ITeS will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT &ITeS."

(emphasis supplied)

b) Order dated 12/10/2010 in which the State Commission reiterated its views in tariff order dated 07/08/2009

In view of the above, the Commission rules that IT & ITeS will be charged at industrial rates (HT and LT rates, as applicable), without getting into the details of whether mobile towers and commercial broadcasting towers and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITeS."

(emphasis supplied)

c) Tariff Order dated 16/09/2012, the State Commission categorised the Mobile Towers under HT-II Commercial Category instead of HT-I Industrial Category. This Order was challenged before this Tribunal. By order dated 7.11.2012 passed in Appeal Nos 234, 235 etc. of 2012, the Order of the State Commission was set aside with the following decision:

10. As indicated by the Learned Counsel for the Appellants, Mobile Towers, etc., prior to passing of the impugned order were categorized under the Industrial category and in fact the State Commission in the

tariff order for the FY 2009-10, rejected the specific proposal of the distribution licensee for change in category from Industrial to Commercial.

11. Despite this, the impugned order dated 16.8.2012 has been passed by the State Commission changing the consumer category of the Appellants into Commercial without any discussion or reasonings and without hearing the Appellants. Thus, we notice that the principles of natural justice have been violated in the present case.

12. We, therefore, deem it fit to set aside the portion of impugned order dated 16.8.2012 regarding re-categorisation of Mobile Towers, Micro Wave Towers, Satellite Antennas used for communication activity to HT/LT Commercial Category from HT/LT Industrial Category prevailing prior to the date of the impugned order. Accordingly the same is set aside.

13. However, the distribution licensee (R-2) is given liberty to file a fresh petition containing the proposal regarding re-categorisation of the Appellants in appropriate tariff category before the State Commission which in turn shall consider the same and pass the appropriate orders in accordance with law after hearing all the concerned parties.

d) Subsequent to the above decision dated 07.11.2012 of this Tribunal, the distribution licensee issued a circular dated 15.12.2012 placing the Mobile Towers under the Industrial Category; Further, there was no proposal of the distribution licensee for change in categorisation from Industrial to commercial.

e) Order dated 26.6.2015 was passed by the State Commission in regard to MYT 2013-14 to 2015-16, inter alia, holding as under:

"The Commission is of the view that the rationale and ruling of its earlier Order in Case No. 116 of 2008 should continue to apply. In other words, the Industrial tariff will apply to Mobile Towers or other activities cited by MSEDCL only if they are covered as IT/ ITES and the provisions of GoM's Policy apply to them".

(Emphasis Supplied)

12.3 Learned counsel for the Appellants contended that in utter contradiction to its own previous orders, the State Commission vide its impugned order dated 3.11.2016 reclassifies mobile/telecom towers from Industrial tariff category to Commercial tariff category, and that too without assigning reasons and without providing an opportunity of hearing to the Appellants.

(a) In the impugned tariff order dated 3.11.2016, MERC has held as follows :

"*…Considering the above, Telecommunication Towers shall be covered under the Commercial category, unless specifically included in the IT &ITeS Policy of the Government of Maharashtra for coverage under the Industry category.*"

Consequently, the mobile/telecommunication towers are to be re categorized into Commercial Tariff Category (from the existing 'Industrial Tariff Category') unless the same are specifically included in the applicable IT & ITES Policy of Maharashtra.

12.4 Learned counsel further submitted that till the passing of the impugned order, the distribution lincensee had duly understood and implemented the tariff orders as categorizing mobile and broadcasting towers under the industrial category without any doubt whatsoever on the interpretation and application of the tariff orders. Therefore, it is not open to the licensee or the State Commission to now change the category of the mobile/broadcasting towers as far as tariff structure under industrial category is concerned. Learned counsel relied on the judgment of Hon'ble Supreme Court in the case of *Indian Metals and Ferro Alloys v. Collector of Central Excise, 1991 Supp (1) SCC 125*. To fortify its contentions that the State Commission ought not to have re-

classified the said category of mobile/tele-communication towers. The relevant portion of the judgment is reproduced below:-

> ***"14. However, even assuming that there could have been some doubt as to the intention of the legislation in this regard, the matter is placed beyond all doubt by the revenue's own consistent interpretation of the item over the years.*** *It has been pointed out that prior to March 1, 1975, residuary Item 68 was not in the schedule. If the revenue's contention that these poles are not pipes and tubes is correct then they could not have been brought to duty at all before March 1, 1975. But the fact is that transmission poles have been brought to duty between 1962 to 1975, and that could only have been under Item 26-AA (for there was no residuary item then). This is indeed proved by the fact that this very assessee was thus assessed initially and also by the issue of notifications of exemption from time to time which proceed on the footing that these poles were assessable to duty under Item 26-AA but were entitled to an exemption if certain conditions were fulfilled. Indeed, the assessee also applied for and obtained relief under one of those exemption notifications since 1964.*
>
> ***15.*** *It is contended on behalf of the department that this earlier view of the department may be wrong and that it is open to the department to contend now that the poles really do not fall under Item 26-AA. In any event, it was submitted since the poles were exempted from duty under one notification or other, it was not very material prior to March 1, 1975 to specifically clarify whether the poles would fall under Item 26-AA or not.* ***This argument proceeds on a misapprehension. The revenue is not being precluded from putting forward the present contention on grounds of estoppel. The practice of the department in assessing the poles to duty (except in cases where they were exempt as the condition in the exemption notifications were fulfilled) and the issue of notifications from time to time (the first of which was almost contemporaneous with the insertion of Item 26-AA) are being relied upon on the doctrine of contemporaneoexpositio to remove any possible ambiguity in the understanding of the language of the relevant statutory instrument:*** *see K.P. Varghese v. TTO [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : (1982) 1 SCR 629] , State of Tamil Nadu v. Mahi Traders[(1989) 1 SCC 724 : 1989 SCC (Tax) 190 : (1989) 1 SCR 445] , CCE v. Andhra Sugar Ltd.[1989 Supp (1) SCC 144 : 1989 SCC (Tax) 162] and Collector of Central Excise v. Parle Exports P. Ltd. [(1989) 1 SCC 345 : 1989 SCC (Tax) 84] Applying the principle of these decisions, that a contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument, we think the assessee's contention that its products fall within the purview of Item 26-AA should be upheld."*

12.5 It would thus appear that the State Commission has consciously with full application of mind had consistently categorised the Mobile / Broadcasting Towers under HT-I Industrial Category for the purpose of retail supply tariff to be charged from the Appellants under the Tariff Orders issued by the State Commission from time to time. It is relevant to add that the classification under the Electricity Act is not governed by the classification adopted by the State Government under the IT/ITES Policy which was brought out by the State for providing incentives to specific industries. In a host of judgments, Hon'ble Supreme Court has held that a long standing view taken by an authority ordinarily be adhered to and not disturbed so as to maintain consistency and to avoid uncertainty. Among them, these judgments are relevant **Shankar Raju v Union of India, (2011) 2 SCC 132 9(Para 10 to 17); Rajarai Pandey v Sant Prasad Tiwari, (1973) 2 SCC 35 ((Para 10); Mishrilal v Virendranath (1999) 4 SCC 11(Para 16); Union of India v Azadi BachaoAndolan (2004) 10 SCC 1**, **para 33and 34; (b) State of Gujarat v Mirzapur Moti Kuresh(2005) 8 SCC 534 Para 111; and Maganlal Chaganlal v Municipal Corporation of Greater Bombay (1974) 2 SCC 402**(**Para 22**). Learned counsel accordingly summarised that in terms of the above, when the State Commission has since the year 2008 taken a conscious and consistent view that the Mobile/Broadcasting Towers would be placed under the Industrial category without going into details whether they fall under the Government of Maharashtra Policy or not, the said position held good for a very long time for more than 10 years and there is no change

whatsoever in the factual or legal position, the above principle of law applies squarely.

12.6 Interestingly, the contention of the State Commission and MSEDCL in the present appeal are contradictory. It is the contention of the State Commission that there has been no change in the position since the year 2008 and it is MSEDCL which has erred in levy of industrial tariff over these years. This contention is also erroneous for the following reasons:

(a) The clear wordings of the Orders since 2008 is that telecom towers are under industrial category, irrespective of whether they are covered by the Government of Maharashtra Policy;

(b) In the year 2012, when the category was sought to be changed to commercial, the position stated before the Tribunal was that the telecom towers were industrial earlier. There was no contention that only the towers registered under the Government of Maharashtra Policy would be industrial.

(c) MSEDCL has specifically proposed classification to commercial category earlier, which was rejected.

12.7 ***Per contra,*** learned counsel appearing for the Respondent Commission submitted that the principal argument of the Appellants is that the Commission has in the impugned order taken a complete U-turn and treated telecom towers as “commercial” when they were hitherto being treated as “industrial”. Learned counsel pointed out that the aforesaid argument is entirely incorrect inter alia on account of the following:-

I. In all its previous orders including in the current Impugned Order the Commission had not classified "**Telecom Towers**" as "Industrial".

II. The dispensation always considered by the Commission from 2007 till the current Impugned Order is that an **activity which is covered by the IT and ITES policy** of the Government of Maharashtra would be charged an Industrial Tariff.

III. The Commission had never given a finding as to whether the "Telecom Towers" were in fact covered by the IT and ITES policy or not. In fact, the Commission holds, that it has not gone into the issue as to what activities are covered by the IT and ITES policy or not.

IV. If the Telecom Towers were covered by the IT and ITES policy, they would be charged Industrial Tariff and all that they had to do was to show the distribution licensee that they were covered by the IT and ITES policy of the Government of Maharashtra .

V. The very same dispensation which was brought in year on year was continued from 2004 till the Impugned Order as well and the Commission has not made any change at all.

Learned counsel vehemently brought out the contents of the various orders of the State Commission to emphasize that the Commission did not hold that "telecom towers" would be categorised as "industrial" and instead, held that all activities covered under the IT and ITES policy would be treated as industrial. The Commission also clearly held that the above dispensation was "…***without getting into the details of whether***

mobile towers ….. and all other similar activities are covered under the Government of Maharashtra Policy on IT & ITES…"

12.8 Referring to MERC Order dated 16 August, 2012 in Case No.19 of 2012 and APTEL Judgment dated 7 November, 2012 in Appeal No.234 of 2011& batch, learned counsel for the State Commission clarified that the MSEDCL in its Tariff Petition in Case No.19 of 2012, had proposed to categorize Mobile Towers under Commercial category and there was no objection to this proposal during the public consultation process. In view of this, Commission in its order categorized Mobile Towers under Commercial category which was set aside by this Tribunal vide its judgment dated 7 November, 2012. It is important to note that in the above judgment, this Tribunal had set aside the Commission's order only on account of denial of principal of natural justice and in point of fact there was no detailed finding on this issue by the Tribunal which categorically stated that it had not given any opinion on the merits of the matter.

12.9 Learned counsel emphasised that while continuing the practice of categorizing activities under Government of Maharashtra's IT and ITES Policy in the Industrial category vide its various Orders the Respondent Commission reiterated that the benefit of Industrial Tariff can be availed by Mobile Towers only if they are covered by Government of Maharashtra's Policy. It is pertinent to note that the above ruling of the Respondent Commission has not been challenged before this Tribunal and hence has, attained finality. In fact, the impugned Order dated 03.11.2016 is nothing more than to repeat and reiterate the said 2015

Order. Accordingly, learned counsel was quick to point out that the contentions made by the Appellants in the batch of appeals are non-tenable and the impugned order passed by the State Commission does not require interference by this Tribunal as the instant appeals are devoid of any merit and accordingly ought to be dismissed. Regarding consistent order by the State Commission considering mobile/telecom towards under industrial category tariff, learned counsel clarified that since 2004, in all its Tariff Orders, the State Commission reiterated that all activities covered under Government of Maharashtra IT/ITES policy will get the benefit of the Industrial tariff category, which means that Telecommunication Towers will get the benefit of the Industrial tariff only if they are covered under the IT and ITES Policy of GoM and would otherwise be covered under the Commercial tariff category.

12.10 Further, under the Supply Code, it was upto the MSEDCL to decide which consumer falls in which tariff category based on the usage of electricity. In case MSEDCL desires to modify the eligibility and applicability of the IT/ITES Policy itself then it may approach the appropriate forum for necessary relief. Learned counsel further contended that reliance placed by the Appellants on the *doctrine of stare decisis* is irrelevant and irrational. Similarly, the judgments of this Tribunal in MIAL vs MERC (Appeal 295 of 2009 decided on 31.5.2011 and Association of Hospitals vs. MERC (Appeal 110 of 2009 decided on 20.10.2011) on the principle that there has to be a rationale for classification under Section 62(3) of the Electricity Act, 2003 is entirely incorrect as the above two cases are not relevant to the present matter.

Further, reliance of the Appellants on other judgments is also not relevant in the facts and circumstances of the present case.

12.11 Additionally, learned counsel also submitted that in the impugned order, the Commission had defined "industrial purpose" and has held that the categorization for the Industrial use is applicable wherein there is "manufacturing and processing" involved. Therefore, for the purposes of the present matter, the question will not be whether telecom towers are "industry" under other statues but whether "telecom towers" would satisfy the definition of "industry" under the Impugned Tariff Order. It is contended on behalf of the Appellants that there is a lack of reasoning in the impugned order regarding the recategorization of the Telecom Towers by the Commission. The Commission has simply followed the rationale and ruling that was followed of in its earlier order in Case No. 116 of 2008, i.e. the Industrial Tariff will be applicable to the Appellants only if they are covered as IT/ITES and the provisions of the GOMs policy. Hence, there could be no question of not giving reasons by the Commission. Learned counsel reiterated that accordingly the contentions of the Appellant that definition of IT/ITES was incorporated by the Commission in the Tariff order of 2004 and other judgments relied upon by them are wrong. In fact, the Respondent Commission has never ruled on which activity is or is not covered by GoM's Policy and has in various orders ruled that if the Appellants are covered by the IT/ITES policy of GOM, 2003 then they will get the benefit of the Industrial tariff . Moreover, each tariff year in itself is a different unit and what may the dispensation in one year may not remain the same in another year. This is especially so when the Commission has not gone

into the question of the coverage of the IT & ITES Policy. Moreover, in terms of Clause 13 of the Maharashtra Supply Code,2005, it is the obligation of the Distribution Licensees to verify whether a particular consumer, in this case, each telecom tower is covered by the GoM's IT and ITES Policy for categorizing it in the Industrial Tariff category or not. Summing up his arguments, learned counsel for the Respondent Commission reiterated that there is no perversity in the impugned order and as such all the appeals need to be dismissed.

Our Findings:-

12.12 We have carefully considered the submissions of learned counsel for the Appellants and learned counsel for the Respondent Commission and also taken note of the various judgments of the apex court as well as this Tribunal relied upon by the parties. It is the contention of the Appellants that till the impugned order dated 03.11.2016, the State Commission has come out with several orders such as dated 17.08.2009, dated 12.10.2010, dated 16.09.2012, dated 26.06.2015 etc. and has constantly placed the mobile / tele-communication towers under the industrial tariff category. Further, the past proposal of MSEDCL for proposing the mobile/tele-communication tower under commercial category has been categorically rejected by the State Commission clearly indicating that there is no change of ground, rational or position since the year 2008. Learned counsel for the Appellants contended that in utter contravention of its own previous orders the State Commission vide its impugned order dated 03.11.2016 has reclassified mobile/tele-communication towers from industrial tariff category to commercial tariff

category and that too without assigning proper reasons and also without providing an opportunity of hearing to the Appellants. The relevant portion of the impugned order reads thus:-

> "*…Considering the above, Telecommunication Towers shall be covered under the Commercial category, unless specifically included in the IT &ITeS Policy of the Government of Maharashtra for coverage under the Industry category.*"

In other words, the mobile / tele-communication tower are to be considered now under commercial tariff category instead of the existing industrial tariff category unless they are covered as IT/ITES under the Policy of the Govt. of Maharashtra.

12.13 Learned counsel for the Appellants placed reliance on the judgment of Hon'ble Supreme Court in case of *Indian Metal and Ferro Alloys* under the Collector of Central Excise to contend that it is not open to the licensee or the State Commission to now change the tariff category of mobile / broadcasting towers in utter contravention of the conscious decisions of the State Commission having consistently categorised the mobile/broadcasting towers under industrial category for the purpose of retail supply tariff. Moreover, it is relevant to note that the classification under the Electricity Act is not governed by the classification adopted by the State Govt. for providing incentives to specific industry. Learned counsel for the Appellants placed reliance on a host of judgments of the Apex Court which has held that a long standing view taken by an authority ordinarily be adhered to and not disturbed so as to maintain consistency and to avoid uncertainty.

12.14 Learned counsel for the Appellants have accordingly highlighted that in terms of the various judgments of the Supreme Court when the State

Commission since long taken a consistent view that mobile/broadcasting towers would be placed under the industrial whether they fall under the Govt. policy of IT/ITES or not, the said position has been held well forth for quite a long time more than 10-12 years and admittedly, there has been no change whatsoever in the factual or legal position, as such the principle of law laid down by the Hon'ble Supreme Court applies squarely in the present case.

12.15 On the other hand, learned counsel for the Respondent Commission contended that the principal argument of the Appellants is that the State Commission has in the impugned order taken a complete U-turn and treated mobile/telecom towers under commercial category when they were hitherto being treated under the industrial category. Learned counsel clarified that in all its previous orders including the current impugned order, the Commission has never classified mobile / telecom towers as industrial and instead, it held that a activity which is covered by the IT/ITES policy would be charged an industrial tariff. In fact, the State Commission has not gone into the issues as to what activities are covered by the IT/ITES policy of the Govt. Learned counsel reiterated that if the telecom towers were covered by the IT/ITES policy, they would be charged industrial tariff and all that they have to do is to show the very same dispensation which was brought in the year on year was continued from 2004 till the impugned order as well and the Commission has not made any change at all. Referring to the judgment dated 07.11.2012 of this Tribunal, learned counsel for the Respondent Commission submitted that in the above judgment, this Tribunal had set aside Commission's order only on account of denial of principle of

natural justice and the Tribunal had not given any opinion on the merits of the matter. Further, learned counsel emphasised that while continuing the practice of categorising activities under the Government's IT/ITES policy in the industrial category vide its various orders, the Commission has reiterated that the benefit of industrial category vide its various orders, can be availed by mobile towers only if they are covered by the Govt. of Maharashtra policy.

12.16 It is pertinent to note that the above ruling of the Respondent Commission has not been challenged before this Tribunal and hence has attained finality. In fact, the impugned order dated 03.11.2016 is nothing more than repeated and reiterated the said order of 2015 . Learned counsel for the Respondent Commission further contended that the Commission has not gone into the question of coverage of IT/ITES policy and in terms of Clause 13 of Maharashtra Supply Code, 2005, it is the obligation of the distribution licensee to verify whether a particular consumer is covered by Government of Maharashtra's IT/ITES policy for categorising in the Industrial Tariff Category or not.

12.17 After critical analysis of the rival contentions of the Appellants and the Respondents Commission, it is relevant to note that after a continuation of more than 10-12 years of considering mobile/telecom powers under Industrial Tariff Category, the State Commission has abruptly changed the said category under the commercial category unless otherwise these towers are established to be under the IT/ITES policy of the Govt. of Maharashtra. The question, thus emerges that under what changed scenario, the State Commission has changed the tariff category of

mobile/tariff towers from industrial to commercial unless they prove that their towers are specifically included in the IT/ITES policy. We note that till the passing of the impugned order, MSEDCL had duly understood and implemented the tariff orders without any doubt whatsoever on the interpretation and application of the tariff orders and hence it is not now open to the licensee or the State Commission to change the category of mobile / telecom towers as far as tariff structure under industrial category is concerned. It is also relevant to notice that the State Commission has contended that there has been no change in the position since the year 2008 and it is MSEDCL which has erred in levy of industrial tariff over these years. These contentions are contrary to each other and also erroneous in consideration of the facts and circumstances prevailing since announcement of the GOM IT/ITES Policy, 2003 and various orders of the State Commission. It is pertinent to note that in the intervening period, MSEDCL made efforts to reclassify the ;mobile/telecom towers in the commercial category but the same was categorically rejected by the State Commission stating that there has been no change in the legal / physical position in the matter. The Appellants, herein who are operators of the mobile/broadcasting towers have enjoyed the status of industrial tariff category since last 10-12 years and obviously pre-judiced of financial loss without any established reasons and grounds necessitating such change in classification of the telecom towers.

12.18 In view of the facts and submissions placed before us during the proceedings, we opine that the classification under the Electricity Act is not governed by the classification adopted by the State Govt. under any

policy brought out by the State Govt. for providing incentives to specific industry. It would thus appear that the State Commission has consciously with full application of mind categorised the mobile/broadcasting towers under HT-I industrial category for the purpose of retail supply tariff to be charged from the Appellants herein under the tariff orders issued by it from time to time. We have perused the rulings under the various judgments of the Apex Court and note that in a host of judgments, Hon'ble Supreme Court has held that a long standing view taken by an authority ordinarily be adhered to and not disturbed so as to maintain consistency and to avoid uncertainty. In terms of the above, the State Commission has since the year 2008 taken a consistent view to put mobile / telecom towers under industrial category without going into the details where they fall under the GOM policy or not. Besides, the said position has been held for quite a long time and also there is no change whatsoever in the factual or legal position, the above principles of law settled by the Apex Court applies squarely in the instant case in hand.

12.19 In view of the above, we are of the considered opinion that the impugned order passed by the State Commission dated 03.11.2016 is not justified in the eyes of law settled by various courts as far as the change of tariff category of mobile towers from industrial category to commercial category is concerned.

13. <u>Issue No.2</u>:-

13.1 Learned counsel for the Appellants submitted that the broad classification of electricity consumers is provided under Section 62(3) of the Electricity Act. This is unlike Section 49 of the Electricity (Supply)

Act, 1948 which provided for a residuary criteria of classification on factors as deemed fit by the State Commission but the classification can only be based on the specified criteria. Therefore, the criteria laid in the impugned order that the telecom towers registered under the State Government policy would be classified as Industry and other telecom towers would be classified as commercial is contrary to Section 62(3) of the Electricity Act and hence bad in law. Learned counsel relied upon the judgment of this Tribunal dated 31.5.2009 in Appeal No. 195 of 2009 (Mumbai International Airport Pvt Limited v MERC) which set aside the categorisation of Mumbai Airport under HT – II Commercial Category considering the nature of service rendered by the Airport . Similarly, hospitals have been held to be not falling under HT Commercial Category (Association of Hospitals v MERC Appeal No. 110/2009 decided on 20.10.2011). Learned counsel was quick to point out that the reliance placed by the Respondents on the decision in the case of *BSNL Ltd* is misconceived as the issue that was there raised was whether telecom activity amounts to "manufacture" or "service", which was decided to be "not manufacture" . However, the issue whether it would be Industry or not is not dependent upon whether the activity amounts to manufacture. In fact, in the impugned order, the State Commission has categorised many activities such as cold storages, LPG/CNG bottling plants etc. to be industrial, which are clearly not manufacturing activities.

13.2 Learned counsel for the Appellants vehemently submitted that the State Commission has itself recognised that the telecom sector amounts to industrial activity. It is not that all Mobile/Broadcasting Towers are

categorised as commercial. The only criteria for the differentiation by the State Commission is the registration under the IT/ITES Policy of the Government of Maharashtra. Such pre-requisite condition is misconceived for the purposes of electricity classification due to the fact that the purpose for use of the electricity, which is not affected by registration process as the nature of the activity, whether registered under the Government of Maharashtra Policy or not continues to be the same. In the instant case, the Appellants are registered under the IT/ITES Policy. Sample certificates have been produced with the rejoinder of the Appellants. What the distribution licensee is now insisting is a separate certificate for each of the thousand odd towers of the Appellants and in the absence of such certificate for each tower, the classification would be on commercial basis.

13.3 Learned counsel for the Appellants further contended that while referring to the definitions given in the IT/ITES Policy of 2003 of Govt. of Maharashtra, it is clear that the installation of Mobile Tower which is part of the cellular notice telecommunication network of the Appellants and subject matter of the present appeals come under the definition of IT/ITES units as defined by the IT & ITES Policy of the Government of Maharashtra. Further, the fact that the mobile tower and related installation of Appellants were treated and covered in the definition of IT/ITES under the various policies of the State of Maharashtra will also be evident from the Registration Certificate issued by Govt. of Maharashtra for the said installations of the Appellants right since the year 2004. The Appellants also relied on the following judgments in

support of their contentions that the tele-communications services are part /subset of information technologies and hence as industrial units:-

- Anthony Philip Witek Vs. Commissioner of Income tax. 'Income Tax Appellate Tribunal] 2008 110ITD 148 Delhi (2008) 113 TTJ Delhi 740
- Amir ZaiSangin [Authority for Advance Ruling] MANU/AR/0002/1997
- Syed Asifuddin and ORs. Vs. The State of Andhra Pradesh and Anr. [High Court of Andhra Pradesh] Cri Petn. Nos 2601 and 2602 of 2003.

13.4 Learned counsel for the Appellants also made reference to the Circular dated 26.06.2009 of MSEDCL by which it tried to withdraw all the earlier letters pertaining to applicability of industrial tariff to mobile towers being covered under the IT and IT Enabled Services. The said circular was stayed by the Order dated 17.08.2009 of Hon'ble Bombay High Court and the status of mobile tower for levy of industrial tariff was restored. A reference has also been made to the APRP Tariff Petition of MSEDCL filed before the State Commission for FY 2008-09 and also letter dated 17.08.2009, whereby it was proposed to exclude the mobile towers from the category of IT and ITES and to convert/classify it in commercial category. However, the State Commission has consciously included IT and ITES under industrial category in the tariff orders for the erstwhile MSEB in 2004. Since then, these services categorically continued to be charged under industrial tariff.

13.5 In view of the above, the State Commission has failed to properly exercise the discretion vested under section 62(3) of the Act which is not only violative of the said section but also violative of Article 14 of the Constitution. As a matter of fact, the Appellants are in other words being

treated equal with malls, restaurants, and other commercial establishments which is nothing but treating unequals as equals. Summing up their arguments, learned counsel for the Appellants reiterated that in view of the above facts, the State Commission has passed the impugned order in utter contravention of the provisions under the Electricity Act as well as various policies/guidelines of the Central / State Govts..

13.6 ***Per contra,*** learned counsel for the Respondent Commission contended that Section 62(3) of the Act provides that the tariff for electricity is to be fixed by the appropriate State Commission on the basis of various factors including the purpose for which the supply is required. In this regard, learned counsel placed reliance upon the judgment of this Tribunal in BSNL vs PSERC (Appeal No. 116 of 2006) where it was held that it is for the State Commission to decide which category a consumer should fall under. The EA,2003 does not define "Industry". In the case of BSNL vs. UOI **(2006 3 SCC 1)** the Hon'ble Supreme Court held that the nature of transaction by which mobile phone connection is made available to the consumers, namely, whether it is carrying out manufacture of goods/supply of goods. Precisely, the Apex Court held that mobile towers or devices are used for transmitting telecommunication signals, and there is no manufacturing or industrial activity".

13.7 Learned counsel further contended that following the aforesaid judgment, this Tribunal in Appeal No. 116 of 2006 dated 4.10.2007 held that:

"*In view of the above mentioned decision of the Supreme Court, we cannot accept the argument that the appellant (BSNL) is an industry*."

Further, in Appeal 88 of 2012(Tata Teleservices vs RERC) this Tribunal in its judgment dated 20.5.2013 held that:

"**43.***IT Policy and other policies issued by the State Government and classification made by the State Government for providing incentives under various programmes etc., do not have any role in tariff determination process. It cannot be denied that the jurisdiction for change of categorization is of the State Commission and not of the State Government.* ***That apart, for the purpose of tariff determination by the State Commission, telecom services does not fall under the category of IT industry...***"

13.8 Advancing his arguments further, learned counsel for the State Commission vehemently submitted that the Appellants have heavily relied on the facts that the telecom sector has been recognised as having an infrastructure status, public utility service under Section 22A (b) of the Legal Services Authority Act; essential service under Section 2 (a)(i) of the Essential Services Maintenance Act,1968; and Section 2 (n) of the Industrial Disputes Act,1947. The contention of the Appellants is also equally immaterial and irrelevant for a consideration of the present matter. To support his contentions, learned counsel placed reliance on the judgment of this Tribunal in A.No.116 of 2006 which has held as under:-

"..*It is possible that the appellant may fall under the category of 'Industry' on applying the meaning of the term 'Industry' as it is found it other statutes* ***but that cannot be the basis to determine whether an appellant is to be charged tariff by treating it as an industry****.."*

13.9 Regarding contentions of the Appellants that National Telecom Policy, 2012 provides infrastructure status to the telecom sector, learned

counsel for the Respondent Commission contended that as per objective Clause 6 of the said policy, the telecom has been recognised as an infrastructure sector but there is no mention of the telecom section "being not commercial". In fact, since 2004, considering the objectives and content of GoM's IT and ITES Policy, the Commission has categorized all the activities covered under GoM's IT and ITES Policy in the Industrial category for the purpose of electricity tariff. The Respondent Commission has continued this approach consistently in its all subsequent Tariff Orders. In view of these facts, learned counsel emphasised that there is no violation of the provisions under the Electricity Act or policies of the State/Central Govt.

Our Findings:-

13.10 It is the contention of the Appellants that the broad classification of the electricity consumers has been provided under Section 62(3) of the Act which is unlike Section 49 of the Electricity (Supply) Act, 1948 which provided for a residuary criteria of classification on factors as deemed fit by the State Commission but the classification can only be based on the specified criteria. Accordingly, the criteria laid in the impugned order that the telecom towers registered under the State Government policy would be classified as Industry and other telecom towers would be classified as commercial is contrary to Section 62(3) of the Electricity Act and hence bad in law. To emphasise their contentions, learned counsel for the Appellants relied upon the judgment of this Tribunal dated 31.5.2009 in Appeal No. 195 of 2009 (Mumbai International Airport Pvt Limited v MERC) which set aside the categorisation of Mumbai Airport under the Commercial Category considering the nature of service

rendered by the Airport . Similarly, in its other judgment dated 20.10.2011, this Tribunal held that hospitals would not fall under the commercial category. Learned counsel for the Appellants also pointed out that reliance placed by the Respondent Commission in the case of *BSNL Ltd* is misconceived and not at all applicable to the present case. Learned counsel alleged that the only criteria for the differentiation by the State Commission now is the registration of towers under of IT/ITES Policy of Govt. of Maharashtra. In fact, such pre-requisite condition is misconceived for the purpose of electricity classification due to the fact that the purposes for use of electricity is not affected by the registration process as the nature of the activities whether registered under policy or not continued to be same.

13.11 Learned counsel for the Appellants also drew our attention towards the IT/ITES Policy of 2003 of Govt. of Maharashtra which provided that the installation of mobile towers which is part of the cellular notice telecommunication network of the Appellants and subject matter of the present Appeals come under the definition of IT/ITES units. Further, it is evident from the Registration Certificate issued by Govt. of Maharashtra for the said installations of the Appellants right since the year 2004. To emphasise that the tele-communications services are part /subset of information technologies, the Appellants relied on various judgments such as:-

- Anthony Philip Witek Vs. Commissioner of Income tax. 'Income Tax Appellate Tribunal] 2008 110ITD 148 Delhi (2008) 113 TTJ Delhi 740
- Amir ZaiSangin [Authority for Advance Ruling] MANU/AR/0002/1997

- Syed Asifuddin and ORs. Vs. The State of Andhra Pradesh and Anr. [High Court of Andhra Pradesh] Cri Petn. Nos 2601 and 2602 of 2003.

13.12 Admittedly, MSEDCL vide its Circular dated 26.06.2009 tried to withdraw the status of industrial tariff to mobile towers and the same was stayed by Hon'ble Bombay High Court vide its Order dated 17.08.2009. Further, in the APRP Tariff Petition of MSEDCL filed before the State Commission for FY 2008-09, thereby proposed to exclude the mobile towers from the category of IT and ITES and to classify them in commercial category which was rejected by the State Commission and since then these services are continued to be charged under industrial tariff.

13.13 On the other hand, learned counsel for the Respondent Commission submitted that tariff for electricity is to be fixed by the appropriate State Commission on the basis of various factors including the purpose for which the supply is required under Section 62 (3) of the Electricity Act. In this regard, learned counsel placed reliance upon the judgment of this Tribunal in BSNL vs PSERC (Appeal No. 116 of 2006) where the Tribunal has held that it is for the State Commission to decide which category a consumer should fall under. Further, in the case of BSNL vs. UOI, the Apex Court precisely held that mobile towers or devices are used for transmitting telecommunication signals, and there is no manufacturing or industrial activity". Accordingly, learned counsel for the Respondent Commission contended that in view of the above mentioned decision of Hon'ble Supreme Court, BSNL was not classified as industry. Further, in Appeal 88 of 2012(Tata Teleservices vs RERC) this Tribunal in its judgment dated 20.5.2013 held that:

"**43.***IT Policy and other policies issued by the State Government and classification made by the State Government for providing incentives under various programmes etc., do not have any role in tariff determination process. It cannot be denied that the jurisdiction for change of categorization is of the State Commission and not of the State Government.* ***That apart, for the purpose of tariff determination by the State Commission, telecom services does not fall under the category of IT industry...***"

13.14 Learned counsel further contended that the contentions of the Appellants regarding recognition of telecom sector under the infrastructure status, public utility service under various Act/Policies are equally immaterial and irrelevant for a consideration of the present matter. Learned counsel for the Respondent Commission further contended that as relied by the Appellants, the National Telecom Policy, 2012 provides infrastructure status to the telecom sector but there is no mention of the telecom section "being not commercial". In fact, since 2004, considering the objectives and content of GoM's IT and ITES Policy, the State Commission has categorized all the activities covered under GoM's IT and ITES Policy in the Industrial category for the purpose of electricity tariff. In view of these facts, learned counsel emphasised that there is no violation of the provisions under the Electricity Act or policies of the State/Central Govt.

13.15 After careful consideration and analysis of the submissions of both the parties, it transpires that as per the ruling of the State Commission, in the impugned order, the telecom towers registered under the State Govt. Policy would be classified as industry and other telecom towers would be classified as commercial which is contrary to Section 62(3) of the Electricity Act, 2003. The very rationale adopted by the State

Commission in granting industrial tariff to mobile/telecom towers was that these services are essential in nature and tantamount to industrial category despite having no manufacturing activities. It is noticed that vide the impugned order, it is not that all mobile / telecom towers have been put under commercial category but the only criteria for their decision is the registration under the IT/ITES Policy of Govt. of Maharashtra. Resultantly, such pre-requisite condition may put some towers under industrial category and some towers under commercial category which is contrary to the purpose of electricity classification due to the fact that use/purpose of the electricity is not affected by any registration process as the nature of the activities whether registered or not continues to be the same. Moreover, it has been presented by the Appellants during proceedings that they are registered under the IT/ITES Policy and some sample certificates were also produced before us. It is, thus clear that the discom/MSEDCL is now insisting a separate certificate for each of the thousands odd telecom towers of the Appellants to avail the industrial tariff. Further, the fact that the mobile towers and related instalments of the Appellants were treated and covered in the definition of IT/ITES under the policy of the Govt. of Maharashtra will also be evident from the registration certificate issued by the Govt. for the said instalments of the Appellants right since the year 2004. We have taken note of various judgments relied upon by the parties and the National Telecom Policy, 2012 which provide that telecom services are part / sub-set of the information technologies and hence as industrial units. It is also relevant to note that based on the nature of services, many services including telecom services have been recognised as an important infrastructure, public utility services,

essential services etc. and have been considered under the incentive scheme as far as electricity tariff is concerned. For instance, airports, hospitals, cold storage, LPG/CNG bottling plants etc. have been considered under the industrial tariff which clearly do not involve manufacturing activities.

13.16 In view of above facts, we opine that the State Commission has not adequately considered the express provisions of the Electricity Act and various policies of the State/Central Govt. while passing the impugned order and thus violates the statutory provisions.

14. Issue No.3-

14.1 Learned counsel for the Appellants submitted that no notice had been issued by MERC to the Appellants before deciding Case No.48 of 2016 filed by MSEDCL for which the impugned order dated 03.11.2016 has been passed. Learned counsel further submitted that even in the public notice and the executive summary in respect of the said case, there was no mention of the proposed recategorization of mobile towers. Even the petition filed by MSEDCL does not reflect its proposal for such recategorization. In the circumstances, the Appellants were not in a position to know that MSEDCL had sought recategorization of mobile towers, as alleged. In view of the these facts, the impugned order dated 3.11.2016 is violative of principles of natural justice. To strengthen their arguments, learned counsel for the Appellants placed reliance on the judgment of this Tribunal dated 7.11.2012 passed in Appeal No.215 of 2012 which had set aside the portion of the tariff order dated 16.8.2012 regarding recategorization of mobile towers in view of violation of the principles of natural justice. This Tribunal had

granted liberty to MSEDCL to file a fresh petition proposing recategorization of mobile towers, and had specifically directed MERC to pass appropriate orders after hearing all the concerned parties. Learned counsel was quick to point that in spite of such clear directions of this Tribunal, the State Commission did not hear the Appellants before passing the impugned order dated 3.11.2016. In the circumstances, the impugned order dated 3.11.2016 is not only violative of the principles of natural justice, but is also in breach of the order of this Tribunal dated 7.11.2012.

14.2 Learned counsel further submitted that neither MERC nor MSEDCL in their respective replies have disputed the said submissions of the Appellants. In this regard, learned *counsel relied upon the judgment of Hon'ble Supreme Court in case of Uma Nath Pandey and others v/s State of Uttar Pradesh and another, reported in (2009) 12 SCC 40 (paragraph 3).*

14.3 ***Per contra****,* learned counsel for the State Commission submitted that the contentions of the Appellants that no notice had been issued by the Commission before passing the order in Case No.48 of 2016 ofiled by MSEDCL are denied. He submitted that a public notice and an Executive Summary was published by MSEDCL inviting suggestions and objections on MSEDCL's petition for final true up for FY 2014-15, Provisional True Up for FY 2015-16 and MYT for FY 2016-17 to FY 2019-20 in Case No. 48 of 2016. Learned counsel clarified that both these documents clearly mentioned that the copy of the detailed petition was available on the website of the Commission as well as MSEDCL's

website. In its prayer to the Commission, MSEDCL had mentioned "*..to provide tariffs for individual categories as proposed by MSEDCL..*".MSEDCL had made a proposal to the Commission regarding the classification of certain telecom towers, etc. under commercial category, irrespective of whether they were covered under the IT/ITES Policy of the GoM. Learned counsel indicated that Bharti Airtel was also one of the objectors before the Commission and is a party in the present matter also (in Appeal 337 of 2016) and had categorically submitted as under:

"*Bharti Airtel Ltd. stated that MSEDCL should charge Industrial Tariff for consumption by Mobile Towers…..requiring an IT/ITES registration certificate..*". Therefore, it is apparent that the status of telecom towers for tariff determination was a part of the process of public scrutiny and subjected to comments and suggestions in accordance with Section 64.

14.4 It is, therefore, apparent that status of telecom towers for tariff determination was a part of the process of public scrutiny and subjected to comments and suggestions in accordance with Section 64 of the Act. Further, it is also contended on behalf of the Appellants that there was no proposal on behalf of MSEDCL regarding the recategorization of the Telecom Towers. In fact, the proposal was submitted by MSEDCL to classify certain telecom towers etc. under commercial category, irrespective of whether they were covered under the IT/ITES policy of the GOM. However, the Commission observed that in this regard no rationale has been submitted by MSEDCL for this specific proposal.

14.5 It would thus appear that adequate notice was given before deciding the reference case leading to passing of the impugned order and one of the Appellants namely Bharti Airtel had submitted its comments / suggestions. As such, there is prima facie no case of violation of principles of natural justice, as now being alleged by the Appellants.

Our Findings:-

14.6 The Appellants have alleged that no notice had been issued by MERC to the Appellants before deciding Case No.48 of 2016 filed by MSEDCL against which the impugned order dated 03.11.2016 has been passed. It is the contention of the Appellants that neither in the public notice nor in the executive summary in respect of the said case, there was any mention and as such the order is not only violative of principles of natural justice but also in breach of the order of this Tribunal. It is pertinent to note that neither the State Commission nor the MSEDCL have disputed the said submissions of the Appellants in their respective replies.

14.7 On the other hand, learned counsel for the State Commission has tried to justify the order of the State Commission that copy of the detailed petition was available on the website of the Commission as well as on MSEDCL's website and in its prayer, MSEDCL had mentioned "*..to provide tariffs for individual categories as proposed by MSEDCL.*.". Learned counsel for the Commission contended that one of the Appellants namely Bharti Airtel was also one of the objectors before the Commission. Therefore, it is apparent that status of telecom towers for tariff determination was a part of the process of public scrutiny and

subjected to comments and suggestions in accordance with Section 64 of the Act.

14.8 We have carefully perused all the materials placed before us during the pleadings and note that petition filed by MSEDCL before the State Commission was for final true up for FY 2014-15, provisionally true up for FY 2015-16, MYT of 2016-17 to 2019-20 in case of 48 of 2016 and it did not categorically include tariff restructuring of mobile/telecom towers which is a matter for consideration in these Appeals. It is also worth considering that when a matter pertaining to several service providers and numerous mobile towers are being undertaken for tariff determination/classification, the concerned Appellants ought to have been given adequate notice/time to present their case and file comments / objections. We do not find force in the arguments of the learned counsel for the State Commission that one of the Appellants namely Bharti Airtel had submitted its comments/suggestions and hence, it may be concluded that restructuring of tariff for Mobile Towers was an element in the petition. Accordingly, we hold that the Appellants were not given requisite notices by the State Commission before passing the impugned order. As such, a case of violation of principles of natural justice has been established.

ORDER

In the light of the above, we are of the considered view that the present Appeals have merits and deserve to be allowed. Hence, Appeals are allowed. The impugned order dated 03.11.2016 passed by Maharashtra

Electricity Regulatory Commission in Petition No.48 of 2016 is hereby set aside to the extent challenged in the Appeals.

In view of the disposal of the Appeals, all the pending IAs do not survive for consideration and, accordingly, stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **12th day of February, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

Pr