

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 219 of 2006

Dated this 28th day of November, 2007

Coram : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Northern Railway

Baroda House,
New Delhi – 110 001

... Appellant

Versus

1. **Uttaranchal Electricity Regulatory Commission (UERC)**
80, Vasant Vihar, Phase-I,
Dehradun,
Uttaranchal

2. **Uttaranchal Power Corporation Ltd.**
Urja Bhawan, Kanwali Road,
Dehradun, Uttaranchal.
Dehradun.

... Respondents

For the Appellant : Mr. Sitesh Mukherjee, Advocate
Mr. Hemant Sahai, Advocate
Mr. Rajiv Yadav, Advocate
Mr. Sapan Kumar Mishra, Advocate
Mr. Sakya Singha Chaudhruri, Advocate
Mr. Alok Nigam, Advocate
Mr. Shailendra Tiwary, Advocate

Ms. Manju Gupta, Chief Elect.Distn.
Engg., Northern Railway
Mr. Alok Nigam, E&Y

For Respondents : Mr. M. G. Ramachandran, Advocate
Mr. Anand K. Ganesan, Advocate and
Ms. Swapna Seshadri, Advocate
Ms. Taruna Singh Baghel, Advocate for
UPCL

Mr. Suresh Tripathy, Advocate
Mr. Azad Singh Chahal, Advocate
Mr. P. S. Bhullar, Advocate,
Mr. Shashwat Kumar, Advocate for UERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The appellant is aggrieved with the tariff order dated 12.07.2006 for the financial year 2006-07 passed by the Uttaranchal Electricity Regulatory Commission, hereafter referred to as the Commission for alleged discriminatory treatment meted out to the appellant in the matter of fixation of electricity tariff as also in being offered only surplus power of the State of Uttaranchal. The impugned order determines the tariff for Uttaranchal Power Corporation Ltd., the respondent No.2 herein which is the distributing company in the State of Uttaranchal. The part of the order that deals with tariff for the appellant Northern Railway is brief and is quoted here in extenso:

“4.1.1.8 Railway Traction (RTS-9)

The Petitioner has considered an additional load of 15 MVA in FY-07 based on discussions with the Northern Railways and has forecast consumption of 40.97 MUs for the year 2006-07.

In the absence of any final agreement between the Petitioner and the Railways and going by the actual consumption of merely 2 MUs up to January 2006, Petitioner’s projections do not seem realistic. As stipulated in the Commission’s Order dated 25-04-2005, sales to Railways are to be made only out of power surplus to the State’s requirements. Such surplus is likely to disappear totally or to get reduced substantially in 2006-07. Keeping this in mind, Petitioner’s projected sale of 40.97 MUs to Railway’s is extremely high. The Commission is, therefore, allowing sale of only 11.65 MUs as approved in its last Tariff Order and that too only out of surplus to the State’s requirement so that such sales do not result in or aggravate any shortages of power in the State, particularly during the deficit months.

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6.3.10. RTS-9 Railway Traction

The Petitioner has proposed to introduce this category for Railways utilizing power for traction purposes. Since supply to Railways has commenced, the Commission has accepted Petitioner's proposal. The Petitioner has proposed the rates for this new category of consumers, which are as follows:

Table 6.13: Proposed Tariff for Railway Traction

<i>*Demand Charges</i>	<i>Energy Charges</i>	<i>Minimum Charge</i>
<i>Rs./kVA/month</i>	<i>Rs./kWh</i>	<i>Rs./kVA/month</i>
<i>200/-</i>	<i>Rs.2.40</i>	<i>400/-</i>

**Demand Charges per kVA of Billable Demand*

In the previous Order, the Commission had directed the petitioner that "Subject to the direction given by the Commission in para 5.1.10 of this Order, UPCL is hereby directed to work out a mutually agreeable arrangement with Railways and come up with a proposal for fixation of rate for such sale."

The Petitioner having failed to get this rate fixed as above, maintaining the applicability of direction given in para 5.1.10 of Order dated 25.04.2005, the Commission hereby fixes the rate for this category as the avoided cost to Railways by avoiding supply from nearby State like UP. Therefore, the Commission has fixed the prevalent rate for

this category in the State of UP as the approved rate as shown below:

Table 6.14 : Approved Tariff for Railway Traction

<i>*Demand Charges</i>	<i>Energy Charges</i>
<i>Rs./kVA/month</i>	<i>Rs./kVAh</i>
<i>165/-</i>	<i>Rs.3.25</i>

**Demand Charges per kVA of Billable Demand*

In addition, in UP, Railways are required to pay minimum charge @ Rs.425/kVA/month. Minimum charge having been abolished for all other consumers, the Commission does not propose to impose the same on Railways.”

2) The case of the appellant as made out in the appeal may be stated briefly as follows:

The Government of India, Ministry of Energy, Department of Power issued an advisory dated 01.05.91 inter alia recommending to the State Government and State Electricity boards to revise their tariff in such a way that tariff for Railway traction is not higher than the high tension industrial tariff for other consumers. For the financial year 2005-06, the respondent No.2 filed its tariff petition proposing an effective tariff of Rs.3.95 per unit for supply to the

appellant. The Commission provisionally accepted the proposal but directed the respondent No.2 and the appellant to work out a mutually agreeable rate. The appellant and the respondent No.2 mutually agreed to the composite rate of atleast Rs.2.90 per unit subject to the condition that the energy charge would not be less than Rs.235 per kVA of the contracted load per month. An alternative rate agreed to was a two part tariff of energy charge, Rs.2.50 per unit plus Rs.150 per kVA demand charges per month subject to the condition that demand charges plus energy charges would not be less than Rs.235 per kVA of the contracted load per month. For the year 2006-07 the effective tariff fixed by the Commission by the impugned order is Rs.4.55 per unit. This is substantially higher than the agreed composite rate of atleast Rs.2.90 per unit. It is also higher than the high tension tariff which is set at an effective rate of Rs.2.53 per unit. The appellant prays for re-fixation of tariff for the year 2005-06.

- 3) The challenge to the order is mainly on the following grounds:
 - a) The tariff applicable to the appellant is arbitrary as it has fixed tariff without taking into consideration the rates agreed to between the parties and has proceeded on the erroneous assumption that the parties had failed to agree upon a tariff.

- b) Avoidance cost cannot be a ground for determining tariff. The proper consideration is the cost of supply as per Regulation 20 of the Distribution Regulations. The impugned order, instead of considering the cost of supply has adopted the tariff prevailing in Uttar Pradesh on the principle of avoidance cost. The principle adopted being wrong the impugned order deserves to be set aside.
- c) The impugned tariff is unreasonably higher than the tariff which is effectively only Rs.2.53 per unit and is violative of Circular dated 01.05.91 which was aimed at progressive electrification of the railways.
- d) The Commission has not taken into account the fact that the appellant itself erects and maintains all the associated network infrastructure of HT lines, transformers etc. to cater to the traction points.
- e) The Commission has violated the provision of Section 43 of the Electricity Act 2003 by directing the respondent No.2 to limit the supply of electricity to the appellant only to the extent of available surplus electricity subject to the ceiling of 11.65 MU as against the projected demand of 40-97 MU.

4) None of the two respondents has filed any counter affidavit to the appeal petition. The Commission has filed written submission. Both the Commission and the respondent No.2 were duly represented at the time of hearing. Their counsel as well as those of the appellant were heard.

Finding with reasons:

5) The impugned order has two main aspects – The first is the rate. The second is restriction on the quantum of supply to 11.65 MU and that too from the surplus power available in the State. So far as the ‘surplus power’ aspect of the order is concerned, the interpretation given to it by the respondent No.2 is of importance. Mr.M.G.Ramachandran, counsel for the respondent No.2 made his interpretation which is recorded in our proceeding dated 31.10.07 and the same is reproduced below:

“During the hearing, Mr. M. G. Ramachandran, the learned counsel for UPCL has interpreted the phrase “only out of surplus to the states requirement” used in paragraph 4.1.1.8 of the tariff order dealing with railway traction (RTS-9), can relate only to generation capacity available with state generating units and under firm PPAs entered into by UPCL for purchase of power from central sector and other generating companies. It should not refer

to the variations in the MUs which may occur for different reasons from time to time. Once the distribution licensee enters into an agreement with the consumers for a specified contract demand as per electricity supply code/conditions of supply, the distribution licensee will be arranging the power requirements based on such contract demand and energy equivalent to or any part thereof should be treated as a quantum which Railways will be entitled to draw as a consumer, like other consumers.”

6) Mr. Suresh Tripathy, advocate appearing for the Commission did not dispute this interpretation. On the subsequent day Mr. Ramachandran further stated that once the arrangement for supply was contracted, there was no subsequent withdrawal of power from the appellant and in fact even during shortage of supply when load shedding was resorted to supply to the appellant was maintained. Thus ‘surplus’ was not to be construed on a day to day basis. The appellant has never been hurt on account of this clause in the impugned order.

7) Nonetheless, the appellant contended that on principle this condition needs to be set aside as the appellant is a consumer like any other consumer and entitled to power under Section 43 of the Electricity Act 2003 which requires a distribution licensee to supply electricity to the premises of every owner or occupier on application

from him. This argument could not be contradicted by Mr.Tripathy. In fact the Commission has not come out with any reason for imposing the condition to supply power only from surplus or to limit the appellant's consumption only to 11.65 MU. The impugned order to this extend is bad and needs to be set aside.

8) Coming to the rate of tariff, the principle adopted is 'avoidance cost'. The Regulations of the Commission themselves do not recognize any such principle. Chapter 6 of the Uttaranchal Electricity Regulatory Commission (Terms & Conditions of Distribution Tariff) Regulation 2004 provides for the criteria for a tariff design. Regulation 20 prescribes cost standard :

"20. Cost standard:

- 1. The tariffs for various categories/voltages shall be benchmarked with and shall progressively reflect the cost of supply based on costs that are prudently incurred by the distribution licensee in its operations. Pending the availability of information that reasonably establishes the category-wise/voltage-wise cost to supply, average cost of supply shall be used as the benchmark for determining tariffs. The category-wise/voltage-wise cost to supply may factor*

in such characteristics as the load factor, voltage, extent of technical and commercial losses etc.”

9) It is not disputed by Mr. Tripathy that the Commission had the copy of the “Minutes of Meeting held on 18th August, 2005 between the officer of UPCL & the Northern Railways at Urja Bhawan, Dehradun to discuss the matter of Railway Traction Tariff for proposed electrification of Railway Traction over railway routes in Uttaranchal” before it when the exercise to determine the tariff for 2005-06 was undertaken. The part of the minutes that is relevant to cost of supply of power is extracted below:

“UPCL’s View Point:

- i) Hon’ble UERC has taken Railway Traction Tariff as proposed by UPCL for the year 2005-06 @ Rs.4.09 per unit for the purpose of revenue estimation in the ARR, which shall be corrected in the next ARR.*
- ii) The average cost of supply as calculated from the Tariff Order of FY 2005-06 is around Rs.2.29 per unit.*
- iii) The highest power purchase cost in the merit order at present is about Rs.2.52 per unit excluding the*

energy drawn from liquid fuel based thermal power stations.

- iv) Keeping in view the directive of the Hon'ble UERC regarding sale of energy to Railway traction at para 5.1.10 in tariff Order (wherein Hon'ble UERC accepted projected sale estimate for Railway Traction, subject to the condition that sales to Railways will be made only out of power surplus to the State's requirement and UPCL will ensure that such supplies do not result in any shortage of power in the State, (particularly during deficit months), the power supply to Railways could involve buying costliest power in the merit order at least in the range of Rs.2.52 per unit plus losses, transmission charges and other minimum administrative charges, which will not be less than Rs.2.90 per unit.*
- v) UPCL has compiled a comparative statement of Railway Traction Tariff (copy enclosed), applicable in various States including Himachal Pradesh, being the neighbouring Hill State close to Uttaranchal. Railway Traction tariff in Himachal Pradesh is Rs.3.15 per unit, which is the lowest in the States shown in the comparative statement.*

vi) *Taking into consideration the proposal of Northern Railway for new traction load in Uttaranchal and other relevant aspects of cost recovery of huge capital investment, incentives / rebates allowed in some other States and the benefits accruing to UPCL as well as Uttaranchal State for new traction load, it is proposed to agree for - (a) a composite tariff of at least Rs.2.90 per unit subject to the condition that energy charges will not be less than Rs.235 per KVA of the contracted load per month : or (b) a two-part tariff of Rs.2.50 per unit plus Rs.150 per KVA demand charges per month subject to the condition that demand charges plus energy charges will not be less than Rs.235 per KVA of the contracted load per month.*

vii) *UPCL is of the view that the approximate average rate of Rs.2.90 per unit offered to Northern Railways will be the lowest and very competitive to attract additional traction load from Railways in the State of Uttaranchal.”*

10) It is clear from the above that the composite cost of surplus was not more than Rs.2.90 per unit. Despite such data available with the Commission why the Commission fixed

the effective composite tariff of Rs.4.55 per unit for the appellant is not understandable.

11) Similarly why the tariff fixed for the appellant is so much higher than the HT tariff also remains unexplained. The Commissions also seems to have overlooked the fact that the appellant bears the cost of infrastructure network of HT lines and transformers etc. which substantially facilitates to reduce the cost to supply to the respondent No.2.

12) In view of the above, we have no alternative than to allow the appeal and set aside the impugned order. Hence the appeal is allowed and the impugned order is set aside. The Commission is directed to re-determine the tariff for the appellant for the financial year 2006-07 keeping in view the observations made above within a period of sixty days of this judgment and the respondent No.2 is directed to refund the amount found to have been received in excess of the tariff determined in pursuance of this judgment within sixty days of such determination.

Pronounced in open court on this 28th day of **November, 2007.**

(Justice Manju Goel)
Judicial Member

(A. A. Khan)
Technical Member

The End