

## APTEL HOLDS INDIAN RAILWAYS IS NOT A DEEMED DISTRIBUTION LICENSEE UNDER THE ELECTRICITY ACT, 2003 AND IS LIABLE TO PAY CROSS SUBSIDY SURCHARGE FOR AVAILING OPEN-ACCESS



In a significant ruling, the Appellate Tribunal for Electricity (APTEL) has held that the Indian Railways does not meet the criteria to be a Deemed Distribution Licensee under the Electricity Act, 2003, as it does not engage in the distribution or supply of electricity to consumers. Consequently, the Indian Railways is now liable to pay additional surcharges or cross-subsidy surcharges when procuring power through open access at various points.

The appeals in question primarily revolved around the determination of whether the Indian Railways qualifies as a Deemed Distribution Licensee under the Electricity Act, 2003, and the resulting obligations, particularly regarding the payment of Additional or Cross-Subsidy Surcharges for sourcing electricity from entities other than designated distribution licensees. APTEL's judgment, encompassing multiple orders from various Regulatory Commissions, delves into numerous legal and regulatory intricacies concerning the status and entitlements of the Indian Railways under both the Railways Act, 1989, and the Electricity Act, 2003.

- **Indian Railways, the Appropriate Government:** On the issue whether Indian Railways falls within the term "Appropriate Government" under Section 14 of the Act, the APTEL, while taking into account the unique operational and organizational structure of the railways and that it operates as a department under the Central Government, held that Indian Railways does indeed fall within the definition of "Appropriate Government" under the context of Section 14 of the Electricity Act, 2003.
- **Activities of Indian Railways do not constitute Distribution of Electricity:** On the issue whether activities of Indian Railways constitute distribution of electricity, APTEL held as follows:

1. While relying upon Section 11(g) and (h) read with Section 2(31)(c) of the Railways Act, 1989, APTEL observed that these provisions are tailored to facilitate the railway's internal operations, including the movement of locomotives and operation of railway stations and related facilities.
2. The activity of conveying electricity from its traction and non-traction sub-stations/switch-yards to various consumption points, including locomotives and station premises, is only an internal routing of electricity within the railway's operational network to power trains and support railway infrastructure.
3. A key component of distribution of electricity involves an essential component, i.e. supply in terms of Section 2(70) of the Electricity Act. However, activities of Indian Railways, while involving the conveyance and use of electricity, do not meet the criterion of 'supply' in the context of the Electricity Act as there is no sale of electricity from Indian Railways to external entities or consumers for a price. The electricity is utilized for the railway's internal operations, including powering locomotives and providing electricity for station premises and associated infrastructure, without involving a transaction that constitutes a 'sale' as understood under the act.
4. Further, APTEL also went on to hold that "electric traction equipment" and the "power supply and distribution installation" referred to in Section 11(g) and Section 2(31)(c) of the Railways Act, 1989 do not constitute the 'Distribution System' defined in, and falling within the scope of, Section 2(19) of the Electricity Act, 2003; and establishment of a 'distribution installation' contemplated under the Railways Act, 1989 does not qualify as the establishment of a 'distribution system' as, through the former, electricity is not supplied to consumers, as stipulated under the Electricity Act, 2003.

- **Railways Act, 1989 not in conflict with Electricity Act, 2003:** On the issue of non obstante clause in Section 11 of the Railways Act, 1989, vis a vis Section 173 of the Electricity Act, 2003, APTEL while delving and deliberating into the provisions of both Acts observed as follows:
  1. Activities involving the distribution of electricity by the Railways, as provided under the Railways Act, 1989, do not inherently conflict with the regulatory framework established under the Electricity Act, 2003 and that the Electricity Act's provisions concerning distribution licensees and their regulatory requirements can coexist with the Railways' operations without contradiction.
  2. Accordingly, APTEL opined that while the Railways is empowered to manage its electrical infrastructure for its operational needs, including transmission and usage of electricity, this authority does not extend to performing as a distribution licensee in the regulatory sense established by the Electricity Act, 2003 without adhering to the act's licensing and regulatory requirements. The Railways must comply with the Electricity Act's provisions if it wishes to undertake distribution activities beyond its internal operational needs, ensuring alignment with the national electricity regulatory framework.
- **Indian Railways is not a Deemed Distribution Licensee:** On the issue whether Indian Railways by virtue of being an Appropriate Government qualifies as a Deemed Distribution Licensee, APTEL delved upon the criteria for being recognized as a Deemed Distribution Licensee under the third proviso to Section 14 of the Electricity Act, 2003 which exempts certain entities, including the government and its departments, from the requirement to obtain a distribution license, provided they are engaged in the distribution of electricity within their operational domains.

In view of the aforesaid, APTEL observed that while Indian Railways operates under the ambit of the Central Government and manages a significant electrical infrastructure for its operations, this alone does not automatically qualify it as a Deemed Distribution Licensee under the Electricity Act, 2003. APTEL highlighted that the activities undertaken by Indian Railways, as specified in the Railways Act, 1989, do not inherently meet the regulatory and operational definitions of "distribution of electricity" as per the Electricity Act, 2003 particularly due to the lack of a commercial component involving the sale of electricity to external consumers.

APTEL while comparing the Electricity Bill 2001 and Electricity Act 2003 held that the Indian Railways request for exemption from discharging the functions of a Distribution Licensee under Section 184 from the applicability of the Electricity Act, was neither acceded to by the Parliamentary Standing Committee, nor did Parliament, in enacting the law, exempt them from the rigours of the aforesaid provisions.

Thereafter, APTEL while relying upon *Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission & Others*, (2014) 8 SCC 444, re-affirmed that an entity cannot claim a Deemed Distribution Licensee status without engaging in the sale of electricity to consumers/end-users. The judgment highlighted that electricity consumption predominantly by the licensee itself does not fulfil the criteria for distribution.

- **Indian Railways entitled to Open Access as a consumer:** APTEL on the issue of whether Indian Railways is entitled to seek Open Access held that Indian Railways does not qualify as a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003. APTEL's decision is rooted in the interpretation of specific sections of the Electricity Act, 2003, notably Sections 2(47), 38(2)(d)(i), 39(2)(d)(i), and 40(c)(i), which outline the framework and conditions under which entities can seek open access to fulfil their electricity needs from alternate sources. Accordingly, APTEL was of the view that Indian Railways' entitlement to source electricity under open access provisions is strictly as a consumer, in accordance with Sections 38(2)(d)(ii), 39(2)(d)(ii), and 40(c)(ii) of the Electricity Act, 2003.
- **Indian Railways liable to pay Cross Subsidy Surcharge:** On the issue of whether Indian Railways would be liable to pay Cross Subsidy Surcharge or Additional Surcharge, APTEL held that since Indian Railways does not qualify as a deemed distribution licensee because its activities related to electricity—primarily internal consumption for operational needs—do not constitute 'distribution of electricity' as defined under the Electricity Act, 2003. Therefore, when Indian Railways opts to source electricity from producers or suppliers other than the local distribution licensee via open access, it is treated as a regular consumer. As such, Indian Railways is subject to the same financial obligations as other open access consumers, including the payment of cross-subsidy surcharges.

Mr. Shri Venkatesh, Managing Partner assisted by Mr. Suhael Buttan, Counsel and Mr. Vineet Kumar, Associate successfully represented The Tata Power Company Limited-Distribution in Appeal No. 343 of 2019 amongst the batch of Appeals.

Link to access the Judgment is [here](#).