Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th floor, Cuffe Parade, Mumbai 400 005
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail mercindia@mercindia.org.in
Website: www.mercindia.org.in

Case No. 11 of 2009

In the matter of
Petition of Association of Hospitals, Educational Institutions and Charitable Trusts seeking re-determination of the tariff, in view of the Appellate Tribunal's Judgment dated April 23, 2009, in Appeal Nos. 153, 154, 155, 156, 157, 158, 159, 161, 162, 164, 165, 166, 167, 168, 170, 174, 175, 176, 177 and 178 of 2008

Shri V.P. Raja, Chairman
Shri S.B. Kulkarni, Member
Shri V.L. Sonavane, Member

ORDER

30th December, 2009

The Association of Hospitals, Educational Institutions and Public Charitable Trusts (hereinafter referred to as the "Petitioners") submitted their respective Petitions under affidavit to the Commission on May 15, 2009, seeking re-determination of tariff in view of the Judgment of the Honourable Appellate Tribunal (ATE) dated April 23, 2009, in Appeal Nos. 153, 154, 155, 156, 157, 158, 159, 161, 162, 164, 165, 166, 167, 168, 170, 174, 175, 176, 177 and 178 of 2008. The detailed list of the Petitioners under various Groups is enclosed in the Annexure to this Order. It has further been observed that out of the twenty Petitioners for whom the ATE Order is applicable, only eighteen Petitioners have submitted fresh Petitions after the above mentioned Judgment.

2. The Petitioners submitted that the Commission's Tariff Order dated June 20, 2008 in Case No. 72 of 2007 for the Maharashtra State Distribution Company Limited (MSEDCL) for FY 2008-09 was challenged in the High Court and thereafter, in the ATE. The Petitioners added that the ATE, by its Judgments dated April 23, 2009, set aside the Tariff Order and directed the Commission to re-determine the tariff. The relevant paragraphs of the ATE Judgments in this regard are reproduced below:

Appeal No.s 153, 154, 155, 156, 157, 158, 159, 161, 164 166, 167, 168, 170, 177 and 178 of 2008 dated April 23, 2009:

> *"7. …As we find that the Appellants were not heard by giving an opportunity to them before deciding the issues in respect of change in tariff design, re-categorisation by introducing a new category and in respect of the increase in cross-subsidy charges, we deem it appropriate to remand the matter to the Commission so that the Commission can decide these issues after giving opportunity to all the Appellants to place their case before the Commission by allowing them to produce the materials for substantiating their plea.*
>
> *...*
>
> *9. Accordingly, the impugned order is set aside and the matter is remanded to the Commission. The Commission is directed to give opportunity to all the Appellants to give the fresh consideration to the points raised by the Appellants and come to its conclusion on the basis of the materials available on record and in accordance with law. This exercise may be completed within 8 weeks from the date of the receipt of this Order. It is made clear that this Judgment would apply to the Appellants only. With these directions, all these Appeals are allowed."*

Appeal No.s 162 and 165 of 2008:

> *"3. We have heard the learned counsel for the Appellants as well as the learned counsel for the Respondents. In view of the stand taken by the learned counsel for the Appellant that the opportunity has not been given to them to place the materials before the Commission to arrive at a proper conclusion, we deem it appropriate to give the said opportunity to the Appellants to place their case before the Commission so that the Commission can give a fresh consideration to the issues raised in this case.*

4. Accordingly, the order impugned is set aside. The matter is remanded to the Commission to decide the above issues after giving opportunity to the Appellants by allowing them to place relevant materials before the Commission and then the Commission can decide the matter afresh on the basis of the materials placed by the parties before the Commission in accordance with law."

Appeal No.s 174, 175 and 176 of 2008:

"8. In view of the said undertaking and also in order to give adequate *opportunity to the Appellants to present their case before the Commission on the above points, we deem it appropriate to set aside the impugned order and remand the matter to the Commission for fresh consideration.*

9. Accordingly, the impugned order is set aside. The State Commission is directed to allow these parties to place their materials to substantiate their plea and to give a fresh consideration to the issues and decide the same after taking into consideration the materials produced before the Commission in accordance with law. This exercise may be completed within 8 weeks from the date of the receipt of this Order. It is made clear that this Judgment would apply to the Appellants only. With these directions, all the 3 Appeals are allowed."

3. Association of Hospitals, Educational Institutions and Public Charitable Trusts, vide their Petition, made the following prayers to the Commission:

i. The Applicant as also the other charitable institutions be categorised into a suitable category and the tariff in respect of Charitable Institutions such as the Applicant be determined and fixed at Rs. 3.63 per unit or lower than Rs. 3.63 per unit for the Financial Year 2008-2009;

ii. Such other and further orders, as are deemed fit in the interests of justice be granted in favour of the Applicant.

4. The Petitioners submitted as under in their Petition:

a. Section 62(3) of the Electricity Act, 2003 (EA 2003) permits the Commission to differentiate between consumers of electricity while determining the tariff with regard to the nature of supply and purpose for which the supply is required.

b. The Commission, in its Operative Order for MSEDCL dated May 31, 2008, classified and categorised the educational institutions and hospitals under HT-II (commercial) category of consumers, which has caused a huge tariff shock to them, since these institutions were earlier classified under HT-I (Non-Continuous) category. The Commission suo-motu created a new category of HT-II commercial, and establishments similar to the Petitioners, which were earlier in HT-I category, were shifted to HT-II commercial category. The educational institutions administered by the charitable trust have been clubbed in the category along with multiplexes and shopping malls. However, no rational basis was provided by the Commission for clubbing non-profit making organisations along with multiplexes and shopping malls.

c. However, a substantial and significant reduction in the tariff has been awarded to the Public Water Works (PWW) category on the basis that they are public utilities and benefit society at large. Therefore, in view of the above, the Petitioners submitted that the public charitable institutions and Government institutions, which have now been categorised in the commercial category, are also Public Utilities and benefitting the society at large.

d. The State Government relies on the Petitioners and other similar entities to discharge its duties under Part IV of the Constitution of India. The educational institutions and the hospitals which are run by charitable institutions are run and operated for philanthropic and social objectives.

e. These institutions, therefore, deserve to be considered favourably at the time of tariff fixation. For efficient discharge of functions by these institutions, the tariff for such institutions should be either at the cost of supply if not at a subsidised rate. The cost of supply being Rs. 3.62 per unit, the tariff for such institutions should be at approximately the same level.

f. A separate category should be created for such charitable institutions. Further, it is improper to impose a tariff structure on them which is same as that applicable to Malls and Multiplexes and clubbing them together for the purpose of tariff determination is violative of Article 14 of the Constitution of India, since unequals have been treated as equals. The National Electricity Policy (NEP) states that the actual increase in tariff should not be such as to load a particular category of consumers with a huge cross-subsidy and the tariff should be comparable to the Cost of Supply (CoS). The Commission, in its above-said Order for MSEDCL has mentioned in Paragraph 27 that the net revenue gap for FY 2008-09 works out to Rs. 1510 Crore, requiring an average increase of approximately 6.67% to meet the revenue requirement.

Therefore, the charitable institutions should also be subjected to a tariff increase of approximately 6.67% over the tariff in the earlier year, whereas, the above mentioned Tariff Order had the effect of loading a cross-subsidy of more than 103% which is not permissible as per the guidelines.

g. The Commission may either fix the tariff at par with the cost of supply or at par with the tariff applicable to the HT-I category, under which the Petitioners were categorised in the earlier Tariff Order.

h. The Commission may take into consideration that the educational institutions benefit the society at large and are a non-profit making organisation, whereas multiplexes and malls are profit-making establishments catering to luxury of the elite class and clubbing the two establishments together for tariff determination is incorrect.

i. The policy of cross-subsidisation adopted by the Commission makes it necessary to levy additional burden on profit making establishments like Malls and Multiplexes. The Commission has adopted the policy of uniform categorisation of consumers for all the distribution licensees in the State, but the National Electricity Policy (NEP) recommends multiple Licensees and competition between them for the benefit of the consumers, and hence, the principle adopted by the Commission is contradictory to this policy.

j. The tariff increase is also inconsistent with the provisions of Sections 61 and 62 of the EA 2003, since, it does not safeguard the consumers' interest. They added that in accordance with Section 62(3) of the EA 2003, the differentiation has to be made in accordance with the purpose for which the supply is required.

k. The average tariff increase, which is equal to the ratio of effective revenue gap to projected revenue with existing tariff, when calculated considering the MERC approved values works out to be 6.76%, i.e.,

$$\text{Average tariff increase} = \frac{\text{Effective revenue gap}}{\text{Projected revenue with existing tariff}}$$

$$= \frac{1510 \text{ Crore}}{22348 \text{ Crore}} * 100 = 6.76\ \%$$

l. Considering the average tariff increase of 6.76 % over the existing tariff of Rs. 3.40 per unit for Public Charitable Trust Institutions, the revised rate works out to Rs. 3.63 per unit, whereas, the actual revised tariff in the Order is Rs. 7 per unit. Further, the hike gives a tariff shock and violates the NEP and Section 61(g) of the EA 2003, since, the actual increase works out to 16 times the allowable increase.

m. The Commission should determine tariffs and categories in line with the tariff philosophy adopted in the past, i.e.,
    i. Categorisation should be determined so that cross-subsidy is reduced without subjecting any consumer category to a tariff shock;
    ii. Consolidate movement towards uniform tariff categorisation throughout the State of Maharashtra. The differences are due to historical reasons, management policies and approach. However, the categorisation and applicability of tariff should not be significantly different. The Commission has attempted to achieve this object.

n. Bringing uniformity in categorisation hampers competition and the Commission ought to have permitted distribution licensees to propose different categories and tariffs.

o. The revised tariff should be fixed at Rs. 3.63 per unit for two reasons:
    i. It is in line with the average tariff increase of 6.76%;
    ii. The tariff of Rs. 3.63 per unit is very close to the cost of supply of Rs. 3.62 per unit determined by the Commission. It is in accordance with Section 61(g) of EA 2003, which states that the tariff should progressively reflect the cost of supply of electricity.

p. Under Section 62(3) of the EA 2003, the Commission has the power to differentiate as per load factor, power factor, voltage, consumption, time of supply, location, nature and purpose of supply. Therefore, purpose of supply is an important criterion, and the Commission has used its powers in case of public water works by awarding significant reduction in tariff, whereas, the Commission has penalised the Public Trust institutions by raising the tariff to Rs. 7 per unit.

q. Moreover, the Commission has not considered the revenue from HT-II Commercial category while calculating the aggregate revenue requirement for FY 2008-09. This is evident from the table on approved sales for FY 2007-08 and FY 2008-09 on Page no. 155 of the Order. Further, the revenue generated from the newly created category would be in excess of Rs. 3841.6 Crore as against the revenue gap of Rs. 1510 Crore mentioned in the Order.

r. In accordance with Section 65 of EA 2003, the subsidy amount is to be paid by the State Government in advance and hence, there is no question of cross-subsidy. The entire cross-subsidy can be eliminated as the State Government is supposed to pay the subsidy in advance. Also, the Tariff Policy stipulates that the cross-subsidy has to be gradually and progressively reduced, and the tariff should be $\pm$ 20% of the cost of supply.

s. The average rate per unit for the Petitioners in FY 2007-08 was Rs. 4.16 per unit. However, the average rate per unit for FY 2008-09 has substantially increased to Rs. 7.36 per unit leading to an increase of 76.92% in tariff and 103.31% increase in the cross-subsidy. The Commission has increased the tariff on the premise that Petitioners have unwarranted commercial consumption, non-critical services, high capacity to pay and huge potential to conserve energy.

t. The ATE, in its Judgment in Appeal No.-106 of 2008 in the matter of 'Mumbai International Airport Pvt. Ltd. Vs. MERC' has held as under:

"This Tribunal has been consistently taking the view that no particular category of consumers can be made to pay higher tariff on the excuse that those consumers were responsible for purchase of costly power. The purchase of costly power depends upon the total consumption in the area of distribution of the distribution licensee. No particular category of consumers can be blamed for such increase. The appellant particularly wants to show from the data available in the Commission's order that the increase in consumption of the category – HT-II (from which HT-III has been carved out) has not increased as rapidly as certain other category of consumers. It has also to be seen that increase in total consumption can be caused either by increase in the number of consumes or by increase in the consumption of each individual consumer. The Commission has made no effort to analyze whether the consumers of HT-III commercial category have increased in number or has increased individual consumption on account of which they can be penalized. We have already discarded the view that any category can be charged higher rate on account of purchase of expensive power on the excuse of that category being responsible for excess power.

20) Accordingly view of the Commission that HT-III category consumers are responsible for purchase of costly power or that this category of consumers should pay a higher tariff has also to be discarded. In the case of Spencer's (supra) we held as under:

"12) So far as loading the appellants with the purchase of the costly power is concerned, the same also needs to be disapproved. The purchase of costly power depends upon the total demand for electricity at a particular area. No particular category can be burdened with the costly power. A similar situation was examined by this Tribunal in the case of Kashi Vishwanath Steel Ltd. Vs. Uttaranchal Electricity Regulatory Commission

& Others in appeal No. 124 of 2005, decided by this Tribunal on 02.06.06. The Uttaranchal Electricity Regulatory Commission had fixed a very high tariff for the power intensive industries on similar grounds. We ruled as under:

"… However, we are constrained to observe, that this is not in line with the spirit of the Act wherein it is postulated that the cross subsidies have to be transparent and gradually brought down. Using the marginal cost of purchase of power for a particular category of consumers will perennially result in higher tariff for the category and, therefore, cannot be justified. At the same time it is also not in the intent of the Act to inflict tariff shock to the consumers".

u. The Commission is statutorily responsible for the co-ordinated development of the entire electricity industry and also for the interest of the consumers and therefore, the Commission has to take into account the social consequences while exercising its functions.

5. The Association of Management of Unaided Engineering Colleges (hereinafter referred to as "Interveners"), in its Intervention Application under affidavit dated June 15, 2009, submitted that the Commission initiated the matter pursuant to the ATE Judgment dated May 31, 2008, and it is well established fact that a relief cannot be given selectively in tariff matters. The tariff of any category has to be considered from the beginning and applied to all consumers of the said category. The Interveners made the following prayers:

i. "Allow the present application for intervention
ii. Allow the applicant to adopt the submissions made by the various educational institutions before this Hon'ble Commission.
iii. Grant the same relief to the members of the Applicant as to the other educational institutions before this Hon'ble Commission."

6. The Commission, vide its Notice dated May 28, 2009, scheduled a Hearing in the matter on June 15, 2009, and directed the Petitioners to serve a copy of their Petitions along with accompaniments to the Respondent, viz., MSEDCL, and the four Consumer Representatives authorised on a standing basis under Section 94 of the EA 2003.

7. The Hearing on the above matter was held on June 15, 2009, and after hearing both the Parties, the Commission directed the Petitioners to submit documentary evidence for identifying the gaps between the submissions made and the ground reality. The Commission directed the Petitioners to serve copies of all Petitions on MSEDCL. The Commission also directed MSEDCL to submit its reply by July 5, 2009, and serve copies on the Petitioners. The Commission further extended the time for submission of reply by MSEDCL, which was filed by MSEDCL on August 3, 2009, wherein MSEDCL stated that MSEDCL's reply was limited to the Petitions received by MSEDCL and further replies, if necessary, would be submitted after receipt of the above-said submissions from the Petitioners.

8. As per the aforesaid directives of the Commission, the Advocate of the Petitioners submitted the documentary evidence on behalf of 14 Petitioners (out of 20 Petitioners), till August 21, 2009. On behalf of 2 Petitioners, viz., Osho International Foundation and Neo Sanyas Foundation, the Advocate of the Petitioner has vide letter dated August 7, 2009, submitted inter-alia that there are no gaps between the submissions made and the ground reality and on the contrary the said two Applicant institutions are doing greater charity work than claimed in the submissions.

9. The Petitioners submitted documentary evidence under affidavit to prove their credentials of being charitable institutions, as listed below:

i. Konkan Mitra Mandal Medical Trust (KMMMT) submitted details of various schemes for making medical facilities available to all, details of concessions given, total number of patients to whom free blood bag and blood products have been issued, total number of free blood bags and blood products issued, and details of blood donations camps organised and blood bags collected;

ii. DY Patil University submitted the details of fees collected and concessions given, scholarships provided, and Trust Audit Report;

iii. DY Patil Hospital submitted the details of charges levied on the patients and social activities carried out, general health check-up camps carried out, blood donations camps organised, HIV counselling report, re-visit report, registration report, and list of patients admitted during the period from June 1, 2009 to July 30, 2009;

iv. DY Patil Sports Academy submitted the Trust Audit Report;

v. Ramrao Adik Education Society submitted the Trust Audit Report;

vi. Continental Medicare Foundation submitted the Trust Audit Report;

vii. Krishna Charitable Trust submitted the details of charity provided to IPD patients;

viii. Sadhu Vaswani Mission Medical Hospital submitted the details of number of patients treated and charity provided;

ix. KEM Charitable Hospital submitted the year-wise break-up of amount spent on free and concessional treatment, news-paper cuttings of heart operations conducted at subsidised price for the poor, photocopy of news paper cuttings of various camps organised by them for cancer patients and mentally retarded children, and details of patients who have been provided concession and free billing;

x. Maharashtra Medical Foundation, i.e., Joshi Hospital and Ratna Memorial Hospital, submitted the summary of indigent patient fund utilisation for FY 2008-09, summary of indigent patients fund account for FY 2007-08, Statement of Accounts for FY 2007-08, I.P fund patient bill details, and photocopy of newspaper cuttings of various camps organised by them for cancer and diabetes patients;

xi. Grant Medical Foundation and Ruby Hall Clinic submitted details of the patients availing free/concession in treatment and free billing for the month of April, May and June 2009;

xii. Poona Hospital and Research Centre submitted details of patients availing concession and free billing;

xiii. Aditya Birla Health Services Ltd., submitted the details of free camps organised, and list of patients availing charitable services;

xiv. N.M. Wadia Institute of Cardiology submitted a note on the procedures followed by the medical social workers at the social service department, list of patients availing free/concession in treatment, and weaker case schemes;

xv. Jehangir Hospital submitted the list of patients who have availed charitable services;

xvi. Ashwini Sahakari Rugnalaya Ani Sanshodhan Kendra Niyamit submitted the list of patients who have been provided free beds in FY 2007-08 and FY 2008-09, statement showing philanthropic activities done in FY 2007-08 and FY 2008-09, details of free camps organised for treatment of different diseases, and details of expenditure incurred towards providing free medical treatment certified by CA. Under the additional submission, they prayed that:

a. *"The Applicant as also the other charitable institutions be categorised into a suitable category and the tariff in respect of Charitable Institutions / Co-operative Social Organisations such as the Applicant be determined and fixed at Rs. 3.63 per unit or lower than Rs. 3.63 per unit for the Financial Year 2008-2009;*
b. *Such other and further orders, as are deemed fit in the interests of justice be granted in favour of the Applicant."*

xvii. Sancheti Hospital for Orthopaedics and Rehabilitation submitted details of free medical assistance provided, details of patients availing free treatment/concession and concession amount, and several events like awareness programmes conducted;

xviii. Sanjeevan Hospital submitted the details of concession provided to various sections of the society, and list of patients who have availed charitable services;

xix. Deenanath Mangeshkar Hospital and Research Centre submitted the details of charity provided as sealed and signed by charity officer;

xx. Maharshi Karve Shree Shikshan Sanstha submitted the details of deficit of branches for FY 2005-06 to FY 2008-09, and details of construction of various school, hostel and college buildings for FY 2005-06 to FY 2008-09.

10. MSEDCL, in its reply dated August 3, 2009, submitted that:

i. The Commission, while categorising the hospitals in the present category, has determined the tariff in accordance with Section 62(3) of the EA 2003. The tariff so determined for the said category has been differentiated in accordance with the load factor of the consumers in that category read with total consumption of electricity and the nature and purpose for which the supply is required. The Commission was within its jurisdiction to so differentiate and determine tariff for this category of consumers.

ii. The provisions of Section 61(g) are only guiding principles for fixation of tariff and the other guiding principles, which result in economic use of resources, safeguarding of consumers' interest and recovery of cost of electricity in a reasonable manner are also required to be followed by the Commission.

iii. As regards the reduction of cross-subsidy, Clause 5.5.3 of the Tariff Policy recognises that cross-subsidies have been existing for the past several years. While no case has been out against MSEDCL either for inefficiencies or operational losses, admittedly, the cost of power procurement has gone up significantly. On the contrary, Clause 5.5.3 of the Tariff Policy recognises that imbalance by reason of cross subsidy is required to be corrected while ensuring that no there is no tariff shock to the consumers. It is further submitted that tariff shock ought to be understood and interpreted with reference to the capacity of the consumer to pay tariff of electricity. Clause 5.5.3 ought to be interpreted against the facts and circumstances of the case and cannot be applied merely by reason of a provision in the Tariff Policy and NEP.

iv. Clause 8.3.2 of the Tariff Policy, which provides that the tariff should progressively reflect the cost of supply of electricity and that a road-map should be notified such that by FY 2010-11, the tariff is within ± 20% of the average cost of supply, is once again a guiding principle. The aforesaid provision cannot be followed without considering the shortage of power as well as the increase in the power purchase rates, and the need to curb consumption.

v. The Commission vide its Orders dated June 15, 2009, in Case No. 121 of 2008 for RInfra-D, and Case No. 118 of 2008 for BEST, has made certain observations on the issue of cross-subsidy and tariff shock.

vi. MSEDCL has followed the procedures as laid down in the MERC (Terms and Conditions of Tariff) Regulations, 2005, while submitting the Petition for Annual Performance Review (APR) for FY 2007-08 and Annual Revenue Requirement (ARR) for FY 2008-09. MSEDCL, in its Petition for APR for FY 2007-08 and ARR for FY 2008-09, has not specifically requested the Commission to prescribe a separate tariff for the Petitioners or such similarly placed consumer category. However, it is neither mandatory on MSEDCL to propose revision in specific consumer category-wise tariff, nor is it binding on the Commission to restrict its scope within the limited periphery of the Petition for APR and ARR as submitted by the licensee. The re-categorisation of consumers done by the Commission in its Order dated June 20, 2008, is not an exclusive case, and the Commission from time to time has modified the structure of electricity tariff as applicable to different categories of consumers, either by way of merger of some categories of consumers or by providing a separate category for some

specific consumers, though no such specific proposal was made by MSEDCL.

vii. Earlier, charitable hospitals were charged under the HT-I Industries category and MSEDCL had proposed a tariff of Rs. 450 per kVA per month as fixed charge and Rs. 5 per kWh as energy charge for consumers connected on express feeders and Rs. 4.60 per kWh as energy charge for consumers connected on non-express feeders.

viii. After considering various aspects of categorisation, the Commission determined the fixed charge of Rs. 150 per kVA per month and energy charge of Rs. 7 per kWh for the new category of HT-II (Commercial), which includes charitable hospitals. There is no substantial difference in the bill amount considering the proposed tariff and the approved tariff as the Commission has reduced the fixed charge substantially from Rs. 300 kVA to Rs. 150 kVA.

ix. MSEDCL submitted a table which shows the percentage change w.r.t. proposed tariff. For lower consumption category (i.e., consumers having consumption of 1000 units per month) the percentage change w.r.t. proposed tariff works out to -56%, similarly, for medium consumption (i.e., consumers having consumption of 10,000 units per month) the percentage change w.r.t. proposed tariff works out to -7%, and for high consumption (i.e., consumers having consumption of 21,000 units per month) the percentage change w.r.t. proposed tariff works out to 14%. Therefore, it is clear that if the consumption is low or medium as compared to the contract demand then there is a reduction in billed amount as compared to the proposed tariff.

x. Since, it is not binding on the Commission to restrict its scope within the limited periphery of the APR and ARR Petition submitted by MSEDCL, therefore, the Commission's decision to carve out a separate consumer category cannot be considered as unjustified.

xi. Electricity is used by different consumers for different purposes and it would not be possible to determine a separate category for each specific purpose as it will further complicate the entire tariff structure in the State.

11. The Commission, vide its notice dated August 24, 2009, scheduled the second hearing in the matter on September 17, 2009.

12. During the above hearing, Shri. Sudeep Nargolkar, represented the Petitioners and submitted as under:

a. As desired by the Commission, the Petitioners have submitted the documentary evidence to demonstrate that they are doing charitable work
b. Equating unequals like hospitals and charitable institutions with commercial entities like multiplexes and malls amounts to violation of Article 14 of the Constitution of India, as multiplexes and malls are vendors of luxury whereas the Petitioners are bearers of necessity.
c. Therefore, charging unequals and equals at the same rate for consumption of electricity, is violative of the principle of equality, and increase in tariff by a whopping 106% amounts to a great tariff shock.
d. The nature and purpose for which the supply is required is the same for Government Hospitals, ESIS Hospitals, and Public Charitable Trust hospitals.
e. The charitable institutions are run and operated for philanthropic and social objectives. The educational institutions and the hospitals run by charitable institutions discharge the functions of the Government. Such institutions including the Petitioners, therefore, deserve to be considered favourably in fixation of tariff by the Commission. If operating costs shoot out of bounds due to increase in expenditure on account of electricity, the institutions will be unable to discharge their functions. The tariff for such institutions therefore should be either at the cost of supply if not at subsidised rates.
f. If considered appropriate by the Commission, a separate category may be created for the Petitioners. However, if the Commission feels that creation of a new category cannot be done since the year is over, then the Petitioners may be re-categorised and clubbed with industrial category as was the practice earlier. If the Petitioners are clubbed with the industrial category, they will still be required to pay cross-subsidy over and above the cost of supply, but it will be more in consonance, and the Petitioners would be satisfied.

13. The Commission observed that the Petitioner was effectively arguing that in case the Petitioners are clubbed with industrial consumers, then it would be acceptable to the Petitioners, even though they would be clubbed with other profitable and commercial entities, and hence, the argument of usage was not the crux of the issue. The Petitioners' Counsel submitted that industries provide goods and services, and the Petitioners are also providing services. He added that the nature of goods and services offered by industry is much closer to that being offered by the Petitioners, as compared to commercial establishments that are fully trading in goods and services.

Counsel added that this Prayer was a Prayer of last resort, and is not the best course of action as being sought by the Petitioners.

14. Counsel for the Petitioners added that the Commission had given cross-subsidy to consumer categories like Public Water Works (PWW), which had large outstandings with MSEDCL, as compared to the Petitioners, who were always prompt in paying their bills. Similarly, even the industrial category has significant quantum of arrears, and yet they are being offered tariffs of Rs. 4.30 per kWh.

15. Counsel for the Petitioners sought clarification from the Commission regarding the basis for classifying the Petitioners under Commercial category, as compared to the earlier classification of Industry.

16. The Advocate representing Shri. Mahavira Jaina Vidyalaya submitted an Intervention Application, and submitted that the Commission has no jurisdiction to determine the tariff for consumers with Contract Demand more than 1 MVA. The Commission clarified that the present proceedings were in the context of the matters remanded by the ATE to the Commission, and were specific to the 20 Petitioners and their issues. The issue of jurisdiction of the Commission was not relevant in view of the order of remand by the Hon'ble ATE.

17. Having heard the Parties and after considering the materials placed on record, the Commission is of the view as under:

18. The broad issues for consideration of the Commission are summarised below:

a. Can the Petitioners be classified under the 'Industrial' category, or is 'Commercial' category the more appropriate categorisation? Does a separate category have to be created for the Petitioners?
b. In case a separate category is being created for the Petitioners, then what should be the tariff chargeable for this category? How should any revenue loss/gain to MSEDCL on this account, if any, be adjusted in tariffs?
c. Is the categorisation by the State/Central Government as a 'Charitable Organisation' under any other statute/law, binding on the Commission in the process of consumer categorisation and tariff determination by the Commission?

d. Has the cross-subsidy been increased for the Petitioners in the impugned Order? Should the tariff be re-determined for the year in question, such that the cross-subsidy is reduced? What is the quantum of refund due to the Petitioners and what should be the time-frame for the refund?

19. As regards whether the Petitioners should be classified under the 'Industrial' category or 'Commercial' category, the Commission is of the view that it is appropriate to classify the Petitioners under the HT Commercial category, since the purpose of use is clearly not 'industrial', as explained subsequently in this Order, wherein the Commission has explained as to what exactly is industrial consumption.

20. As regards the purported inability of the Petitioners to pass on the increase in expenses to their consumers as a reason for determining a lower tariff for the Petitioners, Section 62(3) of the EA 2003 does not permit differentiation between consumers on the basis of the ownership or whether they are loss making or profitable or running on a no-loss no profit basis. If these contentions were to be accepted, it would tantamount to saying that all commercial establishments that are not earning any profit or operating on a no loss no profit basis, should be categorised separately, as compared to commercial establishments that are earning some profit, and that the tariff should be different for these categories. This is clearly not within the scope of Section 62(3) of the EA 2003.

21. Further, as regards the categorisation of the Petitioners by the State/Central Government or any other agency as a 'Charitable Organization' under any other statute/law, the said categorization is not recognized under Section 62(3) of the EA 2003 for creating a differentiation in tariff or for separate categorization for the purpose of the EA 2003.

22. Further, the Hon'ble Tribunal has upheld the Commission's powers to create a new category as long as it is in accordance with Section 62(3) of the EA 2003, and held that there is no requirement for the Commission to publicly announce the tariff before issuing the actual order. The relevant part of the Judgment dated 26.02.2009 is reproduced below:

> *"14) It is not the case of the appellant that the Commission had no power to create a tariff design different from the one proposed by the licensee.* ***The Commission has the power to design the tariff as per its own wisdom. The Commission need not, before issuing the actual order, publicly announce the tariff it proposed and call for public comments****. In fact this is not even the appellant's contention.*

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

16) ***We have no hesitation to say that the Commission is entirely at liberty to create a new category which is not available in the licensee's proposal provided of course the new category falls within the scope of section 62(3) of the Act…"***

23. Also, as regards the contention of principles of natural justice, MSEDCL had proposed a significant tariff increase for the industrial category, under which the Petitioners were earlier categorized. MSEDCL has also submitted simulations of bill impact, which indicate that the difference between the bill impact based on tariff proposed by MSEDCL and the tariff approved by the Commission for the HT II Commercial category, varies depending on whether the consumption is low, medium or high. Even for the cases where the consumption is high, the impact is only 14% higher than that projected based on MSEDCL's proposed tariff. Notwithstanding the above reasoning, since the ATE has ruled that the Commission should decide the matter afresh after giving due opportunity to the Petitioners to present their views, the Commission has accordingly done so.

24. Moreover, though the Petitioners have argued that their categorization under HT II Commercial is inappropriate and they should not be clubbed with other profit making and commercial entities, on the other hand, the Petitioners have sought alternate relief that it would be acceptable for them to be classified under the Industrial category, which also includes other profit making and commercial entities. Thus, there is no consistency in the Petitioners' arguments in this regard, and the issue is only of applicable tariff, and the issue of classification or otherwise is only the route adopted by the Petitioners in an effort to get the tariff reduced.

25. Further, while undertaking the rationalisation of tariff categories, the Commission has borne in mind the provisions of Section 62(3) of the Electricity Act, 2003, which stipulates as under:

> *"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****."(****emphasis added****)*

26. It is not possible to apply all the above specified criteria at the same time for designing the tariff categories; else, with many permutations and combinations, there will be too many categories. Perhaps, that is also not the intention behind the provision, which merely enables the Regulators to work within the criteria. Thus, it will be seen from the elucidation given below, as to how different criteria have been used to categorise different types of consumers:

- The 'load factor' and 'power factor' criteria have been used to provide rebates and disincentives, such as load factor incentive for load factor above certain specified levels, and power factor rebates and disincentives are provided to consumers who are able to maintain their power factor above specified levels.
- The consumer categories are broadly classified under High Tension (HT) and Low Tension (LT) categories, in accordance with the 'voltage' criteria under Section 62(3) reproduced above.
- The 'time of supply' criteria has been used to specify time of day (ToD) tariffs, so that the consumers are incentivised to shift their consumption to off-peak periods and thus, reduce the burden on the system during peak hours.
- The 'nature' of supply criteria has been used to specify differential tariff for continuous (non-interruptible) and non-continuous supply (interruptible)
- The criteria of 'purpose' of supply has been used extensively to differentiate between consumer categories, with categories such as residential, non-residential/commercial purposes, industrial purpose, agricultural purpose, street lighting purpose, etc.

27. It is further clarified that the 'commercial' category actually refers to all categories using electricity for 'non-residential, non-industrial' purpose, or which have not been classified under any other specific category. For instance, all office establishments (whether Government or private), hospitals, educational institutions, airports, bus-stands, multiplexes, shopping malls, small and big stores, automobile showrooms, etc., are covered under this categorisation. Clearly, they cannot be termed as residential or industrial. As regards the documents submitted by the Petitioners to justify their contention that they are 'Charitable Institutions', the same are not germane to the issue here, since the Electricity Act, 2003 does not permit any differentiation on the basis of the ownership. As regards the parallel drawn by the Petitioners' between the nature and purpose for which supply is required by Government Hospitals, ESIS Hospitals, etc., and Public Charitable Trust hospitals, the Commission clarifies that it has been attempting to correct historical anomalies in the tariff categorization in a gradual manner. In the impugned Order, the Commission had ruled that Government Hospitals, ESIS Hospitals, etc., would be charged under LT I category, even though they may be supplied at HT voltages. This anomaly has been corrected in the subsequent Tariff Order, and all hospitals, irrespective of ownership, have been classified under HT II Commercial category.

28. Also, the Petitioners have presented a confused interpretation of cross-subsidy and tariff increase, and have also confused same categorization across licensees to mean same tariff. The Commission clarifies that though the consumer categorization across different licensees is more or less same, the tariffs are different, for reasons elaborated in the Tariff Orders, and are not reproduced here. As regards the issue of cross-subsidy, the Commission would like to clarify that percentage tariff increases can be misleading, since the percentage of increase depends on the existing tariff. For instance, if the average existing tariff for the residential category is say, around Rs. 3 per kWh, and that for the commercial category is say, around Rs. 8 per kWh, and the average cost of supply is say Rs. 5 per kWh, with an average tariff increase requirement of say, 10%. The cross-subsidy provided by commercial category in this illustration is thus, Rs. 3 per kWh, while residential category is being subsidised by Rs. 2 per kWh, and the tariff differential is Rs. 5 per kWh. Let us assume that the revised average cost of supply is Rs. 5.50 per kWh. In this illustration, a 10% increase across the board will give the desired revenue requirement, but will amount to a 30 paise increase for the residential category, as compared to 80 paise increase for the commercial category. Thus, a 10% increase across the board will result in increasing the cross-subsidy contribution of commercial category from Rs. 3 per kWh to Rs. 3.30 per kWh (Rs. 8.80 - Rs. 5.50), while cross-subsidy

provided to residential category will increase from Rs. 2 per kWh to Rs. 2.20 per kWh (Rs. 5.50 - Rs. 3.30). Since the average tariff increase required is 10%, the cross-subsidy can be reduced, only if the tariff of the residential category is increased by say 20% (increase of 60 paise/kWh), and the tariff of commercial category is increased by less than 10%, say 5% (increase of 40 paise/kWh). If this is done, then the tariff differential will reduce by 20 paise/kWh, to Rs. 4.80 per kWh. Thus, as can be seen, even though the tariff has been increased quite steeply for residential category in this illustration, the cross-subsidy has not reduced significantly. Also, the 20% tariff increase will amount to a tariff shock for the residential category. The Commission is thus, faced with a very difficult task, when it comes to ensuring reduction of cross-subsidy, given the steep increase in the cost of supply of the distribution licensees, due to various reasons, elaborated in the respective Tariff Orders.

29. As regards whether the cross-subsidy has been increased for the Petitioners in the impugned Order, it is clarified that the tariff increase for the Petitioner in the impugned Order has occurred due to the re-categorisation into the more appropriate category, on account of the creation of the new category, viz., HT II Commercial, rather than any attempt to increase the cross-subsidy. As regards the contention of tariff shock, in any exercise where the consumer categories are rationalised, which was attempted by the Commission through the impugned Order as well as earlier Tariff Orders, the tariff impact on some categories will be higher than that on other categories, depending on the relationship of previously existing tariff with the revised tariff of the rationalised category. The Commission is committed to reducing the cross-subsidy for all consumer categories, including HT-II Commercial, as evident from the Commission's decisions in the subsequent Tariff Order for MSEDCL, wherein the Average Billing Rate of HT-II Commercial category was reduced by Rs. 0.24 per kWh, providing a 3% reduction in the tariff, and the cross-subsidy was reduced from 184% to 179% of Average Cost of Supply.

30. As regards the Petitioners' contention that the Commission has not considered the revenue from the revised tariff due to creation of the HT II Commercial category, it is clarified that such data was not available at the time of issuing the Order, since the category was carved out of the erstwhile HT I Industrial category. Also, the Petitioners' have not given any basis for the computation of additional revenue of Rs. 3842 crore, which appears to be exorbitant, given that MSEDCL has reported actual sales to the entire HT II Commercial category in FY 2008-09 as 874 MU, giving actual total revenue of Rs. 767 crore. Also, only the difference in revenue considering the consumption under HT I

Industrial category and HT II Commercial category has not been considered, rather than the entire revenue, since this consumption has been considered under HT I Industrial category for computation of revenue, due to lack of segregated data. Moreover, there was no intention to permit MSEDCL to recover any amount greater than its Aggregate Revenue Requirement, since the Commission has been truing up the allowable expenditure and actual revenue at the end of the year, and in this case also, the actual revenue has been considered by the Commission at the time of provisional truing up for FY 2008-09, in the subsequent APR Order.

31. In view of the rationale explained above, the categorisation for tariff purposes as in the Order dated 20.6.2008 would continue to apply as it is not possible to re-classify the Petitioners on the ground of their being charitable hospitals. This ground does not find a mention in Section 62(3) of the EA 2003 whereunder tariff categories can be created for consumers in accordance with the factors laid down in the said Section. The Commission is not satisfied with the nexus being attempted by the Petitioners as that with multiplexes and shopping malls. Clubbing non-profit making organisations along with multiplexes and shopping malls is purely incidental and has nothing to do with the nature of business of the said consumers. The creation of a new category, viz., HT-II Commercial, was to cater to all commercial category consumers availing supply at HT voltages, and currently classified under the existing HT-I Industrial. The basis was not whether the consumer would be charitable, trust, Government owned or for profit motive etc. The argument that imposing a tariff structure on the Petitioner which is same as that applicable to Malls and Multiplexes and clubbing them together for the purpose of tariff determination would be violative of Article 14 of the Constitution since unequals have been treated as equals, is also not convincing for the reasons as follows. Article 14 ensures equality before law, which means that only persons who are in like circumstances should be treated equally. To treat equally those who are not equal would itself be violative of Article 14 which embodies a rule against arbitrariness. Thus classification is permissible if it satisfies the twin test of its being founded on intelligible differentia, which in turn has a rational nexus with the object sought to be achieved. The settled law are the twin tests on the anvil of which the reasonability of classification for the purpose of legislation has to be tested, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such differentia must have a rational relation to the object sought to be achieved by the statute in question. Applying the twin tests to the facts of the present case, differential tariff can be fixed under Section 62(3) of the EA 2003 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**. Hence, the Commission has clubbed all hospitals, shopping malls, etc., under the Commercial Category, using the criteria of **purpose for which the electricity is being utilised**, since all these are commercial activities, and cannot be clubbed under the industrial category. Thus, the elements of intelligible differentia as contained in Section 62(3) of the EA 2003 do permit differentiation in tariffs but at the same time do not permit any differentiation in tariffs on the ground of any consumer being a charitable trust or non-profit making organisations rendering medical services to the public at large, i.e., neither the ownership pattern nor the criteria of profit making/not for profit organisations, can be used as a criteria for differentiating between consumers for the purpose of tariff determination. The next requirement is that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The statute in question is the EA 2003. The object sought to be achieved by the said statute is contained in Section 62(3), and this aspect has been explained above. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The basis of classification of the Petitioners in the category, viz., HT-II Commercial along with all commercial category consumers availing supply at HT voltages is based on the requirement of differentiating tariffs under Section 62(3) of the EA 2003 based on the purpose for which the supply is required. There is therefore a direct nexus between the classification of the Petitioners in the category, viz., HT-II Commercial and the requirement and the object sought to be achieved by Section 62(3) of the EA 2003. There is, therefore, no violation of Article 14. The objection therefore under Article 14 cannot, therefore, prevail, and accordingly in no unmistaken terms, is hereby, turned down.

32. Also, the criterion applied is that of *"availing supply at HT voltages"*. This is common to the Petitioner and Malls and Multiplexes. Thus, there is no question of treating unequals as equals. Both are *"availing supply at HT voltages"*. On this ground also, the Petitions are wholly without any merit and are liable to be dismissed. Further, there appears to be a trend amongst consumer categories to claim that they are unfairly being categorized along with malls and multiplexes under commercial category. It needs to be noted that based on data submitted by MSEDCL for FY 2008-09, the total number of consumers in HT II Commercial category is 2052, and it is obvious that malls and multiplexes would only form a small part of this category. Hence, the contention that the Petitioners are being categorized along with malls and multiplexes ignores the fact that the Petitioners are also categorized along with many more consumers, who are not malls and

33. multiplexes. Hence, merely because the Petitioners feel that some consumers in this category are not comparable; it does not mean that the Commission's approach in this regard can be faulted. Moreover, a few years ago, the Commission had created a separate category for malls and multiplexes, however, this categorization was set aside by the Honourable ATE, and these consumers were directed to be reverted to the Commercial category. Hence, the HT II Commercial category includes all such HT consumers, who cannot be classified under industrial or residential category.

34. The argument that the Petitioners are run by charitable institutions and operated for philanthropic and social objectives, or that the State Government relies on the Petitioners to discharge its duties under Part IV of the Constitution, may hold with the State Government, if at all, as under Section 65 of the EA 2003, if the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62, the State Government shall pay, in advance the amount to compensate the person affected by the grant of subsidy.

35. Accordingly, the Commission is not inclined to consider the tariff for the Petitioners to be either at the cost of supply or at a subsidised rate. Thus, there is no question of any refund becoming due to the Petitioners.

With the above observations and ruling, the Petitions in Case No. 11 of 2009 stand dismissed.

Sd/-	Sd/-	Sd/-
(V. L. Sonavane)	(S.B. Kulkarni)	(V.P.Raja)
Member	Member	Chairman

(Sanjay Sethi)
Secretary, MERC

Annexure:

Sl.	Name of Petitioners
Charitable Hospitals	
1	Kokan Mitra Mandal Medical Trust
2	Poona Hospital and Research Centre
3	Hastimal Sancheti Memorial Trust
4	Jana Prabodhine Medical Trust Sanjeevan Hospital
5	Lata Mangeshkar Medical Foundation, Deenanth Mangeshkar Hospitals & Research
6	Grant Medical Foundation
7	Continental Medicare Foundation
8	Ashwini Sahakari Rugnalaya Ani Sanshodhan Kendra Niyamit
9	Maharashtra Medical Foundation
10	Jahangir Hospitals
11	Sadhu Vaswani Missions Medical Complex Inlak & Budhrani Hospital
12	KEM Hospital Society
13	Krishna Charitable Trust
Educational Institutions and Charitable Trusts	
14	Ramrao Adik Education Society
15	Maharishi Karve Shikan Sansthan
16	Osho International Foundation
17	Neo Sanyas Foundation
18	Dr. D.Y.Patil Sports Academy
Petitioners who have not submitted a fresh Petition	
19	N.M. Wadia Institute of Cardiology
20	Aditya Birla Foundation Trust