

Introduction to Law on Electricity
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Lecture 28
Tariff Determination

Welcome to all the learners. We have started discussing on the provisions related to tariff, and in the last class, we have discussed that how the whole subject on tariff has been distanced away from the government. And we have also learned that the approaches to determine tariff, the very terms and conditions for the determination of tariff has been evolving, and the whole idea is to make the tariff very competitive so that the consumers will get benefited.

Now, in this regard, we will now study that how the law, the Electricity Act, refers to the very determination of tariff. Because in the last class, we have discussed that what are the terms, rules, and regulations which has to be formulated by the appropriate commission for tariff determination and tariff fixation.

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Now, in today's session, we will be studying that how this determination happens, what is the way to determine the tariff and apart from determination of tariff by the appropriate commission, how it has been done by entering into a contract by the parties concerned. So, today in one session, we will discuss this, and then later on, we will also look into the scenario; we will look

into the relevant provisions that how two contracted parties can enter into tariff fixation, and then there shall be an oversight responsibility of the commission.

So, in this session, we will study on tariff determination, what are the procedures which are being followed for the tariff determination, and then we will look at some of the case laws that how the court has responded to the issue of tariff determination.

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➤ **App. Commission empowered to determine tariff – as per the terms and condition laid down u/s 61 (Sec. 62)**

- Supply of electricity by a generating company to a distribution licensee
 - In case of shortage of supply of electricity – fix maximum and minimum ceiling of tariff for sale or purchase in pursuance of agreement – entered b/w generating co. and a licensee or b/w licensees – for a period not exceeding one year – to ensure reasonable prices
- Transmission of electricity
- Wheeling of electricity
- Retail sale of electricity
 - Parallel license – fix only maximum ceiling of tariff

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Now, when you look at the scheme of the Act, you find that appropriate commission has been vested with the necessary authority to determine tariff, but then it has also been suggested that appropriate commission shall be guided by the terms and conditions laid down under section 61 of the Act.

So, when you look at the very scheme of section 62, it says that appropriate commission shall determine the tariff for supply of electricity by a generating company to a distribution licensee, and in case of shortage of supply of electricity, what the appropriate commission shall do is that, shall try to come up with the maximum and minimum ceiling of tariff for sale or purchase of electricity in pursuance to that agreement which has already been taken place between the generating station and the procurer and the distribution licensee.

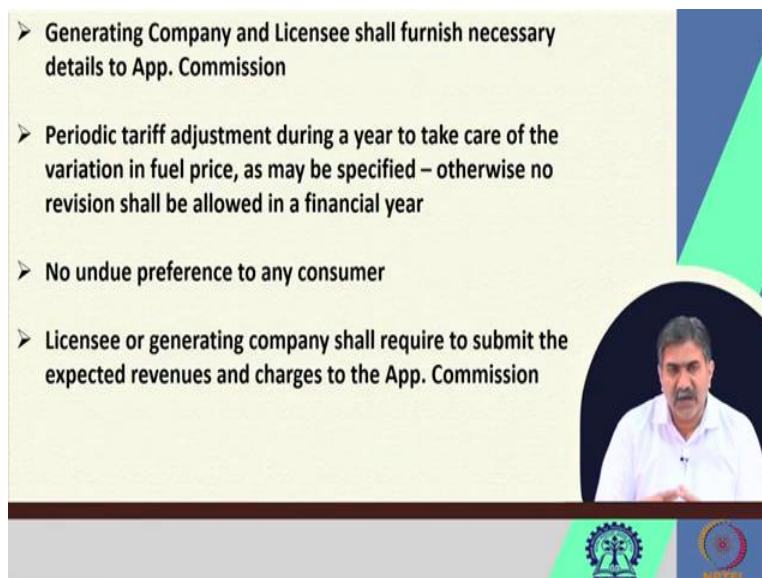
And then, that shall not be for more than a year, whatever appropriate commission decides. And the idea is that the parties concerned should not take undue advantage because of the shortage,

and that is why the role of the appropriate commission has been devised. So, reasonable pricing is to be maintained in case of shortage of supply of electricity.

So, regardless of the power purchase agreement entered between the generating units and the distribution licensee, maximum and minimum ceiling can be determined by the appropriate commission. And as I have been telling to you, and as the law also stresses on the consumer's interest, this provision is certainly a provision furthering the cause of the interest of the consumer. Apart from that, you also find that the appropriate commission is given the necessary authority to determine the tariff for transmission of electricity, for wheeling of electricity and also for retail supply of electricity.

Now, we have studied that under section 14, there can be a possibility of more than one licensee operating in distribution segment. And if we have more than one licensee then section 62 suggests that in such situation of little supply of electricity what is needed, what is desirable that the appropriate commission comes up with the maximum ceiling of tariff so that any price lesser than that, any price lower than that can very well be negotiated by the parties concerned, by the generating units and by such licensee. That is what it says.

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➤ Generating Company and Licensee shall furnish necessary details to App. Commission

➤ Periodic tariff adjustment during a year to take care of the variation in fuel price, as may be specified – otherwise no revision shall be allowed in a financial year

➤ No undue preference to any consumer

➤ Licensee or generating company shall require to submit the expected revenues and charges to the App. Commission

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Now, for determining the tariff, section 62 further says that appropriate commission can very well ask the licensee or the generating company to furnish necessary details. What is the necessary details here? This is all about knowing that what is the cost involved, what are the

operation and maintenance cost involved. So this is how the commission tries to find out that what shall be the kind of reasonable tariff so that there is reasonable return to the generating units, reasonable return to the transmission licensee, reasonable return to the distribution licensee while fixing the tariff. That is what is very important, and that is the reason why this power is given to the appropriate commission to ask for the necessary details from the generating company and the licensee.

Because with that detail, the appropriate commission would be in a position to understand that how reasonable profit can be ensured to the licensees or the generating units. Now, it also says that certainty is an important mantra for infusing the confidence in the players of the market. And that is why it says that the determination of tariff, once done, it must not be changed, unless and until there are issues involving the escalation of price on fuel.

So, periodic adjustment is allowed only when there is a variation in fuel price, and that also, there has to be a sort of objective parameter to be adopted for bringing that change in the tariff determination. Otherwise, there shall be no revision in the tariff determined in the financial year. That is what it says. So, any attempt to relook at the tariff shall be done within a year, only when there is some issue with regard to the cost of fuel. Otherwise, that tariff should allowed to continue at least for a year or so.

Section 62 also talks about a kind of embargo on the generating companies, and on the distribution licensees that no undue preference shall be given to any set of consumers. We have discussed in detail about it while discussing about the interest of consumer under section 62 subsection 3. So, that is another important factor which has to be kept in mind by the appropriate commission for determining the tariff.

And apart from that the section 62 also says that in order to identify that what shall be the reasonable pricing, it is expected that the licensee or the generating company will submit expected revenues and charges to the appropriate commission. So, that accordingly, the appropriate commission will find out, and will try to look at that what is the expectation of revenue collection and how the pricing shall be done so that revenue collection is ensured to the generating company or the licensee.

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- Commission exercised quasi-legislative function in tariff-fixation exercise
- Tariff notification unaccompanied by reason cannot be faulted for having breached the principles of natural justice
- Objection against tariff proposal can always be made – Commission is bound to disclose the reason
- Once tariff proposal is published and goes unobjected to before the State Commission, the question of disclosure of reason for such fixation would not arise at the stage of finalisation of tariff

Now, when you look at the very exercise of tariff determination under section 62, legally speaking, if you take up the question that what is the nature of the very process of determining tariff. Whether it falls within the ambit of judicial function or it falls within the ambit of legislative function? And this question is important for understanding the very procedure which the appropriate commission would be following for arriving at the tariff.

If it is judicial then proper hearing has to be given to all the concerned, and then only decision has to be arrived. If it is legislative, then that is not required. So, looking at the scheme of the section 62 sub-section 1 read with section 61, it appears that the tariff fixation exercise is quasi-legislative in nature. It is quasi-legislative. It is something like where the law is being made and why this becomes important because the procedure for determining the tariff warrants the objection or suggestion from the public, which is section 64, which we will discuss in a while.

Now, how the appropriate commission shall go about it. Now, if you consider it as a quasi-legislative function, then tariff notification unaccompanied by reason cannot be said to be fatal in law, cannot be said that principles of natural justice are not being followed. Because already the necessary objections have been taken into account by the appropriate commission.

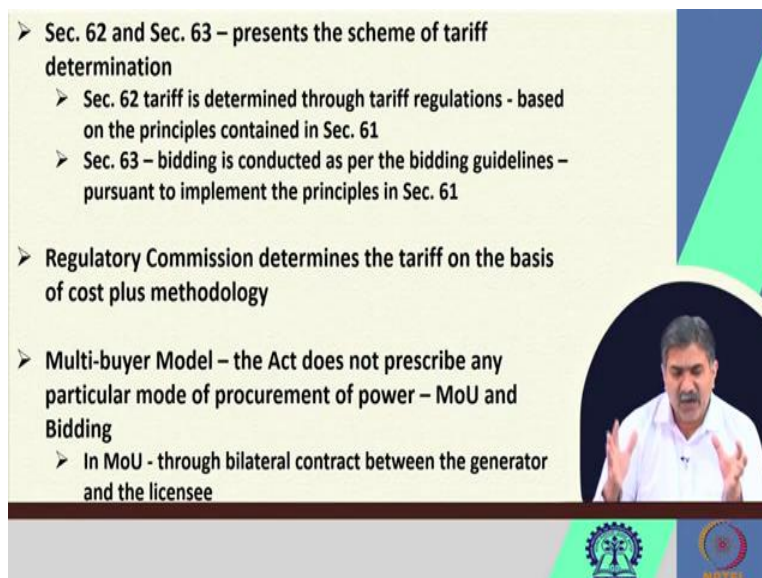
So, it is not necessary for the appropriate commission to clearly spell out that why this tariff was determined. That is what is not needed if you consider it as quasi-legislative. Had it been a judicial one, then such requirement would have been needed. Now, what it says? That once the

formula to determine, once the proposal to determine tariff is being presented to the public and if there are objections made by the public including consumer, then in such a situation appropriate commission is duty bound.

Appropriate commission is having a bound and duty to disclose the reason about the tariff fixation formula. That is what is important. So, please look into this aspect, that if there are no objection laid down, if there are no objection submitted for tariff fixation, then in such a situation, the appropriate commission can very well notify the tariff as per section 62, and there would be no fatality in such notification.

But if objection is being laid down, if the public while looking at the proposal submits the objection and if those objections are unattended, then in such situation, the very exercise of tariff determination would be unsatisfactory, would fall flat, will not be considered as something in accordance with the scheme of the Act. So, that is what is important. And then further it says that, as I said that if tariff proposal is published and there is no objection to it, then absolutely fine. There is no question of disclosing the reason for such fixation. That is absolutely fine; that is what is the essence of legislative Act.

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➤ **Sec. 62 and Sec. 63 – presents the scheme of tariff determination**

- Sec. 62 tariff is determined through tariff regulations - based on the principles contained in Sec. 61
- Sec. 63 – bidding is conducted as per the bidding guidelines – pursuant to implement the principles in Sec. 61

➤ **Regulatory Commission determines the tariff on the basis of cost plus methodology**

➤ **Multi-buyer Model – the Act does not prescribe any particular mode of procurement of power – MoU and Bidding**

- In MoU - through bilateral contract between the generator and the licensee

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Now, when you look at the overall formula, overall scheme of tariff determination under the Electricity Act, there are two ways suggested. One is under section 62, which talks about

appropriate commission, determining the tariff as per the regulation. Second one is based on competitive bidding under section 3, which we will discuss in the next session.


So, what is important that under section 62, the methodology which is being adopted for fixing the tariff is based on cost plus formula. So, somewhere in the core of the approach is that what is being invested and how it is to be ensured that there is a reasonable return to the investment made. And I have already discussed in detail about the cost methodology, the normative approach which is being influencing the methodology in the last session.

Now, why this cost base and why this kind of approach to be followed by the appropriate commission? Because of the paradigm shift which has been introduced under the Electricity Act. What is that? That from the single-buyer model, we have adopted a multi-buyer model. So, therefore the Act does not prescribe any particular mode of procurement of power.

Act does not say that how the procurer shall procure the power. It could be in the form of memorandum of understanding under section 62, where the appropriate commission suggests the tariff, or it could be in the form of bidding as it is conceived under section 63. Now, in MOU (Memorandum of Understanding), it has been said that this is the sort of situation where you have bilateral contract between the generator and the licensee, and in that process, the appropriate commission has been asked to suggest the tariff as per the guidelines laid down under section 61.

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- Power purchase through MoU – tariff of the power to be procured is required to be approved and determined by the respective Commission as per Sec. 62
- Preference can be given on the grounds mentioned u/s 62(3)
 - 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
- Any differentiation shown between Consumers must be undertaken only with the utmost care and the greatest circumspection and based on one or more of the criteria mentioned in the second part of the Section



So, power purchase through memorandum of understanding, when you look at it, what it says, that tariff of the power to be procured is to be approved and determined by the respective commission. So, once there is memorandum of understanding between the parties, generating units and the licensee, and then in that situation, they determine also that what shall be the tariff, but then that must get the approval, and that must be determined by the commission as per section 62.

So, look at it, here it is not happening on the basis of bidding. Here, it is happening on the basis of bilateral agreement where negotiated rates are being finalized. But then for finalizing that negotiated rate the law says, section 62 categorically says that it has to be in compliance with the terms and conditions set under section 61.

So, that is how section 79 or section 86 comes into play, where the commissions determine the tariff. Now, as I said, that appropriate commission while determining the tariff has been categorically refrain from showing any kind of preference to consumers, but then the second part of section 62(3) presents a situation which commission can consider for having a differential rate.

I have already discussed or touched upon this while talking about consumer's interest. So, what are the factors which are taken into account if we look at it, consumer's load factor, power factor, voltage, total consumption of electricity during any specified period of 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.

Now, the last two conditions, when you look at the nature of supply and the purpose for which the supply is required, these conditions confer wide range of choices with the appropriate commission to have differential tariff for different set of consumers. Because the purpose, for which the supply is required can very well be justified considering the activity, the nature of activity, considering the identity of the consumer. So, very wide choice which has been given to the appropriate commission under section 62 subsection 3. But then, what is important to take note of that such differentiation must be done with utmost care and greatest circumspection; why? Because what is important to be taken note of is that whether the very criteria of intelligible differentia is being followed or not.

The group which has been considered and the group which has been left out is there any reason behind the same or not? Law students should appreciate by connecting it with test of reasonable classification, which evolved under Article 14 of the constitution. So, section 62(3), while conferring this power on the appropriate commission, very well, in a way, imposes a sort of procedural limitation and substantive limitation that, yes, you can very well look into the purpose, but then there has to be a proper nexus, there has to be a connection between what you intend to do and the way you have identified the beneficiary whether there is any connection or not.

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➤ Tariff Order – Procedure (Sec. 64)

- Application to be made by generating company or licensee
- Publication of tariff petition
- App. Commission shall decide within 120 days – after considering suggestions/objections received from public
- Either issue a tariff order
- Or reject the application for reasons to be recorded
 - Applicant to be given a reasonable opportunity of being heard

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Now, section 64 talks about the procedure, that what procedure shall be followed by the appropriate commission for determining the tariff order. Now, what it says, that there shall be an application made by the generating company or by the licensee, and then the same has to be notified, same has to be published in the newspaper. And the idea behind publishing the petition is to invite objections or suggestion, and once the objection and suggestion has been invited, appropriate commission has been given 120 days to look into those objections and suggestions and then decide accordingly.

Now, as we know, the electricity sector is heavily regulated, it is a regulated activity, and therefore, these kinds of provisions which allow public to participate, these kinds of provisions play significant role in shaping the power and function of the appropriate commission. Because these are the steps where appropriate commission will be bound to satisfy the objections or reasons which are submitted by the public.

Otherwise, these regulatory bodies are not directly accountable to any elected representative, they are independent and autonomous, so it is not very difficult to imagine that if, through these kinds of provisions, they are made accountable, there is a possibility that they may not discharge the function in a very objective manner, in a very approach which aligns with the scheme of the Act.

It says that once the objection is being attended to and suggestions are being taken note of, the appropriate commission can very well issue the tariff order, or it can reject the application. But

while rejecting the application, the law categorically says that reasons must be recorded for such rejection.

And further, it says that if the application is rejected, then the applicant must be given an opportunity to present his case. So, again these kinds of provisions, as a law student, we need to understand, are important for the functioning of the regulatory bodies, transparent, accountable and at the same time ensuring the fulfillment of the spirit of the law. So, that is what is the procedure which is there under section 64.

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- No personal hearing is to be given while issuing the tariff order (u/s 64(3)(a))
 - consideration of suggestion and objection fulfills the requirement of principle of natural justice and hearing in all cases cannot be must and has not been made requirement
- Sec. 62 r/w 64 – tariff fixation is a legislative function – still the order passed is appealable u/s 111

Now, section 64 also raises the question that is there any prerequisite on the part of the appropriate commission to give the personal hearing before notifying the tariff? Now, when you look at the structuring of section 64(3), what it says? It says that you invite the objection, and you have two choices; the appropriate commission has two choices. One choice is the choice of issuing the tariff order, and the second one is to reject the application, and while rejecting the application, then procedural requirement is to be followed. That reason has to be given, and then hearing has to be given.

So, the closer reading of the scheme says that no need to give personal hearing. Because anyway personal hearing is statutorily assured in case of rejection of the application, and that is why it has been said or suggested that what is important that the procedural compliance must be there in

case of rejection. And how this understanding is coming? This understanding is coming from this very reading of section 62 with section 64, that tariff fixation is a legislative function.

This is something which has to be read akin to, and this is something which has to be read very similar to the law making exercise undertaken by the legislative body. And further, it says that if at any point of time, it has been found that fixation of tariff has not taken place in accordance with section 61, in accordance with the terms and conditions laid down under section 61, it is always open for the agreed party to file an appeal under section 111. So, that is what is this scheme of the Act says.

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- State Commission – may determine the tariff for any inter - state supply, transmission or wheeling of electricity – territories of two states - otherwise falls under the jurisdiction of CERC - by application of the parties concerned - having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity – Non-obstante clause (Sec. 64(5))
- Freedom to the consumer – allowed open access - to enter into a Power Purchase agreement with the generating companies on such terms and conditions including the tariff of the power as agreed by both the parties (Sec. 49)

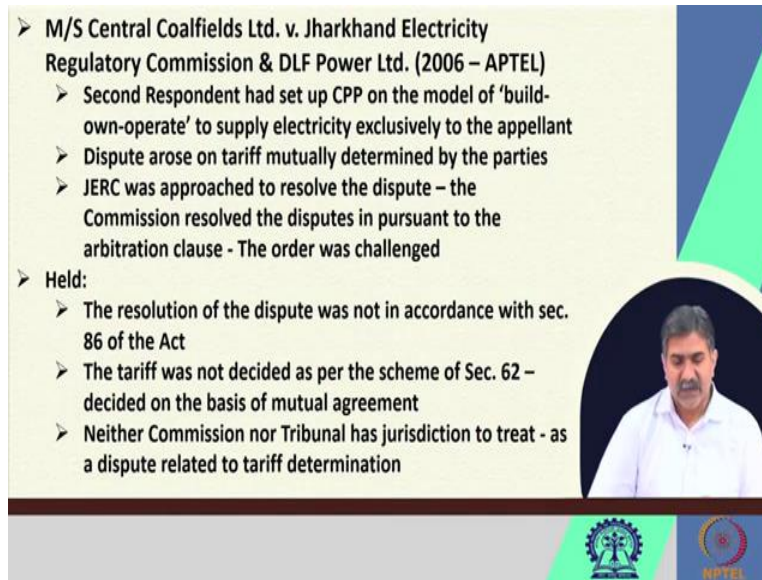
Further, it says that, generally, it has been said that interstate supply, transmission or wheeling of electricity should be the responsibility of the Central Electricity Regulatory Commission, but section 64 subsection 5 creates a sort of exception where it says that the state commission can very well determine the tariff when the territories of two states are involved.

Categorically, the section talks about two states. So, if it happens to be more than two states, then again, the necessary jurisdiction falls with the Central Electricity Regulatory Commission. So, the state commission can formulate, can determine the tariff, having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. And why this exception? How you are reading this exception because when you read section 64 subsection 5, it starts with non-obstinate clause.

And we have been reading as law student that non-obstinate clause has this feature that it overwrites. So, otherwise, what is a jurisdiction? What is there with the Central Electricity Regulatory Commission under section 64 (5)? An exception is created, and it has been suggested that the state commission can very well also determine the tariff. But then, it must be a situation where that state commission is having a jurisdiction in respect of the licensee who intends to distribute.

Section 49, I am highlighting just to bring this point that how power purchase agreement is categorically acknowledged under the scheme of the law. It gives a choice to the consumer who has the open access permission to enter into a power purchase agreement with the generating companies. And on such terms and conditions including the tariff per power as agreed by both the parties. So, parties can agree on terms and conditions, but please take note when parties can agree on terms and condition, obviously, it must be subject to section 61, it must be subject to section 62 that, generally the kind of guidelines which are being laid down.

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- M/S Central Coalfields Ltd. v. Jharkhand Electricity Regulatory Commission & DLF Power Ltd. (2006 – APTEL)
 - Second Respondent had set up CPP on the model of 'build-own-operate' to supply electricity exclusively to the appellant
 - Dispute arose on tariff mutually determined by the parties
 - JERC was approached to resolve the dispute – the Commission resolved the disputes in pursuant to the arbitration clause - The order was challenged
- Held:
 - The resolution of the dispute was not in accordance with sec. 86 of the Act
 - The tariff was not decided as per the scheme of Sec. 62 – decided on the basis of mutual agreement
 - Neither Commission nor Tribunal has jurisdiction to treat - as a dispute related to tariff determination

Let me just highlight this case. This is M/S Central Coalfields Limited versus Jharkhand Electricity Regulatory Commission. This is an interesting case decided by the tribunal where this Central Coalfields Limited invited DLF Power Limited to setup a captive power plant, and there was some negotiation happened with regard to tariff between Central Coalfields Limited and DLF power plant. The DLF was said to setup a power plant on the model of build, operate and own. And DLF setup a plant, start supplying electricity to Central Coalfields.

It was a captive power plant, it was exclusively supplying electricity to Central Coalfields, and then there was some issues raised with regard to tariff fixation. Both the parties, they approached the regulatory commission, and they said that there is some dispute and kindly resolve it. Jharkhand Electricity Regulatory Commission attempted to resolve the same, and when Jharkhand Electricity Commission suggested a formula, then Central Coalfields again raised the point that because the tariff fixation was not done as per section 62, the regulatory commission does not have any jurisdiction. And thus, there cannot be any appeal against the decision of the regulatory commission before the appellate tribunal. Now, the tribunal looked into the scheme of the law, and tribunal says that section 62 comes into play only when the tariff determination is done between the generating company and the licensee.

In this case, DLF Power is not a licensee. There is no license issued to DLF Power under section 12. It is just generating power, and that power is exclusively meant for Central Coalfields

Limited. Therefore, whatever tariff has been fixed is all about mutual agreement, and mutual understanding between both the parties and there is no question of bringing in; there is no question of invoking section 62 of the Act.

And further, the tribunal also said that whatever regulatory commission has done, done in pursuant to the arbitration clause, agreed between the parties here, and it has been done as an expert body. And on this premise, the tribunal categorically said that because tariff fixation was done as per the scheme of section 62, there is no question of considering the appeal against the decision of the regulatory commission under section 111. So, the court clarified that in what context, in what situation section 62 gets attracted, and the order of the appropriate commission becomes appealable before the appellate tribunal.

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- Kerala State Electricity Board v. Principal Sir Syed Institute for Technical Institute Studies (2020 – SC)
 - Differential tariff for Self-Financing Educational Institutions (SFEI) from Government run and Government Aided Private Educational Institutions was notified by the Regulatory Commission
 - Justified u/s 62(3) – enables - differential tariff
- Held:
 - Differential tariff was justified – ‘...the purpose for which the supply is required’
 - u/s 62(3) – who is serving the purpose and for whom such purpose is being served have to be factored in
 - The State run and State aided institutions are funded by the tax payers – students come from modest background – relates to essential welfare measures

This is another case where two different tariffs were being fixed by the Kerala Electricity Regulatory Commission. In Kerala State Electricity Board versus Principal Sir Syed Institute for Technical Institute Studies, Supreme Court looked was asked to look into this question that can there be two different tariff structure? One is for government-run educational institutions or government-aided educational institution, and another is for self-financing educational institutions.

Now, the question was raised that both of them are imparting education, they are not into profit hearing, and therefore, there cannot be any different tariff fixation. The regulatory commission

said that different tariff formulation is very much possible. It is permitted because of the very fact that the section 64 subsection 3 says the purpose for which supply of electricity is being made.

So, that expression purpose gives the necessary discretion to the regulatory commission. In this case, regulatory commission said that we have very rightly distinguished between self-financing and government-aided or government-run, because in government-run, generally students from modest background, they come and therefore, that has to be seen more as a kind of responsibility of the state to engage into welfare activities which is not the case with private educational institution.

And private educational institution can very well be seen as commercial activity, and on that premise the, differential pricing was suggested. The Supreme Court agrees with this distinction. Supreme Court said as long as the difference is based on intangible ground, necessary statutory approval is to be examined, and necessary statutory approval is to be understood in the light of the scheme of section 62 subsection 3.

So, this is a good case to understand that how regulatory commission can very well design, regulatory commission can very well come with the two different tariffs. It could also be for preferring one set of industry, and it could also be for preferring the government-run initiatives in contrast with the private initiatives. So, this is all on tariff determination under section 62. Thank you very much.