

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 131 of 2005

Dated the 31st March, 2006

Present: - Hon'ble Mr. Justice Anil Dev Singh – Chairperson
Hon'ble Mr. H.L. Bajaj – Technical Member

Udyog Nagar Factory Owners AssociationAppellant

Versus

1. BSES Rajdhani Power LimitedRespondent No. 1
2. Delhi Electricity Regulatory Commission Respondent No. 2

For the appellant: Mr. Laliet Kumar & Mr. A.K. Gupta

For the Respondents: Mr. Arun Monga
Mr. Abhishekh Baidya for BSES
Mr. Suresh Tripathy for DERC with
Mr. Anil Bali, Deputy Director (Law)

JUDGEMENT

Per Hon'ble Mr. H.L. Bajaj, Technical Member.

1. This appeal by Udyog Nagar Factory Owners Association, is directed against the order of the Delhi Electricity Regulatory Commission, dated 7th July, 2005.

2. Briefly stated the facts are as follows:
3. Udyog Nagar Factory Owners Association is a Registered Welfare Association of the owners of industrial premises in Udyog Nagar, Industrial Area, Delhi. While some members (LIP consumers) receive electricity at 11,000 volts, others (SIP Consumers) receive at 440 volts.
4. BSES Rajdhani Power Limited, the respondent No.1, filed a petition for approval of ARR and determination of Tariff for the year 2005-06 before Delhi Electricity Regulatory Commission (for short Commission/DERC) on 29th December, 2004.
5. The appellant, in response to the public notice issued by DERC, had submitted that proposed demand/fixed charges for the industrial consumer should be reduced as there is no fixed cost, which is to be incurred on the maintenance of the HT network. Appellant had also argued before the Commission that HT distribution network is energy efficient and, therefore, the Aggregate Technical and Commercial (ATC) losses are minimal and, therefore, the rate at which electricity is supplied

to them should be proportionate to the cost of electricity. Eventually, the Commission by the impugned Order dated 7th July, 2005, inter alia, fixed the Tariff for the industrial consumers as per the following table:

Category	Fixed Charges 3	Demand Charges⁴	Energy Charges (paise/kWh)
3.1.1 Small Industrial Power <100 kW - SIP	Rs. 50/kW/mth		500 paise/kwh
a) Up to 10 kW	Rs. 50/kW/mth		435 paise/kVAh ⁶
b) >10kW to 100 kW			
3.1.2 Industrial power (SIP) on 11kV Single Delivery Point for Group of SIP Consumers	Rs. 50/kW/mth		370 paise/kVAh
3.2 Large Industrial Power >100 kW LIP	-		430 Paise/kVAh ⁷
a) Supply on 11 kV	-	150/kVA/mth	495 Paise/kVAh
b) Supply on LT (400 Volts)		200/kVA/mth	

At this stage it will also be useful to set out notes of superscripts used in the table given above:

“3. Fixed charges are to be levied on sanctioned load or MDI reading, whichever is higher, on per kW or part thereof basis. Where the MDI reading exceeds sanctioned load, a surcharge of 30% shall be levied on the fixed charges corresponding to excess demand in kW for such billing cycle.

4. Where the MDI reading exceeds contract demand, a surcharge of 30% shall be levied on the demand charges corresponding to excess demand for such billing cycle.

6. Where kVAh meters have not been provided, kVAh consumption shall be estimated assuming average power factor of 0.87 during the period of direction indicated in the order.

7. Additional rebate of 2.5% on the energy charges on 11 kV rates for availing supply of 33/66 kV and 4% for supply at 220 kV shall be admissible”.

6. Aggrieved by the order of the DERC, the appellant association has filed the present appeal claiming that in the interest of justice, the fixed charges of the HT consumer may be brought at par with that of the LT consumer or the charges to be paid by the HT consumer be brought at par with that of Railway Traction or Delhi Metro Rail Corporation, who are drawing electricity at high voltage with effect from 15th July, 2005, the date when the current Tariff came into force.

7. We have heard the learned Counsel for the parties. The learned Counsel for the appellant submitted/pointed out as under:

(a) The fixed charges which have been increased by the first respondent in the tariff proposal are without any basis as nominal expenditure has been incurred by it for building the dedicated infrastructure and for maintaining the scheme/ system in proper condition;

- (b) As per provisions of law, the tariff should make distinction on the basis of voltage;
- (c) The fixed charges are sought to be recovered from the appellant by the first respondent on the basis of:
 - (i) The fixed/demand charges, meant to defray the capital related and other fixed costs and;
 - (ii) Energy charges, meant to meet the variable expenses, i.e., power purchase cost, etc.
- (d) As per provision of Section 45(3) of the Act;
The charges for electricity supplied by a distribution licensee may include-
 - (i) a fixed charge in addition to the charge for the actual electricity supplied;
 - (ii) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee;
- (e) The first Respondent has tried to justify the fixed charges on the HT consumer despite the fact that the appellant have invested huge sums of money for getting the electricity connection and the HT connections are not prone to losses.
- (f) Though the Commission has devoted full paragraph for discussing the cost analysis of the fixed charges in respect of domestic consumer, not even a word has been mentioned in respect of the industrial HT consumers.

The Commission while justifying the levy of fixed charges has mentioned in para 5.6.6 of the order that ‘the best method of levying fixed charges for domestic consumer is on the basis of the sanctioned load, as other options do not representatively reflect the cost of providing the capacity requirements of the consumer.’ The opinion of the Commission is not grounded on any basis or details of the cost incurred in supplying the electricity which is wholly unjustified, unlawful and illegal.

(g) The Commission while determining the fixed charges/ demand charges for industrial consumer up to 100 kW as Rs. 50/- per kWh per month and Rs. 150/- per kVA per month for the consumer having the load more than 100 kW, has ignored the following facts:

- (i) In the case of HT consumer, the major contribution towards the cost of installation is being made by the consumer and no cost is being incurred by the respondent utility, BSES Rajdhani Power Ltd., towards (a) the cost of the transformer (b) repairing and maintenance of the transformer (c) investment on G.O. Switches, LT ACB in capital, repair and maintenance cost of other equipment required for LT distribution and (d) room land; and
- (ii) In respect of the connection less than 100 kW the infrastructure is being maintained by the utility.

Therefore, the actual fixed cost qua the HT consumer (more than 100 kW) is far less than that of the LT consumer (Less than 100 kW). As a sequitur in terms of the cost analysis, the HT

consumers ought to be charged less qua the fixed cost, if any, in comparison to the LT consumer.

- (h) Section 62(3) of the Electricity Act, 2003 provides that '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.'
- (i) The charges as per Section 45 (3) include a fixed charge; therefore, the fixed charge should be determined in accordance with the said provision. Unfortunately, the fixed charges/demand charges have not been fixed on the basis of load factor, power factor, voltage etc., but on the consideration, which are not permissible under the Act;
- (j) Besides the fixed charges, the Commission has also laid down the energy charges as Rs. 4.30p. per kVAh in respect of load more than 100 kW on HT, whereas the energy charges for load less than 100 kW has been fixed as Rs. 4.35. The energy charges should be based on the cost of supply and the cross subsidy is required to be eliminated;

- (k) It is accepted by the Commission in Section 5.4.4 of the impugned order that the tariff should be based on voltage of supply. The respondent has not provided the requisite parameter to the Commission in the garb of non-installation of the electronic meter. However, in Section 7.8 of the DERC order it has been mentioned that the installation of electronic meters has been completed in respect of electricity connection up to 10 kW of SIP/NDLT category;
- (l) The energy charges of the HT consumer should be based on cost of supply and the tariff should be fixed on the basis of supply voltage of consumer. Moreover, Commission should not burden the HT consumers by providing the cross subsidy to the domestic consumers. As per Section 5.6.2 of the Commission's tariff order, it had agreed that the cross subsidy is required to be eliminated within the given time-frame work to be decided on the basis of various parameters but the Commission has neither laid down the parameters, nor framed the guidelines for eliminating the cross subsidy. On the other hand, the Commission has not disclosed the actual cost of supply to the various consumer categories, including the HT category; and

(m) The appellant should not be shocked to prevent the tariff shock to the other categories of consumers. The Commission has no power under Section 61 & 62 of the Electricity Act, 2003 to determine the tariff other than the parameters laid down under Section 62.

8. The learned Counsel for the second respondent, in response to the submissions advanced on behalf of the appellant raised a preliminary objection. It was submitted that the appellant actually seeks a direction in the nature of mandamus to the Commission to bring fixed charges payable by the HT consumers at par with fixed charges that are being paid by the LT consumer or that being paid for Railway traction by the Railways or by the Delhi Metro Rail Corporation, who are also drawing the electricity at high voltage w.e.f. 15th July, 2005 i.e., the date when the current tariff came into force. Such a direction can not be sought in an appeal filed under Section 111 of the Electricity Act, 2003.

9. Before considering the submissions of the learned counsel for the appellant, we at the outset proceed to take up the preliminary objection and dispose of the same. Raison

d'être for the appellant to seek the above mentioned parity in the tariff emanates from the Tariff Order issued by DERC on 7th July, 2005. The appellant is aggrieved by the order of the DERC and, therefore, as per Section 111 of the Electricity Act 2003, an appeal against such an order of the DERC is surely within the jurisdiction of the Appellate Tribunal. Accordingly, the preliminary objection raised by the respondent is hereby rejected.

10. Coming to the submissions of the learned counsel for the appellant, we find that basically the contentions broadly give rise to the following four questions:-

- 1) Whether the tariff for industry must be equated with Railways and DMRC tariff.
- 2) Whether it is permissible to saddle the HT consumers with the burden of cross subsidy.
- 3) Whether HT tariff should be less than LT tariff.
- 4) Whether the tariff should include an element of fixed charges.

Question No. 1: Whether the tariff for industry must be equated with railways and DMRC tariff.

11. In order to examine the question whether tariff for industry should be equated with railways and DMRC tariff, we need to refer to sub-Section (3) of Section 62 of the Act, which reads as under:

62(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 supply is required.”

The word “purpose’ used in the above mentioned sub-clause, as per Black’s Law Dictionary means:

“An objective, goal or end; specify, the business activity that a corporation is chartered to engage in”

12. Thus, the commission cannot accord any preferential treatment to any consumer of electricity in the determination of tariff. But different tariffs can be fixed for different consumers on the basis of their load factor, power factor,

voltage, total consumption of electricity during any specified period of time or the time at which the supply is required or the geographical position of any area and the nature of supply and the purpose for which supply is required. The appropriate commission is also empowered to fix different tariffs on the basis of reasons for which electricity supply is required. The tariff for the Railway Traction and DMRC stand on different footing than other classes of consumers. The railways and the Delhi Metro Rail Corporation draw power with the objective to satisfy the transportation needs of the masses.

13. Moreover, Railway Traction draws power at 66/33 KV and DMRC at 220 KV and 66KV and entire system beyond these intake points is maintained by the Railways and DMRC. Against this, the Appellant draws power at 11KV and at 440 volts.

14. In this view of the matter, the Appellant's plea to equate their tariff with that of DMRC or Railways is not justified. We answer the question accordingly.

Question 2: Whether it is permissible to saddle the HT consumers with the burden of cross subsidy:

15. The issue relating to subsidy is to be considered in the light of the provisions of Sections 65 & 61 of the Act and the Tariff Policy and Electricity Policy of the Govt. of India notified on January 6th, 2006 and February 12, 2005 respectively.

“Section 65 of the Act reads as under:

“If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62, the State Government shall, notwithstanding any direction which may be given under Section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner, the State Commission may direct, as a condition for the license or any other person concerned to implement the subsidy provided for by the State Government.

Provided that no such direction of the State Government shall be operative, if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the State Commission shall be

applicable from the date of issue of orders by the Commission in this regard.”

16. As per Section 61 of the Electricity Act, the Appropriate Commission shall, subject to provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be, inter alia, guided by the National Electricity Policy and Tariff Policy. Sub-Section 61(g) stipulates that the tariff progressively, reflects the cost of supply of electricity, and also reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission.

17. We note that the Tariff Policy notified by the Government on 6th January, 2006 lays down the following principles for design of tariff:

“(1) In accordance with the National Electricity Policy, consumers below poverty line who consume below a specified level, say 30 units per month, may receive a special support through cross subsidy. Tariffs for such designated group of consumers will be at least 50% of the average cost of supply. This provision will be re-examined after five years.

(2) For achieving the objective that the Tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within plus-minus 20% of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.

For example, if the average cost of service is Rs.3 per unit, at the end of year 2010-2011, the tariff for the cross subsidized categories those referred to in para 1 above should not be lower than Rs. 2.40 per unit and that for any of the corss subsidizing categories should not go beyond Rs. 3.60 per unit.

(3) While fixing tariff for agricultural use, the imperatives of the need of using ground water resources in a sustainable manner would also need to be kept in mind in addition to the average cost of supply. Tariff for agricultural use may be set at different levels for different parts of a state depending on the condition of the ground water table to prevent excessive depletion of ground water. Section 62(3) of the Act provides that geographical position of any area could be one of the criteria for tariff differentiation. A higher level of subsidy could be considered to support poorer farmers of the region where

adverse ground water table condition requires larger quantity of electricity for irrigation purposes subject to suitable restrictions to ensure maintenance of ground water levels and sustainable ground water usage.

(4) Extent of subsidy for different categories of consumers can be decided by the State Government keeping in view various relevant aspects. But provision of free electricity is not desirable as it encourages wasteful consumption of electricity besides, in most cases, lowering of water table in turn creating avoidable problem of water shortage for irrigation and drinking water for later generations. It is also likely to lead to rapid rise in demand of electricity putting severe strain on the distribution network thus adversely affecting the quality of supply of power. Therefore, it is necessary that reasonable level of user charges are levied. The subsidized rates of electricity should be permitted only up to a pre-identified level of consumption beyond which tariffs reflecting efficient cost of service should be charged from consumers. If the State Government wants to reimburse even part of this cost of electricity to poor category of consumers, the amount can be paid in cash or any other suitable way. Use of prepaid meters can also facilitate this transfer of subsidy to such consumers.

(5) Metering of supply to agricultural/rural consumers can be achieved in a consumer friendly way and in effective manner by management of local distribution in rural areas through commercial arrangement with franchisees with involvement of panchayat institutions, user associations, co-operative societies etc. Use of self closing load limiters may be encouraged as a cost effective option for metering in cases of ‘limited use consumers’ who are eligible for subsidized electricity.”

18. National Electricity Policy notified on 12th February, 2005, inter-alia, deals with the question of Recovery of Cost of Service & Targeted Subsidies as is evident from para 5.5 of the policy reproduced below:-

“5.5 Recovery of Cost of Services & Targeted Subsidies

5.5.1 : There is an urgent need for ensuring recovery of cost of service from consumers to make the power sector sustainable.

(5.5.2): A minimum level of support may be required to make the electricity affordable for consumers of very poor category. Consumers below poverty line who consume below a specified level, say 30 units per month, may

receive special support in terms of tariff which are cross-subsidised. Tariffs for such designated group of consumers will be at least 50% of the average (overall) cost of supply. This provision will be further re-examined after five years.

(5.5.3): Over the last few decades cross-subsidies have increased to unsustainable levels. Cross-subsidies hide inefficiencies and losses in operations. There is urgent need to correct this imbalance without giving tariff shock to consumers. The existing cross-subsidies for other categories of consumers would need to be reduced progressively and gradually.

(5.5.4): The State Governments may give advance subsidy to the extent they consider appropriate in terms of Section 65 of the Act in which case necessary budget provision would be required to be made in advance so that the utility does not suffer financial problem that may affect its operations. Efforts would be made to ensure that the subsidies reach the targeted beneficiaries in the most transparent and efficient way.

19. Thus, from a reading of the Section 61 and 65 of the Electricity Act and National Electricity Policy and the Tariff

Policy of Government of India following position emerges with regard to the subsidies:

- i. In case the State Government requires the grant of subsidy to any consumer or class of consumers, it shall pay in advance, the amount of the subsidy in the manner the State Commission may direct.
- ii. In case the State Government requires the grant of subsidy to any consumer or class of consumers but the state government fails to make the payment of the subsidy amount, the directions of the State Government shall not be operative.
- iii. Cross subsidy needs to be reduced progressively within the period specified by the appropriate commission.
- iv. Consumers below the poverty line consuming less than 30 units per month are required to receive special support through cross subsidy in accordance with the National Electricity Policy incorporated in the Para (1) of the Tariff Policy by reference.
- v. The state electricity regulatory commissions must notify roadmap for achieving the objective namely that the tariff should progressively reflect the cost of supply of electricity, with a target that latest by the end of the year 2010-11, tariffs are within $\pm 20\%$ of the average cost of supply.

- vi. The higher level of subsidy can be granted to support poor farmers of a region where adverse ground water table conditions required larger quantity of electricity for irrigation purposes subject to placing suitable restrictions to ensure maintenance of ground water levels and sustainable ground water usage.
- vii. Different subsidies can be decided for different categories of consumers by the State Governments having regard to the various relevant aspects.
- viii. Provision of free electricity is not desirable as it leads to wasteful consumption of electricity and in most of the cases resulting in lowering the water table and creating avoidable problem of water shortage for irrigation and drinking purposes for future generations.
- ix. Free electricity is likely to lead to rapid rise in demand of electricity putting severe strain on the distribution network.
- x. It is necessary for the commissions to fix reasonable level of user charges.
- xi. Subsidized rates of electricity are to be permitted only up to a pre identified level of consumption. Thereafter, tariff

- reflecting efficient cost of service ought to be charged from consumers.
- xii. In case the state government wishes to reimburse part of the cost of electricity to poor category of consumers, the amount be paid in cash or an any other suitable way.
 - xiii. Use of pre paid meters be resorted to, that will facilitate transfer of subsidy to poor consumers.
 - xiv. Cross subsidies, over the last few decades have increased to unsustainable levels, hide inefficiencies and losses in operation, the imbalance needs to be corrected without giving tariff shock to the consumers.
20. In consonance with the requirements of law, the commission is making an endeavor to reduce the prevailing cross subsidy by increasing the tariff of the subsidized category. This fact is evident from para 5.5.2 of the Order of the DERC.

This para reads as under:-

“5.5.2 Reduction of cross – subsidy

BRPL and BYPL have stated that the cross-subsidy should be reduced further to move towards tariffs based

on cost of service in line with the provisions of the EA 2003, by increasing the tariff for subsidized categories.

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 of the 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 can be gradually reduced over a period of time. Further, while eliminating cross-subsidy, the Commission also needs to keep in mind the overriding principle of avoidance of tariff shock to any consumer category.”

21. While reiterating the same view, the DERC has further observed as under:-

“The Commission, in line with the principles of gradual reduction in cross-subsidy, has increased the tariffs of domestic category in higher proportion as compared to the increase in tariff for subsidizing categories. The average tariff increase for domestic category for meeting the entire revenue gap works out to around 10%.”

22. On consideration of the submissions of the learned counsel for the Appellant and Respondents, the provisions of the Electricity Act 2003, the National Electricity and Tariff Policies, we are of the view that the cross-subsides can only be gradually reduced and brought to the levels envisaged by the Act and the Tariff Policy. At present it may not be pragmatic to drastically reduce the subsidies in one go.

23. A gradual reduction of subsidies every tariff year will go a long way in achieving the balance as envisaged by the Act and the policies. In the circumstances, therefore, we would not like to interfere with the approach of the Commission in this regard. Accordingly, the question is answered in the affirmative but with the rider that cross subsidies must be reduced progressively and gradually,

Question 3: Whether HT tariff should be less than the LT tariff.

24. As already noticed, the learned counsel for the appellant submitted that the loss level for HT consumer and the

expenditure on equipment, maintenance etc., being lower, the tariff for HT consumer should be less than the tariff for LT consumer.

25. Logically, the tariff for supply at higher voltages should be lower than the tariff for supply at lower voltages. The commission also appears to be working on this philosophy and it has initiated the process by differentiating between consumers, on the basis of the voltage of supply. The difference in tariff based on supply voltage should be based on difference in cost of supply at the respective voltages. However, data on cost of supply at different voltages is not available. The data must be made available to the Commission by the utilities. The first respondent shall be bound to provide the requisite data to the Commission expeditiously, not later than six months from the date of this Order.

Question 4: Whether the tariff should include an element of fixed charges:

26. This brings us to the question of Fixed Charges. The rationale and relevance of fixed charges is well established in the Electricity Industry. Fixed charges are to be recovered as a part of the fixed cost of the utility through fixed charges, so that at least a part of the fixed cost is recovered even if there is no consumption by the consumer. It is to be recognized that when a consumer is connected to the system, the utility has to provide or keep in readiness certain capacity of the distribution system to serve the consumer. Skilled workforce and supervisory staff is kept on the job for monitoring the system, attending to emergencies, restoring the supply in the event of an outage, routine and periodic maintenance, meter reading, billing, bill delivery, defraying administrative expenses not directly related to the consumption of energy.

27. It seems to us that the fixed charges levied on the consumer should reflect the cost of capacity requirement of the consumer after considering the fixed cost of such system and diversity of load on the system. The question is answered accordingly.

28. In view of the aforesaid discussion, no interference is warranted with the order of the Commission. Accordingly, the appeal fails and is hereby dismissed. However, the directions to the first respondent contained in para 25 of this order shall be complied with by it within the time stipulated therein.

(Justice Anil Dev Singh)
Chairperson

(H.L. Bajaj)
Technical Member