

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:28th Nov, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

APPEAL NO.281 OF 2013

In the Matter of:

**Central Railway,
CST
Mumbai-400 001**

..... Appellant

Versus

- 1. Tata Power Company Limited
Dharavi Receiving Station,
Near Shalimar Industrial Estate,
Matunga (East) Mumbai-400 019**

- 2. Maharashtra Electricity Regulatory Commission
(MERC)
World Trade Centre, Centre No.1,
13th Floor, Cufee Parade,
Mumbai-400 005**

...Respondent(s)

Counsel for the Appellant(s) : Dr. Ashwani Bharadwaj

**Counsel for the Respondent(s):Mr. Amit Kapur
Mr. Vishal Anand**

Ms. Divya Chaturvedi for R-1
Mr. Buddy A Ranganadhan
Mr. Raunak Jain for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

1. Central Railway, Mumbai is the Appellant herein.
2. Challenging the Impugned Order dated 28.6.2013 passed by the Maharashtra State Commisison, the Appellant has filed this Appeal.
3. The short facts are as follows:
 - (i) The Indian Railways is one of the important consumer of the Tata Power Company Limited, the Respondent.
 - (ii) The Appellant has been receiving power from M/s. Tata Power Company on 100/33/22 Kilo VoltS.
 - (iii) This Power is used for service of suburban (80%) and Main line (20%) trains. Hence, Railway uses this power for transportation of suburban

passenger (80%) which is public utility services at a very low passenger fare.

(iv) Railways plays vital role in economic growth of the Country.

(v) In accordance with the Multi Year Tariff Regulations, 2007, the Tata Power Company on behalf of its Distribution Business submitted its application for approval of the Annual Revenue Requirement for FY 2011-12 and ARR and Multi Year Tariff for FY 2012-13 to FY 2015-16 on 22.01.2013.

(vi) The public notice was issued on 18.2.2013. However, the public notice did come to the knowledge of the Railway hence the Appellant missed the opportunity to appear before the MERC to make their submissions. Without hearing the Appellant, the State Commission had passed the Impugned Order issuing the revised tariff order for Railway traction for the electricity supplied by Tata Power Company through the Impugned Order dated 28.6.2013.

(vii) In this Order, the Overall tariff is increased by 20/21% in comparison with the existing tariff during FY 2013-14 and thereafter 12/13% for the FY 2014-15 and 10% for FY 2015-16.

(viii) Aggrieved over this order, the Appellant has presented this Appeal challenging the order dated 28.6.2013.

4. The learned Senior Counsel appearing for the Appellant has made the following grounds:

(a) Public Notice was issued by the State Commission pursuant to the Petition filed by the Tata Power which went unnoticed by the Appellant. No separate notice was issued to the Appellant. As such, the Impugned Order was issued without affording opportunity of hearing to the Appellant.

(b) As per Article 287 of the Constitution of India, the Appellant being the Railway, is entitled to reduced/discounted tariff as compared to the other bulk consumers.

(c) The Wheeling Charges levied on the Appellant would amount to double recovery of charges from the Appellant towards distribution infrastructure. Since the

electricity is availed by the Appellant at 22/33/100 KV connection at any of its traction sub station and the infrastructure and expenditure towards installing the infrastructure such as power lines and switch gear namely fuses, isolators, oil circuit breaker etc necessary for the procurement of electricity from Grid sub station to the premises of the Appellant is borne by the Appellant.

(d) The overall tariff in respect of the Appellant has been hiked to 21% during the FY 2013-14 and thereafter 12/13% for the FY 2014-15 to FY 15-16 in comparison to previously applicable tariff. The Appellant should be charged lower tariff proportionate to the cost of supply to the Appellant.

(e) The Delhi Commission has allowed low tariff for DMRC recognising it as an essential sector utility. The Delhi Commisison has determined the demand charges at Rs.125 per KVA per month and Energy Charges at Rs.5.00 per KVAh for the period 2012-13 to 2014-15.

(f) Similarly, the 80% of the usage of power sourced from the Tata Power is utilised towards suburban services of the Mumbai city. In fact, the Railways has

not increased the fare of the passenger services for almost a decade till March, 2013.

5. On these grounds, the Impugned Order is sought to be set aside by the Appellant.
6. The learned Counsel for the Respondent in justification of the Impugned Order submitted that the reasonings given in the Impugned Order for the increase in the tariff and Wheeling Charges are perfectly valid. Therefore, there is no infirmity in the Impugned Order.
7. The following questions are raised for consideration in this Appeal:
 - (a) **Whether the Impugned Order would suffer from infirmity due to the fact the opportunity of hearing has not been given to the Appellant before passing the Impugned Tariff Order?**
 - (b) **Whether once the Railways take any 22/33/100 KV Power connection at any of its Traction Sub-Station from the TPC-D, the Distribution Licensee supplies power from its main Grid Sub-station to the premises of the Railways and expenditure on capital equipment like the power line and switchgear viz., fuses, isolators, oil**

circuit breaker etc is borne by Railway and Distribution Infra structure is finally created by Railways, the levying of “Wheeling Charge” will not be a double recovery from Railway for distribution infrastructure ?

(c) Whether the “Wheeling Charges” during Financial Year 2009-10 as issued by MERC for HT-Rs.0.18/Kwh and for LT Rs.0.37/Kwh were applicable to Open Access consumers and Change Over Consumers only and the same could not be made applicable to all consumers including Railways?

(d) Whether even the provisions of the Constitution of India provide that the power tariff for the Railways should be reasonable and lower than the tariffs charged to other bulk consumers and this is a case for the existing traction tariff of the Railways to be brought down to a reasonable level, taking into account the fact that tariffs for any consumer category must reflect the cost of supply for that consumer category and the revised hike in Railway traction tariff should not be allowed and existing traction tariff of the Railway traction

should be reduced and brought down to a reasonable level proportionate to TPC's cost of supply to Railways?

8. Let us discuss the issues in the following paragraphs.
9. According to the Appellant, mere issuance of public notice without separate notice to the Appellant would not satisfy the principles of Natural Justice and public notice in the present case went unnoticed by the Appellant. Therefore, a separate notice would have been issued to the Appellant.
10. This ground in our view, is not valid one.
11. Section 64(2) and 86(3) of the Electricity Act provides that every applicant shall publish its application in abridged form and manner as may be specified by the Appropriate Commission. The State Commission in Regulations 18.4 and 18.5 of the Maharashtra Electricity Regulatory Commission (MYR) Regulations, 2011 has prescribed the detailed procedure for publishing the public notice.
12. Accordingly, the State Commission in the present case, admitted the Petition filed by the Tata Power and directed the Tata Power to publish its Petition in the prescribed abridged Form and manner, as may be specified by the Appropriate Commission. The State Commission in

Regualtions 18.4 and 18.5 of the MYT Regualtions, 2011 has prescribed detailed procedure for publishing the public notice. Accordingly, the State Commisison, in the present case admitted the Petition filed by the Tata Power and directed the Tata Power to publish its Petition in the prescribed abridged form to ensure adequate public participation. Similarly, the State Commission directed the Tata Power to reply all the suggestions and objections received from the stake holders on its Petition. Accordingly, the Tata Power issued public notice in the Newspaper and pursuant to the public notice; the State Commission received written suggestions and objections on various issues from several stake holders and consumers.

13. The public hearing was held on 18.1.2013. The Appellant was not present nor submitted any suggestions or objections. The reading of the 2011 Regulations reflects that it requires general publication.
14. In the present case, the public notice was published in the Newspaper and made available on the web site of the Tata Power. The MYT Regualtions, 2011 did not provide for any individual notice. The publication of the public notice in the news papers and web site in terms of the MYT Regualtions,

2011 is sufficient notice for stake holders including the Appellants.

15. It is settled position of law that once the law requires publication of public notice in the News Papers and compliance of the legal requirements would amount to sufficient compliance.
16. It is clear from the law laid down that it is that the Objector should appear before the State Commission and make the suggestions. If they failed to appear they cannot make any grievance of non issuance of public notice. This position of law has been laid down in the following judgments:
 - (a) Sobhraj Odharmal Vs State of Rajasthan reported as AIR 1963 SC 640 (CB);
 - (b) Improvement Trust, Moga Vs Manchanda Soap Works & Others reported as (1996) 8 SCC 686 (Para 5);
 - (c) Rai vimal Krishna and Ors Vs State of Bihar and Ors reported as (2003) 6 SCC 401 (Para 27)
 - (d) MIAL Vs MERC & Ors reported as 2009 ELR (APTEL) 417;

17. In view of the foregoing legal and factual aspects, the Appellant's grievance raised in the present Appeal is misconceived.
18. In the present Appeal, the Appeal has contended that it is entitled to reduced tariff in terms of Article 287 of the Constitution of India.
19. A bare perusal of Article 287 of the Constitution of India would indicate that Article 287 bars any State Government to impose tax on the consumption of electricity by the Railways. The tariff determined by the State Commission is in accordance with the Electricity Act which is a Central Legislation enacted by the Parliament. Article 287 does not deal with the tariff much less with the plea of the Appellant that it provides for lower tariff for Railways as compared to other HT Consumers.
20. Therefore, the Appellant's contention that it is entitled to lower tariff in the light of Article 287 of the Constitution of India is misconceived. This point has been decided by this Tribunal in Appeal No.2012 -ELR (APTEL) 1041 in the case of Union of India through Southern Railway, Chennai Vs Tamil Nadu Electricity Regulatory Commission and Tamil Nadu Electricity Board.

21. The 3rd issue is with reference to the Wheeling Charges.
22. According to the Appellant, the Wheeling Charges levied on the Appellant amounts to double recovery of charges from the Appellant towards the Distribution Infra structure.
23. It is contended by the Appellant that in relation to the determination of Wheeling Charges payable by the Appellant, the Wheeling Charges are being charged from it through the Impugned Order whereas earlier, the Appellant was not being charged Wheeling Charges.
24. On noticing the two previous orders in Case No.98 of 2009 dated 12.9.2010 and Case No.179 of 2011 dated 28.6.2013, the contention of the Counsel for the Appellant is untenable. The HT railways tariff as per the Tariff Order dated 12.9.2010 did not have a separate head called the "Wheeling Charges" and the same was introduced as a separate head by way of MYT Regulations, 2011. In the MYT Regulations, 2011, Wheeling Charges and Supply Business are divided into separate heads and the Distribution Licensee is eligible to charge both Wheeling and Supply tariff from the consumers. Further the components under wheeling charges have been specifically provided under MYT Regulations, 2011. Therefore, it does not matter as to whether the Appellant has set up its own infrastructure

to receive supply of electricity; wheeling charges are always recovered from the Appellant for the Distribution Company's network used for supply of electricity. However, the same was never shown as separate head and the same was subsumed under the head of Energy Charges. Therefore, the State Commission has specified the Wheeling Charges in the Impugned Order to comply with the requirements as laid down in the MYT Regulations, 2011. Hence, there is no infirmity in levying the Wheeling Charges on the Appellant.

25. The next issue is relating to Cost of Supply.
26. The Appellant has contended that the overall tariff in respect of the Appellant has been hiked to 21% during the FY 2013-14 thereafter 12-13% for the FY 2014-15 to FY 2015-16 in comparison to previously applicable tariff.
27. In this context, it is to be stated that the State Commission has analysed in detail all the components of ARR and determined the tariff on the basis of the average cost of supply. The tariff in the Impugned Order also includes recovery of regulatory assets.
28. The Regulatory Asset has arisen on account of unrecovered revenue which was receivable in the hands of the Tata Power from all the consumers including the Appellant.

29. That apart, the National Tariff Policy requires tariff to be with $\pm 20\%$ of the average cost of supply. The Impugned Order clearly reflects that the Tata Power has been afforded the increase in the tariff within the acceptable band as envisaged in the National Tariff Policy.
30. The Appellant has argued that it is entitled to lower tariff than what was being approved by the State Commission as 80% of the power sourced from the Tata Power is utilised towards suburban services of the city of Mumbai.
31. It is also contended that the Appellant has not increased the fare of the passenger services for almost a decade till March, 2013.
32. As pointed out by the Respondent, this Tribunal in the case of Union of India through Southern Railway, Chennai Vs Tamil Nadu Electricity Regulatory Commission and Tamil Nadu Electricity Board, Chennai reported in 2012 ELR (APTEL) 1041 has held that with the advent of economic reforms initiated by Government in the early nineties, the concept of what should be the attitude of public utilities in its service to the society has undergone a change.
33. Therefore, in view of the above, the Appellant could not say any longer that since it serves the public without profit

motive it requires special treatment. The pricing of train fare is not in the realm of jurisdiction exercised by this Tribunal. Therefore, it is irrelevant to impose the tariff through the Impugned Order.

34. The next issue relates to the Tariff applicable to the Appellant in comparison with the DMRC.
35. The Appellant has pointed out the lower tariff and the actual cost of supply which is being practiced in respect of DMRC as the Delhi Commission has recognised it as social sector utility.
36. On this aspect, this Tribunal examined the relevant practices being followed by one State Commission on another State Commission. In the decision Union of India through Southern Railway, Chennai Vs Tamil Nadu Electricity Regulatory Commission and Tamil Nadu Electricity Board Chennai reported as 2012 ELR (APTEL) 1041, it has been held that while exercising such powers, each State Commission has to take in to consideration local conditions and other relevant factors only and the methodologies adopted by other Commissions has no relevance. Therefore, the practice of the Delhi Commission cannot be used as a yardstick to be followed by the Maharashtra State Commission. This principle has been

cited in the judgment dated 29.1.2014 in Appeal No.153 of 2012 titled as East Coast Railway Vs Orissa Regulatory Commisison & Others and the judgment dated 7.1.2014 in Appeal No.248 of 2012 titled as Western Central Railway vs Rajasthan Electricity Regualtory Commission.

37. Summary of Our Findings

(i) The requirement of public notice on the Petition of tariff determination of the distribution licensee as per the provisions of the Electricity Act, 2003 and the Regualtions was satisfied in the present case. There is no requirement of separate notice to the Appellant in law.

(ii) The contention of the Appellant that it is entitled to lower tariff in the light of Article 287 of the Constitution of India is misconceived.

(iii) There is no infirmity in charging of Wheeling Charges in the tariff of the Appellant as it is a charge for the wire business of the distribution licensee and has been determined as per the Tariff Regualtions.

(iv) There is no infirmity in determination of tariff for the Appellant's category.

(v) The Appellant's contention for parity with the tariff determined by Delhi Commission for DMRC is not valid.

38. In view of the above, the Appeal is dismissed as 'devoid of any merits'. No order as to costs.

39. Pronounced in the Open Court on this **28th Day of November, 2014.**

(Rakesh Nath)
Technical Member
Dated:28th Nov, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

√REPORTABLE/~~NON-REPORTABLE~~