

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 268 of 2006

Dated this 13th day of March, 2007

Coram : Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Northern Railway ... Appellant
Head Quarters Office,
Baroda House,
New Delhi – 110 001
Through the General Manager

Versus

1. Delhi Electricity Regulatory Commission
Viniyamak Bhawan, C-Block,
Shivalik, Malviya Nagar,
New Delhi – 110 017.
2. North Delhi Power Limited
Sub-station Building, Hudson Lane,
Kingsway Camp,
New Delhi – 110 019.
3. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi – 110 019. ... Respondents

Counsel for the Appellant : Mr. Hemant Sahi, Advocate
Mr. Sitesh Mukherjee, Advocate,
Mr. Sakya Singh Choudhari,
Advocate, Mr. S.H.Choudhury,
Ms. Manju Gupta, Chief
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Northern Railway, New Delhi

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Mr. R. S. Suri, Advocate,
Mr. Mohd. Wasay Khan, Advocate,
for Resp. No.1

Mr. V.P.Singh, Advocate,
Ms. Sonali Jaitley, Advocate for
Resp. No.3

Mr. Ashish for Res. No.2,

J U D G M E N T

Ms. Justice Manju Goel

1. The present appeal is directed against the order dated 22.09.2006 passed by the Delhi Electricity Regulatory Commission (DERC) in the matter of fixation of tariff for the distribution companies (DISCOMs) under Section 62 and 86 of The Electricity Act 2003. The appellant Northern Railway is a bulk consumer of electricity distributed through Respondents 2 & 3 namely New Delhi Power Ltd. and BSES Rajdhani Power ltd. respectively. The Impugned Order was passed on 22.09.2006. The Respondent No. 2, NDPL, filed its Petition for approval of Annual Revenue Requirement (ARR) and Determination of Tariff for the year 2006-07 on December 14, 2005. The filing of the Petition was followed by a series of interactions and the Respondent No.2 filed clarifications and filed information in respect of various issues raised by the DERC, the Respondent No.1. The Petition was thereafter admitted on 30th March, 2006. As per the procedure envisaged, the Respondent No.2 issued public notice and called for responses from various stake holders and held a public hearing. After considering all the relevant facts and circumstances, the Impugned Order was passed. The part of the order that is challenged in this

appeal relates to fixation of tariff for railway traction. The part 4.13 of the Impugned Order contains the tariff fixed for the railway traction. The part 4.13.3 and 4.13.4 of the order reads as under :

“4.13.3 Tariff for Railway traction

In line with the principles of gradual reduction in cross subsidy over a period of time, the Commission in Tariff Order dated July 7, 2005 had kept the tariff applicable to the Railways at the existing tariff levels. The Commission has proposed to continue with the existing level of fixed as well as energy charges for this category for the FY 2006-07. However, the issue of simultaneous maximum demand would be dealt as per the directive of the Commission in para 2.11.3 of this order.

4.13.4 Approved Tariff

The existing and approved tariffs for Railway Traction are given in Table 4.24.

Table 4-24: Tariff for Railway Traction

	Existing Tariff		Approved Tariff	
	Demand charges (Rs./kVA/month)	Energy Charges (paise/kvah)	Demand Charges (Rs./kVA/month)	Energy Charges (paise/kVAh)
Railway Traction	150	375	150	375
<i>For Supply of 33/66 kV, consumers will get a rebate of 2.5% on the energy charges applicable for supply at 11 kV and a rebate of 4% for supply at 220 kV.</i>				

2. By the same order the Respondent No.1 fixed the tariff applicable to the Delhi Metro Rail Corporation Ltd. (DMRC) and this is dealt in para 4.14.2 as under :

“4.14.2 Tariff for DMRC

In view of the above, the Commission its Tariff Order dated July 7, 2005 had approved a tariff with demand charge of Rs. 75/kVA/month and energy charges of 230 paise/kVAh for DMRC supply at 220 kV and 66 kV. The Commission has proposed to continue with the existing level of fixed as well as energy charges for this category for the FY 2006-07. However, the issue of simultaneous maximum demand would be dealt as per the directive of the Commission in para 2.3.3 of this order.

As regard to the tariff for commercial and other establishments being supplied by DMRC, the Commission addressed the issue vide its Order dated May 5, 2004. Subsequently in the Tariff Order dated June 9, 2004 the Commission mentioned that the discounts as agreed between the parties on NDLT II Tariff shall be applicable based on the revised tariff schedule in this Order. The Commission has proposed to continue with the existing practice for this category for the FY 2006-07.

The Commission does not propose any change in the tariff principles for commercial and other establishments being supplied by DMRC and hence the discounts, as agreed between the parties on NDLT II Tariff, shall be applicable based on the revised tariff schedule in this Order.”

3. The grievance of the appellant is that although DMRC and the appellant are both railways the appellant has been discriminated against in as much as it has been made to pay tariff at a rate higher than that paid by DMRC. The order is challenged both on the grounds of principles of equality as enshrined in Article 14 of the Constitution of India and also on the ground of equality as envisaged in Section 62 of The Electricity Act. All the three respondents have filed counter affidavits and have supported the impugned order. Although the impugned order does not specifically deal with the reasons for treating the appellant and the DMRC differentially in the matter of tariff, in its counter affidavit the respondent No.1 has provided the reasons for so doing. The respondents 2 & 3 have followed the respondent No.1 in their contention for supporting the impugned order. All the parties have been heard in detail and we have given our anxious consideration to them.

4. It appears that the DMRC has been getting preferential treatment in the matter of tariff for the previous three years. The rates of tariff for the DMRC as well as for the appellant had been kept constant over the last three years. The appellant did not object to the discriminatory treatment in the earlier years although it has come up to challenge the differential treatment meted out to it for the year 2006-07. The omission to challenge the earlier orders of tariff fixation does not however come in the way of the appellant challenging the impugned order dated December 14, 2005

as each order is independent and can be challenged independently.

5. The point for consideration before this Tribunal is whether the respondent No.1 could have fixed different rates of tariff for the two consumers namely the appellant Northern Railway and the DMRC. The respondent No.1 has the earlier tariff orders namely for the years 2002-2003 & 2003-04, 2004-05 and for 2006-2007 in order to show that in all these years DMRC has been given a preferential treatment. In the relevant part of the order for 2002-03 and 2003-04 the grounds on which respondent No.1 has differentiated between the appellant and the DMRC can be traced. The tariff order for the financial years 2002-03 & 2003-04 records a submission made by DMRC for a preferential treatment. The DISCOMs themselves had asked for treating DMRC as a separate category of consumer. The DMRC in its earlier direction made inter alia the following submission to the respondent No.1 during the hearing for tariff fixation for the years 2002-2003 & 2003-2004:

- a) DMRC is engaged in the activities of providing mass rapid transit system for Delhi and is a public utility and a social sector project having many social benefits which would be bestowed upon a section of traveling public majority of whom belong to an economically weaker section of the society.
- b) All infrastructure and facilities after the point of inter connection with TRANSCO/DISCOM system are

established, maintained and operated by DMRC at its own cost and the TRANSCO/DISCOM do not incur any dedicated expense for supply to DMRC. As such, tariff for DMRC should be single part based on number of units consumed and the two part tariff has no application to the nature of consumption by DMRC.

6. The Commission after examining the response of the government on the plea raised by the DMRC took the following view in the matter of treating the DMRC as a separate class of consumers and in the matter of preference in fixing of tariff payable by it :

“5.13.2.3 Commission’s view

After considering and analyzed in detail the submissions made by the petitioner and DMRC and also the response from the Government. The Commission recognizes that DMRC is a social sector utility for the public of Delhi and its viability is greatly impacted by the prices of electricity. Being a new consumer at 220 kV and with its differentiating nature of services and operations, the Commission is inclined to agree with the view of the Government that DMRC may be treated as a separate category of consumers whose tariff would be based upon the actual cost of supply excluding both the subsidy and cross-subsidy elements. This will also be in line with the objective of the Commission that it has to move towards cost of supply for all categories of consumers. Accordingly, the Commission has determined the tariff for DMRC on the basis of actual cost of supply by TRANSCO to DMRC and the nominal component of overheads of the

DISCOM. However, the Commission is not in agreement with the view of the petitioner that two part tariff in case of DMRC has no application. But for the want of requisite details to carry out computations for the fixed and variable cost components, the Commission has for the purpose of this Order, determined a single part tariff for DMRC.”

7. In the Tariff Order for the financial year 2004-05 the Respondent No.1 fixed the same tariff as was fixed for the earlier years and on the same grounds. The Tariff Order for the financial year 2004-05, an extract of which has been placed on record indicates that the DMRC repeated its earlier contentions and submitted that the earlier order of the Commission in respect of tariff be maintained. The Respondent No.1 agreeing with the request of the DMRC made the following order :

“6.12.2 Commission’s view

In its previous Tariff Order dated June 26, 2003 the Commission treated DMRC as a separate category of consumers and has determined the tariff for DMRC on the basis of actual cost of supply by TRANSCO to DMRC with a nominal component of overheads of the DISCOM. The Commission has adopted the same methodology for determining the tariff for DMRC for supply at 220 kV.

The Commission in its Tariff Order has determined the tariff for DMRC for supply at 220 kV based on average cost of supply of TRANSCO. The cost of supply of TRANSCO for supply at 220 kV and 66 kV will be different; however in

absence of details regarding fixed cost and loss levels at different voltages, the cost of supply at voltage levels cannot be determined. Therefore, the Commission while setting the tariff for DMRC has considered the average cost of supply of TRANSCO for supply at 220 kV as well as at 66 kV. On the estimated the average cost of supply of TRANSCO a nominal component of overheads of the DISCOM have been added to establish tariff for DMRC.

6.12.3 Tariff for DMRC

In view of the above, the Commission approves a tariff of 230 paise/kVAh for DMRC for supply at 220 kV and 66 kV.”

8. The way in which the Respondent No.1 has been treating the present appellant can be found in the Tariff Order for financial year 2005-06 and extract of which has been placed on the record 5.6.11

5.6.11 Railway Tariff

Northern Railway has requested the Commission to consider granting specific relief by way of reduction in existing Tariff by considering cost of purchase from Central Agencies like NTPC. It has suggested that no element of cross subsidy be loaded in traction tariff considering cascading effect it has on passenger fare and freight, it has also suggested that for the purpose of kVAh based tariff, average power factor level of 0.90 instead of 0.85 should not be accepted. It has submitted that service tax should not be passed on to a public utility like Railways and Railways should be exempted

from the payment of penalty charges on over drawal considering the unique nature of traction load.

The Commission acknowledges the service provided by the Railways to the nation and the importance of electricity tariff in the functioning of the Railways. The Commission would like to point out that in accordance with the EA 2003 and the policies prescribed from time to time, the Commission is attempting to reduce the prevailing cross-subsidy by increasing the tariff for subsidized categories in higher proportion as compared to subsidizing categories, so that the differential between the tariff for subsidized and subsidizing categories is reduced. However, it must be appreciated that cross-subsidy cannot be eliminated overnight. Cross-subsidy will be gradually reduced over a period of time. Further, while eliminating cross-subsidy, the Commission also needs to keep in mind the over-riding principle of avoidance of tariff shock to any consumer category.

6.11.3 Tariff for Railway Traction

In line with the principles of gradual reduction in cross subsidy over a period of time, the Commission has kept the tariff applicable to the Railways at the existing tariff levels.

9. The Respondent No.1 in its counter affidavit reiterates that DMRC is entitled for a preferential treatment and has offered to justify the preferential treatment and has given certain other additional grounds for doing so. The submissions of the Respondent No.1 in this regard can be summarised as under :

- a) Section 61 and 62 of The Electricity Act permits differentiation according to the geographical position of any area and the purpose for which a supply is required. The DMRC as a social sector utility for the public of Delhi and its viability is greatly impacted by the price of the electricity. Its nature of services, geographical position of area and the purpose are different from Railways.
- b) DMRC is a new consumer at 220 kV with its differentiating nature of services and operations.
- c) The operations of DMRC has limited revenue potential it provides only passenger services unlike the Railways which carry goods and earn additional revenue from such services.
- d) The Government of NCT of Delhi vide its letter dated PS(P)/38/DERC/196 dated 16th May, 2003 has extended its support to the proposal that DMRC may be treated as separate category of consumer whose tariff will be based on actual cost of supply excluding both subsidy and cross-subsidy elements.
- e) The Respondent No.1 further submits that there is no arbitrariness or any element of discrimination in treating the DMRC as a category different from Railways.

10. The Respondent No.1 further points out that this Tribunal in Appeal No. 131 of 2005 has already taken the view of cross-subsidy can be gradually reduced and brought to the levels envisaged by The Electricity Act 2003 and the Tariff Policy. Accordingly, Respondent No.1 pleads that the conscious decision has been taken by the Commission to continue the existing level of fixed as well as energy charges for the financial year 2006-07, in line with the principle of gradual reduction of cross-subsidy over a period of time. It submits that in its earlier Tariff Order dated 09.06.2004 it determined the tariff for DMRC on the basis of average cost of supply by TRANSCO to DMRC by adding nominal component of overhead to the DISCOM for the supply at 220 kV and 66 kV. It also contends that the appellant has also been given reasonable, just and fair price in view of the circumstances, including the cost of electricity, generation prevailing in Delhi. Further it contends that the burden of cross-subsidy on Railway is much lower than the other subsidizing category of consumers. Energy charge for Railway traction is less than the energy charge of such domestic consumers who consume more than 400 units in a month, which is the highest slab. It also contends that the State Government took a decision in its meeting on 06th November, 2002 with DMRC, TRANSCO and three DISCOMs that DMRC will be treated as a separate category of consumer and that tariff for DMRC should be based on actual cost of supply without cross-subsidy or any subsidy element and this recommendation of the Government has been considered during the fixation of tariff for DMRC.

11. In a rejoinder, the appellant submits that the only factors attributed by Respondent No.1 for giving the preferential treatment to DMRC are that DMRC is a social sector utility for the public of Delhi and its viability is greatly impacted by the price of electricity and that these factors are equally applicable to the appellant. It also submits that the mere fact that the Railways have revenue from haulage of goods cannot be a factor to discriminate between DMRC and the Railway. The appellant reiterates that the functions of appellant and that of DMRC are similar and the appellant carries out the same function of providing Mass Rapid Transit System for bringing passengers from suburban areas to the city and also to some extent within the city of Delhi. The appellant reiterates that there has been arbitrariness in the fixing of tariff for the appellant.

12. Section 62(3) of The Electricity Act 2003 prescribes to what extent any differentiation can be done in the matter of determining tariff. The provision is extracted below :

“62. Determination of tariff

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer’s load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.”

13. It is submitted on behalf of the appellant that the grounds on which a preference can be given to any consumer of electricity in determining tariff can be only the following :
1. Consumers
 - a) Load factor
 - b) Power factor
 - c) Voltage
 - d) Total consumption of electricity during any specified period or the time at which the supply is required
 2. The geographical position of any area
 3. Nature of supply and
 4. Purpose for which the supply is required.
14. The appellant says that on all these factors it can rank equally with DMRC and therefore the DMRC cannot get a treatment which in any way is better than the appellant. The Impugned Order, as stated earlier does not categorically lay down the grounds on which the tariff fixed for the appellant and DMRC are different. The Impugned Order merely follows its decision in this regard in the earlier years. The orders for the earlier years also do not make a conscious comparison between the case of the appellant and the case of DMRC. The previous tariff order only considers the submissions of DMRC and proceeds to fix tariff for DMRC. The previous orders also considered the submissions of the appellant and fixed the tariff of the appellant. A comparative analysis of the conflicting claims for preferential treatment by the appellant and the DMRC

has not been made. This omission, however, will not justify a decision to allow the appeal and remand the matter to the respondents. Accordingly, during the hearing of the appeal the parties were allowed to make their submissions as to whether DMRC can be treated as a category distinct from the appellant and be given a treatment different from that given to the appellant. The ground for distinguishing between the two consumers has to be found within the four corners of the ground for differentiating provided by Section 62(3) of The Electricity Act 2003.

15. The Commission's view expressed in the Tariff Order for the financial years 2002-03 and 2003-04 recognizes that DMRC is a social sector utility for the public of Delhi and its viability is greatly impacted by the price of electricity. It also recognizes that DMRC being a new consumer at 220 kV and its differentiating nature of services and operations the Commission was inclined to agree with the view of the Government that DMRC might be treated as a separate category of consumers. The Commission, nonetheless, hastens to add that the tariff for DMRC would be based on actual cost of supply excluding both subsidy and cross-subsidy elements.
16. Although the appellant is also a social sector utility for the public of Delhi and its viability is also likely to be impacted by price of electricity yet there is a great difference between the appellant and the DMRC in that the DMRC is the new consumer and is still in the process of building up its infrastructure and therefore, the impact of tariff on it is

much higher than the impact of tariff on the appellant. The full meaning of the words “*a new consumer of 220 kV and its differentiating nature of services*” in the Tariff Order for financial years 2002-03 and 2003-04 can be explained and understood in this context.

17. The appellant disputes that DMRC can be treated as a preferred class only because it is a new consumer at 220 kV. It is contended by the appellant that the comparative age of the consumers is not a criteria for differentiation/categorization under Section 62(3) of The Electricity Act, 2003. The parameters provided in such sections are exhaustive and cannot be expanded to include new parameters not included therein. The appellant, therefore, contends that even though the appellant is 150 years old organization, it is constantly expanding its services, reach, passenger handling and railway network to the ever increasing passengers and freight service requirements for the developing economy. Comparing the need to build up the infrastructure for DMRC with its own needs, the appellant contends that the appellant also has to undertake substantial expenditure every year towards infrastructure towards building new infrastructure and also for maintaining expanding ones. Accordingly, it is contended by the appellant that differentiation on ground that DMRC is the new organization cannot be permitted in law. Coming to the question of drawing power at 220 kV it is contended by the appellant that DMRC consumes power only at 66 kV just like the appellant although DMRC draws power at 220 kV only at ISBT due to absence of the 66 kV

sub-station at that point. Although the arguments made by the appellant are apparently quite sound, they lose their force when examined closely. The appellant is a massive organization established 150 years back and the proportion of its expansion and its consequent new infrastructure is nominal when compared to the proportion of the same factor vis-à-vis the DMRC. Unless DMRC is treated preferentially, its viability itself may be at stake. The purpose of supply of electricity to the two organizations can thus be distinguished. The DMRC can be distinguished from the appellant in terms of age. The purpose of supplying electricity to the two organizations namely the appellant and DMRC can also be said to be different. For the Railways, the purpose of supply of electricity is to maintain its operation at the existing level except for the nominal increase by the year whereas the purpose of supply of electricity to DMRC is to create an altogether new transport system for the City of Delhi.

18. It was pointed out at the time of arguments that the appellant is carrying passengers at a fare much lower than that charged by DMRC. This itself indicates the financial strength of the appellant vis-à-vis DMRC. This factor also can be included in understanding the purpose of the supply of electricity. The purpose of supporting the establishment of DMRC for providing the Mass Rapid Transit System, a crying need for the people of Delhi, is itself one great ground for treating the DMRC as a separate class of consumers. It can, therefore, be safely stated that the purpose of supply of electricity to the DMRC is different from the purpose of

supply of electricity to the appellant and therefore, 62(3) of The Electricity Act 2003 permits preferential treatment to DMRC as compared to the appellant.

19. The Respondent No.1 has not treated the appellant with any undue hardship. In its order on the tariff for the appellant, the Commission has acknowledged the services provided by Railway to the nation and of the importance of electricity tariff in the functioning of Railways. It has also recognized that the cross-subsidy should be reduced only gradually and therefore for the year in question the tariff for the Railways has been kept at the same level. The Railways is still a subsidized sector and not a subsidizing sector.
20. We are unable to find any arbitrariness in the impugned decision. It appears that the appellant itself agreed with preferential treatment given to DMRC in the last several years but for some reason has now chosen to challenge the same after the Impugned Order was passed for the financial year 2006-07. We see no merit in the appeal. The same is accordingly dismissed.

Pronounced in open court on this 13th day of March, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member