

**KERALA STATE ELECTRICITY REGULATORY COMMISSION**  
**THIRUVANANTHAPURAM**

Present : **Shri. Preman Dinaraj, Chairman**  
**Shri. S. Venugopal, Member**  
**Shri. K.Vikraman Nair, Member**

**OA 59/2018**

In the matter of : Determine and classify BSNL into the 'Industry' category

Petitioner : Bharat Sanchar Nigam Limited (BSNL)  
Admin Bldg, Telephone Exchange Compound,  
Manacaud, PO, Trivandrum -695009

Petitioner represented by : Sri. R Chandra Babu, Superintending Engineer (E),BSNL  
Smt. Leelamma Mathew, EE(E), BSNL  
Smt. Nisha Jose, SDE (E), BSNL  
Adv. M Salim, Standing Counsel, BSNL

Respondent : M/s Kerala State Electricity Board Limited,  
Vydyuthi Bhavanam, Pattom,  
Thiruvananthapuram - 695004.

KSEB Ltd represented by : Sri. K G P Namboothiri, EE, TRAC  
Sri. Rajesh R, AEE, TRAC, KSEBL

**Order dated 25.10.2019**

1. Bharat Sanchar Nigam Limited (hereinafter referred to as BSNL or the petitioner) has filed a petition on 12.09.2018 with the following prayers:

*'To reclassify and determine the category of the petitioner from Tariff General LT-VI General F to LT-IV A Industry and HT-II General B to HT-I Industry (A).'*

2. The summary of the issues raised by the BSNL is given below,

(1) The petitioner, Bharat Sanchar Nigam Limited (BSNL), a Government of India Enterprise, is a company incorporated under the Companies Act, 1956. Posts and telegraphs, telephones, wireless, broadcasting and other like forms of communication fall under the Entry 31, List 1- Union List, of seventh schedule of the Constitution of India.

(2) The petitioner is a consumer of electricity in the area of supply of Kerala State Electricity Board, and having about 7395 individual connections,

both LT & HT across the State. The amount of average annual consumption ranges at LT come about 13.50 crore units and under HT come about 7.0 crore units. The average annual electricity charge remitted to KSEB Ltd comes about Rs. 216.00 crore.

- (3) As per the tariff order dated 17.04.2017, 'electricity tariff applicable to Telecommunication service is classified under general category, which neither falls under Industrial or Commercial category. This classification is inconsistent with the provisions of the EA-2003, Tariff Policy and also contravenes the provisions of the Finance Act, 2002.
- (4) It is further submitted that a three Judge Bench of the Honourable Supreme Court in General Manager, Telecom Vs. A. Sreenivas Rao and others (1998 AIR SC 656) considered the question whether Telecom Department of Union of India is an 'industry' and held that according to the test laid down by a Seven Judge Bench in Bangalore Water Supply and Sewage Board Vs. A.Rajappa and others (1978) 2 SCC 213, the Telecom Department of Union of India is an 'industry' within that definition, because it is engaged in a commercial activity and the Department is not engaged in discharging any one of the sovereign functions of the State.
- (5) In the Finance Act, 2002, Industrial undertaking is defined in clause (aa) of Sub section 7 of Section 72, as follows.

"Industrial undertaking" means any undertaking which is engaged in

- i. The manufacture or processing of goods; or
- ii. The manufacture of Computer Software.
- iii. The business of generation or distribution of electricity or any other form of power; or  
(a) the business of providing telecommunication services, whether basic or cellular including radio, paging, domestic satellite service, network of trunking, broadband, network and internet services or
- iv. Mining; or
- iv. The construction of ships, aircrafts or rail systems

Accordingly, BSNL, a Telecommunication service provider would also come under the classification of 'Industry'.

- (6) BSNL further submitted that,
  - (i) 'Industry' means any systematic activity carried out for the production, supply or distribution of goods or services and hence BSNL comes under industrial category.
  - (ii) The BSNL pursuant to section 4 of Telegraph Act has established telecommunication network in Kerala Telecom Circle for provision of value added service for mobile communication and data service. The network comprises of Base Trans Receiver Station consisting

of Antenna Masts & Radio equipment, base station controller & mobile switching station which all operate in tandem with each other. These are part of IT industries and in nature of IT units which are entitled to levy of electricity tariff at industrial rate.

- (iii) The operation of BSNL is clearly industrial process of receiving, converting, transmitting and delivering voice and information and data signal which in any case qualified as an industrial use as per the general criteria of applicability of industrial category of tariff which has been defined also to include such activity in nature of “processing” and is not restricted only to activities in the nature of “manufacturing”.
- (iv) Operation and managing telecommunication system is an important activity for the overall growth of nation, like that of Railways. Hence the petitioner, BSNL, is entitled to get a fair treatment. In that context, classifying BSNL in the ‘General’ category at a higher rate of tariff is arbitrary, discriminatory and gross violation of the Article 14 of the Constitution of India.
- (v) Hon. Supreme Court in Hindustan Paper Corporation Limited Vs. Government of Kerala (1986) 3 SCC 398 has held that Government undertakings and companies form a class by themselves. The benefit accrued out of the Government run units will be driven to Public Welfare and Public Cause is the prime object, not profit oriented, but purely service oriented

11. KSEB Ltd vide the affidavit dated 01.12.2018 submitted the remarks on the petition filed by M/s BSNL. The summary of the issues raised by KSEB Ltd is given below.

- (i) As per the tariff order dated 17.04.2017, the BSNL offices/Exchanges are classified under LT VI(F) General and in HT under HT General (B) category. Prior to 01.05.2013, BSNL were classified under LT- VII (A) Commercial and under HT at HT IV commercial category. By the recategorization of BSNL offices and exchanges from LT VII (A) Commercial/ HT IV Commercial to LT-VI(F)/ HT II (B) categories, BSNL enjoyed a tariff reduction of 30 paise per unit.
- (ii) As per section 62(4) of the Act, *‘no tariff or part of tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formulae.’* Also, Kerala State Electricity Regulatory Commission (Conduct of Business Regulation), 2003 and its subsequent amendments stipulates that, the petitioner has to file a review before the State Commission within 45 days from the date of order. Therefore, the petition is not maintainable in law.

- (iii) Hon'ble Appellate Tribunal for Electricity vide the following judgments had settled the issues raised by the petitioner that the telephone exchanges, mobile towers etc cannot be treated as Industrial category.

Appeal No.	Order date	Petitioner	Respondents
116 of 2016	04.10.2007	BSNL,Punjab Circle	PSEC & PSEB
88 of 2012	20.05.2013	Tata Tele Services Ltd.	RERC& Distribution companies in Rajasthan
42 of 2013	11.04.2013	Bharati Hexacom Limited	RERC& Jaipur vidyuit Vitaran Nigam Ltd.

All the above cases had been filed before the Hon'ble APTEL by the telecom providers against the decision of the respective State Electricity Regulatory Commission's in assigning Non-domestic tariff (other than Industrial category) for their Base Transceiver Station (BTS) Towers, Telephone /Mobile Exchanges/switches.

12. The Commission admitted the petition and posted for hearing on 3.12.2018. During the hearing, Sri R Chandra Babu, SE (E), BSNL presented the issues on behalf of the petitioner and submitted as follows:
- (i) BSNL 100% GOI hold company. BSNL, being a public utility service ought to have been given special consideration and ought not have been exposed to higher tariff.
  - (ii) BSNL is paying the highest amount KSEB Ltd by way of electricity charges in the state. About 60% of the operation BSNL service extends over/across the rural area.
  - (iii) BSNL also offered free calls/ SMS and Free Data for few days to flood affected Mobile and Landline Customers. Thus BSNL is already providing cross subsidy for weaker sections in the community. It is not fair to impose more burden on BSNL in the form of higher energy tariff.
  - (iv) BSNL requested that, concessional tariff may be provides to the telephone exchanges and mobile towers owned by BSNL considering that the BSNL is a Government owned PSU and its social responsibilities. The activities of BSNL at telephone exchanges and mobile towers are industrial in nature, Industrial tariff may be extended to the telephone exchanges and mobile towers of BSNL.
  - (v) The administrative offices of the BSNL may be charged at the tariff applicable to the offices of the State and Central PSUs.
13. Sri K.G.P Nampoothiri representing KSEB Ltd submitted that, the Commission vide the tariff order dated 14.08.2014 has reduced the tariff of BSNL from Commercial category. KSEB Ltd further submitted that, it is settled by the Hon'ble Appellate Tribunal that, BSNL is not eligible to get industrial tariff.

14. Based on the deliberations during the hearing and other documents and records submitted by the petitioner and the respondent, the Commission issued following directions to the petitioner during the hearing.

- (i) BSNL has to make a detailed report on the electricity consumption for its various activities including telephone exchanges, mobile towers, administrative offices etc.
- (ii) BSNL shall present the matter in detail in the public hearing on the ARR, ERC and Tariff petition for the MYT period starting from 2018-19 to 2021-22, scheduled on 10.12.2018 at Thiruvananthapuram.

15. In compliance of the direction of the Commission, M/s. BSNL submitted the details vide its letter dated 07.12.2018 and also presented matter during the public hearing at Thiruvananthapuram on 10.12.2018.

- (i) BSNL exchanges and mobile tower site may be categorised under IT& IT enabled services.
- (ii) The energy used for various purposes by M/s BSNL is given blow.

<i>Building Type</i>	<i>Connected load</i>	<i>Annual unit consumption (2017-18) (MU)</i>	<i>Annual electricity bill (2017-18) (Rs. Cr)</i>
	<i>(MW/ MVA)</i>		
<i>Admin. Buildings</i>	2.70	7.40	6.72
<i>Telephone Exchanges</i>	38.20	113.00	103.60
<i>Mobile tower sites</i>	36.90	67.60	72.20
<b>Total</b>	<b>77.80</b>	<b>188.00</b>	<b>182.52</b>

(iii) The total HT and LT connections and consumption of BSNL is given below.

Supply level	Total connections (Nos)	Annual consumption (MU)
HT	151	66.76
LT	4409	121.16
Total	4560	187.92

(iv) During the presentation in the public hearing on 10.12.2018, M/s. BSNL revised their prayer as follows:

- (1) *Classify BSNL offices in LT- VI General (B) and remove from the present category of LT- General VI (F). Similarly, in HT, BSNL offices may be classified under HT – General- II (A).*

- (2) *BSNL Telephone exchanges and mobile tower sites may be classified under "IT and IT enabled Services" [LT IV -B] and HT- I (B).*
- (3) *To extend the demand based tariff from 1 KW connected load and above.*
- (4) *In the case of HT Tariff, the minimum KVA for charging Fixed Charge/Demand Charge may please be brought down from present 75% to 50% of Contract Demand.*

### **Analysis and Decision**

16. The Commission has examined in detail the petition filed by M/s BSNL for recategorizing their tariff as per the provisions of the Electricity Act, 2003 and the Regulations notified by this Commission.
17. The prayer of the petitioner in the original petition is to classify the petitioner under 'Industrial category' instead of LT-VI General (F) category and HT- II General B category. In this matter, Hon'ble Appellate Tribunal for Electricity vide the judgment dated 4<sup>th</sup> October 2007 in Appeal Petition No. 116 of 2006, in an appeal filed by BSNL against the order of the Punjab Electricity Regulatory Commission, clearly ordered that the activities of the BSNL cannot be accepted as Industry. The relevant portion of the judgment of the Hon'ble APTEL is extracted below.

*"9. The question whether the appellant is carrying out any process of manufacturing of goods or supply of any goods is no longer res-integra. In Bharat Sanchar Nigam Ltd. & Anr. Vs. Union of India & Ors., (2006) 3 SCC 1, 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. The Supreme Court held that the appellant was not carrying out any process of manufacturing of goods or supply of any goods, it was simply rendering service to customers. In this connection, it was held as follows:-*

*"61. We will proceed on the basis that incorporeal rights may be goods for the purposes of levying sales tax. Assuming it to be so, the question is whether these electromagnetic waves can fulfil the criteria laid down in Tata Consultancy for goods. In our opinion the question must be answered in the negative. Electromagnetic waves have been described in David Gilles & Roger Marshal: Telecommunications Law: Butterworths:*

*"1.14. Electromagnetic waves travel through free space from one point to another but can be channeled through waveguides which*

*may be metallic cables, optical fibres or even simple tubes. All electromagnetic waves are susceptible to interference from one another and unrelated electrical energy can distort or destroy the information they carry. To reduce these problems they have been organized within the spectrum into bands of frequencies or wavelengths for the transmission of particular types of services and information.”*

*62. The process of sending a signal is as follows:*

*“Data is superimposed on a carrier current or wave by means of a process called modulation. Signal modulation can be done in either of two main ways: analog and digital. In recent years, digital modulation has been getting more common, while analog modulation methods have been used less and less. There are still plenty of analog signals around, however, and they will probably never become totally extinct. Except for DC signals such as telegraph and baseband, all signal carriers have a definable frequency or frequencies. Signals also have a property called wavelength, which is inversely proportional to the frequency”.*  
*(Encyclopedia of Technology Terms of Techmedia)*

*63. It is clear, electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.*

*64. The second reason is more basic. A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of the sale in a subscriber’s mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection.*

*65. We cannot anticipate what may be achieved by scientific and technological advances in future. No one has argued that at present electromagnetic waves are abstractable or are capable of*

*delivery. It would, therefore, appear that an electromagnetic wave (or radio frequency as contended by one of the counsel for the respondents), does not fulfil the parameters applied by the Supreme Court in Tata, Consultancy for determining whether they are goods, right to use of which would be a sale for the purpose of Article 366(29-A)(d).”*

*10. Thus, it needs to be noted that there is no consumption of electro-magnetic waves by the customer. The mere fact that electrical energy is converted into electro-magnetic waves does not detract from the fact that the appellant is providing only service to its customers and nothing more. In the process, no goods are being manufactured. Unlike goods the electro-magnetic waves are neither delivered to the customers nor consumed by them.*

*11. In view of the above mentioned decision of the Supreme Court, we cannot accept the argument that the appellant is an industry and ought not to be placed in the category of NRS category.”*

In view of the above judgment of the Hon'ble APTEL, it is a settled position that the activities of BSNL cannot be treated as an Industrial Activity.

18. However, in the additional affidavit dated 07.12.2018 and during the public hearing held on 10.12.2018, the petitioner has not pressed for categorising them under industrial category, and revised the prayer of the petitioner as follows.

- (1) *Classify BSNL offices in LT- VI General (B) and remove from the present category of LT- General VI (F). Similarly, in HT, BSNL offices may be classified under HT – General- II (A).*
- (2) *BSNL Telephone exchanges and mobile tower sites may be classified under “IT and IT enabled Services” [LT IV -B] and HT- I (B).*
- (3) *To extend the demand based tariff from 1 KW connected load and above.*
- (4) *In the case of HT Tariff, the minimum KVA for charging Fixed Charge/Demand Charge may please be brought down from present 75% to 50% of Contract Demand.*

19. The Commission has examined the revised prayers of the petitioner and decided as follows.

- (1) As per the previous tariff order dated 17.04.2017 which was applicable till 07.07.2019, the installations of cellular mobile communications, satellite



communications, offices and/or exchanges of telecom companies are classified under LT VII (F) tariff under LT and HT II(B) tariff under HT. Accordingly the administrative offices of the BSNL were also categorized under LT VII(F)/ HT II (B) tariff. However, the administrative offices of the State and Central Public Sector Undertakings (PSUs) were categorized under LT-VI(B)/ HT-II (A) tariff. As a PSU owned by the Central Government, the administrative offices of BSNL is eligible to get LT-VI(B)/ HT-II (A), provided separate electricity connections are availed for its administrative offices.

BSNL in its additional submission dated 07.12.2018, submitted the details of the electricity consumption of the 'administrative buildings of BSNL', including the connected load and annual energy consumption.

The Commission while approving the ARR, ERC and Tariff order of KSEB Ltd for the MYT period has examined the details submitted by BSNL and ordered as follows.

(Last proviso under paragraph 35 of the order of the Commission dated 08.07.2019 in OA No. 15/2018).

*“During the public hearing at Thiruvananthapuram on 10.12.2018, M/s BSNL had requested the Commission to classify them under the Industrial tariff category. During the deliberations, M/s BSNL submitted that, along with the installations of cellular mobile communications and telephone exchanges, the administrative offices/ buildings of the BSNL also charged under LT-VI (F) tariff. The Commission has examined the matter in detail and decided to include the administrative buildings of BSNL under LT-VI(B) tariff. There is, however no change in the tariff applicable to installations of cellular mobile communications, exchanges of telecom companies etc, and it will be continued to charge under LT-VI(F) category under LT and HT-II(B) category under HT.”*

As extracted above, the Commission vide the order dated 08.07.2019 in OA No. 15/2018 has ordered to categorise the administrative buildings of BSNL under LT VI(B) category, the tariff applicable to the offices of the PSUs under State or Central Governments.

- (2) The second prayer of the BSNL in the affidavit dated 07.12.2018 is to classify the telephone exchanges and mobile towers under 'IT and IT enabled services, LT-IV (B) and HT-1 (B) tariff.

Commission examined the request in detail. As per the Tariff order dated 17.04.2017, all the installations of cellular mobile communications satellite communications and offices and/or exchanges are classified under LT-VI(F) tariff under LT and HT-II(B) Tariff under HT. The LT-VI(F) / HT-II(B)

tariff are less than the corresponding tariff applicable for commercial establishments, however higher than the corresponding industrial tariffs.

The tariff applicable to Information Technology (IT) and IT enabled services are classified under LT-IV (B) under LT and HT-1(B) under HT, treating the IT and IT enabled services as an Industry. The activities of the BSNL at their telephone exchanges and mobile towers cannot be equated to the IT and IT enabled services.

Further, Hon'ble Appellate Tribunal vide the judgment dated 4<sup>th</sup> October 2007 in Appeal No.116 of 2006 decided that, the telephone exchanges and mobile towers of BSNL cannot be treated as an Industry.

Considering the above reasons, the Commission is constrained to reject the request of the BSNL to classify the telephone exchanges and mobile towers under the tariff applicable to IT and IT enabled services.

- (3) The third prayer of the BSNL in the affidavit dated 07.12.2018 is to extend the demand based tariff from 1 kW connected and above. As per the tariff order dated 17.04.2017, optional demand based tariff is applicable to consumers with connected load above 20 kW under LT-VI(A), LT-VI(B), LT-VI (C), LT-(E), LT-VI(F), LT-VI(G), LT-VII(A) and LT-VII(C) categories.

There are about 21 lakh consumers under these categories. If the optional demand based tariff is extended to the above consumers with connected load above 1 kW, the licensee has to provide facilities for taking monthly meter readings and other facilities for the entire consumers falling under the above categories, so as to bill them under optional demand based tariff.

Further, to widen the optional demand based tariff by lowering the load limit, the Commission has to get a detailed report on the impact of the implementation of the optional demand based tariff in the State so far. Further, at present ToD tariff is made applicable only to the LT Industrial consumers with connected load 20 kW only. If considered essential, the Commission may take an appropriate decision on the revision of the ToD tariff and optional demand based tariff of LT consumers separately. The Commission has decided not to make any changes in the present pattern of implementation of optional demand based tariff.

- (4) The fourth prayer of the petitioner is that, the minimum kVA for charging fixed charge/ demand charge for HT tariff may be brought down from the present level 75% to 50% of the contract demand.

As per the prevailing tariff orders in the State, since the year 2001, the billing demand for HT & EHT tariff shall be the recorded maximum demand for the month in kVA or 75% of the contract demand as per the agreement, whichever is higher. This is applicable to all HT & EHT consumers under Industrial, General categories, commercial categories, agriculture categories etc in the State. The minimum billing demand is fixed at 75% of the contract demand, to ensure to recovery of a part of the fixed cost liability incurred by the licensee to provide supply to such consumers. This being the case, the Commission cannot consider lowering the limit as per petition.

However, under Regulation 100 of the Supply Code 2014 the contract demand can be reduced if the demand of the consumer is consistently lower than the contract demand as per the agreement. BSNL can, if appropriate, avail this facility and reduce their contract demand if the demand of any of their HT connection is found to be lower than the contract demand as per the agreement.

20. With the above observations and decisions, the Commission dispose the petition filed by BSNL.

**Sd/-**

**K.Vikraman Nair  
Member**

**Sd/-**

**S.Venugopal  
Member**

**Sd/-**

**Preman Dinaraj  
Chairman**

**Approved for issue**

**G Jyothichudan  
Secretary**