

**Before**  
**UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**  
**Petition No. 16 of 2019**

**In the Matter of:**

Refund of Additional Surcharge paid to Uttarakhand Power Corporation Ltd. on power purchased through open access during June 2013 to March 2017 by M/s Alps Industries Ltd.

**In the Matter of:**

M/s Alps Industries Ltd. 57/2, Industrial Area, Sahibabad,  
Ghaziabad-201010 (Uttar Pradesh)

.....**Petitioner**

**And**

**In the matter of:**

1. Uttarakhand Power Corporation Ltd. Corporate Head Quarter, Victoria Cross Vijeyta Gabar Singh Urja Bhawan Kanwali Road, Balliwala Chowk, Dehradun.
2. Managing Director, Uttarakhand Power Corporation Ltd., Corporate Head Quarter, Victoria Cross Vijeyta Gabar Singh Urja Bhawan Kanwali Road, Balliwala Chowk, Dehradun.
3. Director (Finance) Uttarakhand Power Corporation Ltd., Corporate Head Quarter, Victoria Cross Vijeyta Gabar Singh Urja Bhawan Kanwali Road, Balliwala Chowk, Dehradun.
4. Director (Operation)Uttarakhand Power Corporation Ltd., Corporate Head Quarter, Victoria Cross Vijeyta Gabar Singh Urja Bhawan Kanwali Road, Balliwala Chowk, Dehradun.
5. The Chief Engineer (Distribution), Uttarakhand Power Corporation Ltd. Roshanabad, SIDCUL, Haridwar.
6. The Superintendent Engineer (Distribution), Uttarakhand Power Corporation Ltd. Roshanabad, SIDCUL, Haridwar.
7. The Executive Engineer, (Distribution) Uttarakhand Power Corporation Ltd. Roshanabad, SIDCUL, Haridwar.

.....**Respondents**

## Coram

**Shri D.P. Gairola, Member (Law)**

**Shri M.K.Jain, Member (Technical)**

**Date of Hearing July 15, 2019**

**Date of Order: August 05, 2019**

This Order relates to the Petition filed by M/s Alps Industries Ltd. (hereinafter referred to as "Petitioner") seeking refund of Additional Surcharge paid to Uttarakhand Power Corporation Ltd. (hereinafter referred to as "Licensee", "Respondent" or "UPCL") on power purchased through open access during June 2013 to March 2017.

### **1. Background**

- 1.1. M/s. Alps Industries Limited, the Petitioner, is a Public Limited Company registered under the Companies Act, 1956 having its registered office at 57/2, Site-IV, Industrial Area, Sahibabad, Ghaziabad- 201010 (Uttar Pradesh) and its two Spinning Mills are situated at SIDCUL, Haridwar, Uttarakhand.
- 1.2. Both the spinning mills of the Petitioner operate on separate Electricity Connections supplied by UPCL. Both units have been availing the facility of Continuous Supply of Power since inception, from UPCL. Besides this, the Petitioner has entered into an Agreement for purchase of power under Open Access through IEX from 17<sup>th</sup> June, 2013.
- 1.3. The consumers availing Open Access under Section 42 of the Electricity Act, 2003 (the Act), are *inter alia* liable to pay Additional Surcharge as specified by the Commission. The Commission under Regulation 24 of UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010 (OA Regulations 2010) & Regulation 23 of UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2015 (OA Regulations 2015) has specified the procedure for the

distribution licensee, i.e. UPCL, to levy Additional Surcharge to the Open Access Consumer. Relevant para of the said OA Regulations, 2015 reads as:

*“(1) Any consumer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under sub-section (4) of Section 42 of the Act.*

*(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.*

*(3) The distribution licensee shall submit to the Commission, on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply.*

*The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge.*

*Provided that any additional surcharge so determined by the Commission shall be applicable on prospective basis on all open access consumers.”*

**[Emphasis added]**

- 1.4. In accordance with the aforesaid provisions, UPCL in the year 2011 had filed a Petition before the Commission for determination of Additional Surcharge to meet the fixed cost of UPCL arising out of its obligation to supply. Accordingly, the Commission vide its Order dated 18.08.2011 approved a levy of 15% surcharge of the applicable ToD rate of energy charge on the basis of prevalent Tariff Order for power drawn through Open Access. Relevant para of the said order of the Commission is reproduced hereunder:

*“16. In the light of the above, the Commission Orders that:*

*(i) The licensee shall charge Additional Surcharge only from those embedded consumers who avail the continuous supply option and draw power through open Access for meeting their part/full load requirements.*

*(ii) The Additional Surcharge shall be levied on the energy drawn through open access @ 15% of the applicable ToD rate of energy charge on the basis of prevalent Tariff Order.*

*...”*

- 1.5. Meanwhile, the Commission during the tariff proceedings for FY 2017-18 received representations from stakeholders that UPCL was charging continuous supply surcharge @15% of energy charges on power availed through open access also. The Commission was requested to exempt continuous supply surcharge on the same. The Commission in its Tariff Order dated 29.03.2017 for FY 2017-18 abolished the applicability of continuous supply surcharge on power purchased through open access.
- 1.6. Subsequent to this, the Commission again received representations from the stakeholders informing the Commission that, UPCL while implementing the aforesaid tariff order dated 29.03.2017, had issued an OM dated 31.03.2017 wherein, UPCL had stated that the continuous supply surcharge shall not be applicable on power procured through open access, however, additional surcharge as approved by the Commission vide its order dated 18.08.2011 shall continue to be payable by those embedded open access consumers who avail continuous supply option and draw power through open access.
- 1.7. Taking cognizance of the above, the Commission initiated *suo-moto* proceedings in the matter. During the proceedings, UPCL informed the Commission that it was not charging continuous supply surcharge on the power sourced through open access as directed by the Commission in the Tariff Order for FY 2017-18 but was charging additional surcharge as approved by the Commission in its Order dated 18.08.2011. UPCL further submitted that both continuous supply surcharge on UPCL energy and additional surcharge on open access energy of such embedded

consumers is being charged and since the rate of charge of additional surcharge and continuous supply surcharge is same, i.e. 15% of energy charges, therefore, additional surcharge and continuous supply surcharge is levied in the same head in the centralised billing system, i.e. continuous supply surcharge. Thereafter, the Commission in its Order dated 23.05.2017 clarified the intent of the Commission while discontinuing the continuous supply surcharge on the energy drawn through open access in its Tariff Order dated 29.03.2017. The relevant para of the said Order dated 23.05.2017 is reproduced below:

*“However, for subsequent financial years, UPCL did not file any petition in accordance with the prevalent Open Access Regulations and continued levying the additional surcharge. UPCL’s contention that it is not charging continuous supply surcharge on the power sourced through open access as directed by the Commission in the tariff order FY 2017-18. However, as submitted by UPCL that at present the continuous supply surcharge/additional surcharge on continuous supply consumers is being charged @ 15% on total energy including UPCL and open access energy through the centralized billing system. UPCL has further submitted that both continuous supply surcharge on UPCL energy and additional surcharge on open access energy of such consumers are being charged. UPCL has also submitted that since the rate of charge of additional surcharge and continuous supply surcharge are same, i.e. 15% of energy charges, therefore, additional surcharge and continuous supply surcharge are levied in same head in the centralized billing system, i.e. continuous supply surcharge. On this continuous supply surcharge/ additional surcharge on the energy drawn through open access, the Commission based on the representations made by various stakeholders during the tariff proceedings for FY 2017-18 had directed that no continuous supply surcharge would be leviable on energy sourced through open access. Now UPCL is taking the premise that it is not charging any continuous supply surcharge as directed by the Commission but is charging the additional surcharge as approved by the Commission vide its Order dated August 18, 2011 as the said Order is still applicable. In this regard, it is important to note that UPCL was continuously billing this additional surcharge for past 5-6 years as continuous supply surcharge and the stakeholders during the Tariff proceedings for FY 2017-18 requested the Commission to discontinue the same. Accepting their*

*representations made in this regard, the Commission directed UPCL to discontinue levying such charge w.e.f. April 01, 2017. Even though additional surcharge was being billed under the nomenclature of continuous supply surcharge as submitted by UPCL, the Commission has already vide its Tariff Order dated March 29, 2017 decided to discontinue levying such charges. The Commission is of the view that when no continuous supply surcharge was being levied by UPCL, there is no relevance of any representations made by Open Access consumers and discontinuing the same by the Commission accordingly. Hence, UPCL has misinterpreted the intent of the Commission."*

- 1.8. Thereafter, the Petitioner, vide letter dated 12.03.2019, filed the instant Petition before the Commission praying that the Commission may direct the Respondent to consider its claim for refund of 15% Surcharge of the applicable ToD rate of energy charge on the basis of prevalent Tariff Order for power drawn through open access from June 2013 to 31.03.2017 together with interest at the rate of 18% and to refund the same within a specified period as determined by the Commission.
- 1.9. Accordingly, the Commission fixed a hearing in the matter on 02.04.2019 and sent a notice for hearing to the Petitioner and UPCL, wherein, UPCL was also directed to submit its comments, if any, before the Commission.
- 1.10. UPCL vide letter dated 30.03.2019 submitted its comments before the Commission which were replied to by the Petitioner vide letter dated 02.04.2019. A hearing was conducted in the matter on 02.04.2019 where both the parties were heard. The Commission admitted the Petition. Thereafter, a second hearing was conducted at the Commission's office on 30.05.2019 wherein, the Commission, on the request of UPCL, allowed it to file a detailed objection against the Petition.
- 1.11. Subsequently, UPCL vide letter dated 15.06.2019 filed a detailed reply on the merits of the Petition before the Commission which was point wise replied to by the Petitioner vide its letter dated 21.06.2019. The Commission heard both the parties on merit on 15.07.2019, wherein the Commission heard the arguments/submission made by the parties at length.

## 2. Submission of the Respondent

2.1. Having perused the submission of UPCL it is observed that UPCL at the very outset has challenged the jurisdiction of the Commission to entertain the instant Petition. UPCL submitted that the matter is related to a dispute between the licensee and the consumer and therefore, the matter should be placed before the Consumer Grievance Redressal Forum and not the Commission. Substantiating its argument, UPCL has relied upon the judgment dated 14.08.2007 of the Hon'ble Supreme Court in the matter of *Maharashtra State Electricity Regulatory Commission Vs. Lloyds Steel Industries Ltd.* in *Civil Appeal 3551 of 2006*, submitting that in case of individual consumer dispute with the licensee, a consumer shall approach the forums established under section 42 (5) & 42 (6) of the Act.

The Respondent further submitted that the Petitioner has not revealed the specific provisions under which the Petition has been filed.

2.2. In addition to the above, UPCL also referred the judgment dated 28.07.2011 of the Hon'ble APTEL in the matter of *MSEDCL Vs. MERC & Ors.*, submitting that in the said matter APTEL had held that only the matters related to grant of open access lie in the jurisdiction of the Regulatory Commissions whereas all other downstream issues, which may come up after allowance of open access, shall be treated under grievance and jurisdiction, accordingly, will lie before CGRF.

2.3. Further, UPCL also raised the issue of limitation and mooted that the Petition is time barred and is liable to be dismissed.

2.4. Further, UPCL submitted that the Commission, earlier, in similar kind of petition filled by M/s Kashi Vishwanath Textile Mill (P) Ltd. in the year 2017, did not entertain the matter and since the present matter is similar nature the same is liable to be dismissed.

2.5. Furthermore, UPCL submitted that the Commission has only abolished/discontinued the surcharge from 01.04.2017 onwards and all the charges before that were allowed by the Commission.

### 3. Submission of the Petitioner

- 3.1. The Petitioner submitted that the levy of 15% surcharge of the applicable ToD rate of energy charge on the power drawn through Open Access approved by the Commission vide order dated 18.08.2011 was for the financial years 2010-2011 and 2011-2012 only. That the Tariff Orders for the financial years 2012-13 and onwards did not approve levy of the said 15% surcharge and, therefore, UPCL has no right to levy the same.
- 3.2. Further, the Petitioner submitted that it had started purchasing Open Access power through IEX from June 2013 onwards, and UPCL till 31.03.2017 has charged 15% surcharge of the applicable tariff rate of energy charge on the power drawn through Open Access from the Petitioner which is illegal and arbitrary and against the approved tariff of the Commission.
- 3.3. The Petitioner referred to the Order of the Commission dated 23.05.2017 stating that it clearly shows that to levy any charge by the licensee on the Petitioner, the same had to be approved in the Tariff Order of that financial year prior to being charged from the Petitioner.
- 3.4. In addition to the above, the Petitioner submitted that it has been made to pay 15% surcharge of the applicable ToD rate of energy charge on the power drawn through Open Access from 17.06.2013 to 31.03.2017 which amounts to Rs. 4.85 Crores approximately and that any amount which is charged by the licensee without the approval of the Commission is illegal and is liable to be refunded to the consumer with interest.
- 3.5. That in view of tenets laid down by the Hon'ble Supreme Court in case of UPSEB Vs. Atma Steels reported in (1998) 2 SCC 597, the Petitioner is also entitled to be paid the interest at least of 18% per annum.
- 3.6. The Petitioner has also referred to the judgment of Hon'ble Supreme Court in case of *Shree Sidhballi Steels Limited vs. State of Uttar Pradesh, (2011) 3 SCC 193*, wherein the Hon'ble Court has clarified that the licensee has no power to amend and/or modify the tariff determined by the Regulatory Commission.

- 3.7. On the issue of the Petition not being filed under any specific provision, the Petitioner submitted that the object and the preamble of the Act intends to ensure more transparency and safeguard of consumer rights. The dispute involved in the present Petition is directly connected with the protection of the interest of the consumer. Further, under section 86 (a) & (b) the Commission has powers to determine the tariff for generation, supply, transmission, wheeling of electricity etc. and where open access has been permitted under section 42 of the Electricity Act, 2003, the Commission has powers to determine the wheeling charges and surcharge thereon. Thus, section 86 (a) & (b) empowers the Commission to settle this instant dispute.
- 3.8. The Petitioner submitted that the instant Petition concerns the tariff orders of the Commission, the interpretation thereof and the violation of the said tariff orders by UPCL, which proceedings are within the exclusive jurisdiction of the Commission. Such proceedings cannot be said to be subject matter of dispute before the Consumer Redressal Forum or Ombudsman. Supplementing the argument, the Petitioner referred to the judgment dated 07.02.2017 of the Hon'ble APTEL in the matter of Paschim Gujarat Vij Company Ltd. Vs. Gokul Agro Resources Ltd. & Ors.
- 3.9. With regard to the issue of jurisdiction of the Commission and *locus-standi* of the Petitioner to file the petition, the Petitioner submitted that it is a consumer of UPCL and has complained on the levy of additional surcharge by UPCL without authority of law and contrary to the tariff orders passed by the Commission. The issue concerns the tariff orders of the Commission, the interpretation thereof and violation of the said tariff orders by UPCL, therefore, the proceedings are within the exclusive jurisdiction of the Commission.
- 3.10. On the issue of limitation, the Petitioner submitted that limitation is applicable only to civil proceedings covered by the Civil Procedure. For proceedings under the Electricity Act, 2003, the Hon'ble Supreme Court in the case of *AP Power Coordination Committee v. Lanco Kondapalli Power Limited & Ors.* (2016) 3 SCC 468 has specifically clarified that limitation is not applicable to the proceedings under the Electricity Act, 2003 except for the adjudicatory functions of the Commission under

section 86 (1) (f) and that the present proceedings are not under section 86 (1)(f). Therefore, the question of limitation does not arise.

3.11. It was further submitted by the Petitioner that Section 62 (6) of the Act places an obligation on the licensee to refund the excess tariff charged along with interest. In addition, Section 45 of the Act places an obligation on the licensee to levy tariff strictly in accordance with such tariff as determined by the Commission from time to time and violation of the said provisions is subject to penal action under section 142 of the Act.

#### **4. Commission's view and decision**

4.1. The Commission at length heard the submissions made by both parties and, accordingly, has identified three issues which are cardinal to the present matter in dispute. Arguments raised on the issues have also been taken on record. The issues identified by the Commission are as follows:

- (i) Whether the Commission has jurisdiction to hear the Petition filed in a dispute between the distribution company and an individual consumer.
- (ii) Whether the Petition is time barred under the Limitation Act 1963 (Limitation Act) and whether the same is applicable in the present proceedings.
- (iii) Whether the levy of 15% Additional Surcharge, on the Petitioner, by the licensee, during the period 17.06.2013 to 31.03.2017, when the Petitioner was purchasing power under Open Access through IEX, is legally tenable and whether the Petitioner is entitled for refund of such Additional Surcharge.

4.2. With regard to the first issue, i.e. Whether the Commission has the jurisdiction to hear the Petition, both parties have mooted their arguments wherein, UPCL has submitted that the matter being a dispute between consumer and licensee this dispute should be placed before the concerned CGRF established under section 42(5) of the Electricity Act, 2003 and the Commission does not have jurisdiction to entertain individual consumer complaints. UPCL has relied upon the judgment of

the Hon'ble Supreme Court dated 14.08.2007 (**Supra**) to substantiate its argument. Relevant extract of the said judgment is reproduced hereunder:

*“Thus a complete machinery has been provided in Section 42(5) and 42(6) for redressal of grievances of individual consumers. Hence wherever a Forum/Ombudsman have been created the consumers can only resort to these bodies for redressal of their grievances. Therefore, not much is required to be discussed on this issue. As the aforesaid two decisions correctly lay down the law when an individual consumer has a grievance he can approach the forum created under sub-section (5) of Section 42 of the Act.*

*8. In this connection, we may also refer to Section 86 of the Act which lays down the functions of the State Commission. Sub-Section (1) (f) of the said Section lays down the adjudicatory function of the State Commission which does not encompass within its domain complaints of individual consumers. It only provides that the Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any such dispute for arbitration. This does not include in it an individual consumer. The proper forum for that is Section 42(5) and thereafter Section 42(6) read with Regulations of 2003 as referred to hereinabove.”*

- 4.3. Besides above, UPCL also submitted that the matters related to only grant of Open Access lie in the jurisdiction of the Regulatory Commissions, whereas all other downstream issues, which may come up after allowance of Open Access, are to be treated under grievance and jurisdiction, accordingly, will lie before the respective Forum. In this regard, UPCL referred to the judgment dated 28.07.2011 of the Hon'ble Tribunal in the matter of *MSEDCL Vs. MERC & Ors.* The findings of the Hon'ble Tribunal in the said judgment is reproduced hereunder:

“29

*...As per the 2003 Act, the Commission has been empowered to provide open access and to ensure open access which includes the issuance of direction to grant open access. This jurisdiction cannot be taken away by the Consumer Grievance Redressal Forums. ”*

...

*46. The dispute relating to the Open Access would be dealt only by the Commission as the Act clearly provides that the Commission must ensure fulfillment of the mandate to provide such Open Access which would include issuing directions to grant Open Access which has rightly been given in the impugned order..."*

- 4.4. In reply to the above submissions of UPCL, the Petitioner submitted that where the issue concerns the tariff orders of the Commission, the interpretation thereof and violation of the said tariff orders by UPCL, the proceedings are within the exclusive jurisdiction of the Commission. Supplementing its argument the Petitioner has quoted the judgment dated 07.02.2017 of the Hon'ble APTEL in the matter of *Paschim Gujarat Vij Company Ltd. vs. Gokul Agro Resources Ltd. & Ors.*, Appeal No. 264 of 2016, relevant extract of which is reproduced hereunder:

*"22. We must also revisit Section 42(8) of the said Act which states that the provisions of sub-sections (5) and (6) shall be without prejudice to the right which the consumer may have apart from the right conferred upon him by sub-sections (5) and (6) of Section 42. It is clear from the language of sub-section (8) of Section 42 that any right the consumer may have under sub-sections (5), (6) and (7) of Section 42 would be in addition to and not in derogation of any other right under the said Act. Counsel for the Appellant has, relying on the judgment in *Dakshin Haryana Bijli Vitaran Nigam Ltd.*, urged that Section 173 of the said Act saves the Consumer Protection Act, 1986, and, therefore, the consumer can approach the Consumer Redressal Forum constituted thereunder. It is true that a consumer's right to approach the Consumer Redressal Forum can be said to be covered by Section 42(8), but *Dakshin Haryana Bijli Vitaran Nigam Ltd.* does not say that any other right which the consumer may have under the said Act is not covered by Section 42(8). Thus, a consumer will be entitled to approach the State Commission in cases where there is a violation of the provisions of the said Act or the regulations framed by the State Commission or orders passed by the State Commission A-264.16 or in complex cases, which are not pure and simple billing disputes but which involve interpretation of the provisions of the said Act, relevant regulations and tariff orders."*

4.5. In this regard it is relevant to quote section 42(8) of the 2003 Act which stipulates that:

*“(8) The provisions of sub-sections (5),(6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections.”*

From reading the above, it is understood that the remedy available to the consumer under section 42(5) & 42(6) is without prejudice to any other remedies available to the consumer and the said Sections do not curtail/limit the right of the consumer that it may have apart from the said Sections.

In addition to this, it is relevant to quote here the judgment dated 30.01.2017 of the Hon’ble APTEL in the matter of *Power Transmission Corporation of Uttarakhand Vs. M/s Gold Plus Glass Industries Ltd. & Ors. in Appeal No. 226 of 2014 and I.A. No. 346 of 2014*, wherein the Hon’ble Tribunal had observed that:

*“35. At this stage, it is necessary to revisit to Section 42(8) of the said Act which provides that the provisions of sub-sections (5) and (6) shall be without prejudice to a right which the consumer may have apart from the right conferred upon him by sub-sections (5) and (6) of Section 42. Thus any right the consumer may have under sub-sections (5) (6) and (7) of Section 42 would be in addition to and not in derogation of any other right under the said Act. This, in our opinion, preserves the State Commission’s jurisdiction to step in, in gross cases particularly of violation of the said Act or the relevant regulations or its orders.”*

**[Emphasis added]**

4.6. Besides above, the Hon’ble Supreme Court and the Hon’ble APTEL has deliberated upon this issue in plethora of its judgments. Some of the findings of the Hon’ble Courts which are relevant to settle the present issue over jurisdiction need to be perused. In the matter of *Maharashtra Electricity Regulatory Commission Vs Reliance Energy Ltd. & Ors on 14 August, 2007, Civil Appeal No. 2846 of 2006*, the Hon’ble Supreme Court has held that:

*“16. When the Commission received a spate of complaints from consumers against its licensees/distribution companies that they are arbitrarily issuing supplementary/amended bills and charging excess amounts for supply of electricity, it felt persuaded to invoke its general power to supervise the licensees/distribution companies and in that connection issued notice dated 3.8.2004. **There can be no manner of doubt that the Commission has full power to pull up any of its licensee or distribution company to see that the rules and regulations laid down by the Commission are properly complied with.** After all, it is the duty of the Commission under Sections 45(5), 55(2), 57, 62, 86, 128, 129, 181 and other provisions of the Act to ensure that the public is not harassed.”*

**[Emphasis added]**

- 4.7. In the judgment of the Hon’ble APTEL dated 30.01.2017 (**Supra**), the Hon’ble Tribunal while referring to another judgment delivered by it, had observed that:

*37. In this connection, we may refer to the judgment dated 11/03/2011 passed by this Tribunal in MSEDCL v. MSERC on which reliance is placed by Respondent No.1. In that case, the consumer had approached Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) for refund of the excess service line charges paid based on Circular No.631. The State Commission passed order directing MSEDCL to refund the amount. MSEDCL challenged the said order inter alia on the ground that the State Commission had no jurisdiction to entertain the consumers’ petition because it was a dispute between consumer and licensee. Reliance was placed on Reliance Energy Limited. This Tribunal held that in Reliance Energy Limited, the Supreme Court has held that the State Commission has got full powers to pull up a distribution licensee to ensure that the rules and regulations laid down by the State Commission as well as the orders passed by it are complied with. This Tribunal observed that billing dispute between the licensee and consumer cannot be gone into by the State Commission, but retaining excess service line charges under a Circular held to be invalid was illegal and, therefore, the State Commission has jurisdiction to entertain such dispute.*

- 4.8. The conjoint reading of all the judgments stated above would provide sufficient powers to the State Commission to give suitable directions as may be necessary to prevent the abuse of process or to meet the end of justice. It is amply clear that the Commission has full power to pull up the licensee where there is violation of the provisions of the Act/Rules/Regulations or the Orders/directions of the Commission which shall *inter alia* include the dispute of the open access consumer with the licensee arising out of the said violations.
- 4.9. Considering the above w.r.t. the present matter, the Petitioner has pointed out that the Petitioner is a consumer of UPCL and has complained on the levy of tariff by UPCL without authority of law and contrary to the tariff orders passed the Commission and since the issue entails interpretation of the order and compliance of the Regulations of the Commission, is of the exclusive jurisdiction of the Commission. Hence, the question raised by Respondent (UPCL) over jurisdiction of the Commission is hereby declined.
- 4.10. With regard to the second issue raised by UPCL regarding the Petition being time barred under the Limitation Act, the Petitioner has relied upon the judgment of the Hon'ble Supreme Court (**Supra**) stating that limitation is not applicable to the proceedings under the Electricity Act, 2003 except for the adjudicatory functions of the Commission under section 86(1)(f) and that the present proceedings are not under section 86(1)(f). In this regard it is relevant to quote the said judgment of the Hon'ble Court,

*“(i) A plain reading of this section leads to a conclusion that unless the provisions of the Electricity Act are in conflict with any other law when this Act will have overriding effect as per Section 174, the provisions of the Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force.*

*(ii) In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Section 174 and 175 of the Electricity Act*

*assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence or limitation, we are persuaded to hold that in the light nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation.*

*(iii) In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86 (1)(f) also appears to be for speedy resolution so that a vital developmental factor – electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the civil court. Evidently, in the absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. **Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.***

**[Emphasis added]**

- 4.11. From the above judgment of the Hon'ble Court it is clear that the limitation bar only applies to the proceedings initiated under section 86(1)(f) of the Act invoking only judicial powers of the Commission. Since, the instant matter propels to invoke the regulatory powers of the Commission and is not an adjudication matter under section 86(1)(f), therefore, the question of applicability of Limitation Act does not arise.
- 4.12. With regard to the third issue, i.e. Whether the levy of 15% Additional Surcharge, on the Petitioner, by the licensee, during the period 17.06.2013 to 31.03.2017, when the Petitioner was purchasing power under Open Access through IEX, is legally tenable and whether the Petitioner is entitled for refund of such Additional Surcharge, it is imperative that before delving into the correctness of levy of such surcharge, the law which authorizes UPCL to levy such charges be studied.

Section 42(4) of the Electricity Act, 2003 stipulates that:

*"(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."*

Further, Clause 8.5.4 of the Tariff Policy dated January 28, 2016 also provides for levy of additional surcharge as follows:

*"8.5.4 The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related to network assets would be recovered through wheeling charges."*

The provisions for charging additional surcharge have already been specified in UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010. The same provisions have also been provided in UERC (Terms and Conditions of Intra-

State Open Access) Regulations, 2015. Relevant extract of Regulation 23 of the existing Open Access Regulations, 2015 is as follows:

*“(1) Any consumer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under sub-section (4) of Section 42 of the Act.*

*(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.*

*(3) The distribution licensee shall submit to the Commission, on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply.*

*The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge. Provided that any additional surcharge so determined by the Commission shall be applicable on prospective basis on all open access consumers.”*

From the above, it is established under law that UPCL is entitled to levy such surcharge, however, it is conditional and subject to submission of detailed calculations and relevant statements by it before the Commission.

In this connection, it is also relevant to visit the Commission’s Order dated 23.05.2017, relevant extract of the said Order reads as,

*“2.4 The Open Access Regulations clearly provide that the licensee has to establish, by way of filing a petition before the Commission, that the power remained stranded on account of increase in capacities than what was envisaged, for procuring power through open access. Further, on six monthly basis licensee has to mandatorily submit detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply power. Moreover, UPCL has not demonstrated that due to*

*procurement of power through open access by such consumers, the power arranged through long-term contracts remained stranded. In the absence of any approved additional surcharges w.e.f. 01.04.2017, the licensee is not entitled to levy the same from open access consumers as also decided vide the Commission's Tariff Order dated 29.03.2017.*

*2.5 For the purpose of claiming additional surcharge from such stakeholders UPCL may file a petition as provided in the Regulations. Till determination of such charges by the Commission UPCL is directed to stop levying the same with immediate effect in accordance with the directions provided in the Tariff Order dated 29.03.2017."*

- 4.13. It is clear that for levying the aforesaid Additional Surcharge @15% of the prevalent energy charges it is pre-requisite for the distribution licensee, i.e. UPCL to submit detailed calculation statement of fixed cost which the licensee is incurring towards its obligations to supply before the Commission and in absence of such compliance by the distribution licensee, levying of such surcharge becomes illegitimate.
- 4.14. Notwithstanding the above, here it will be pertinent to mention that the Petitioner has been availing open access since June 2013 and paying the continuous supply surcharge/additional surcharge from June 2013 till March 2017 i.e. for almost 4 years and till the filing of this Petition has never agitated or objected to payment of continuous supply surcharge /additional surcharge in any Forum. All these 4 years, the Petitioner along with other embedded open Access consumers continued to enjoy the benefits of lower consumer tariff as the additional surcharge recovered by UPCL from open access consumers is treated as part of non-tariff income which gets adjusted in the overall Annual Revenue Requirement (ARR) of UPCL and thereby lower tariffs have been charged from the consumers of electricity in the State including these industrial consumers who were also open access consumers. Accordingly, till March 2017, the benefit of additional surcharge recovered by UPCL was passed on to the consumers of electricity and was never retained by UPCL in accordance with the MYT Regulations. It will not be out of place here to mention that the Petitioner being an industry would have already factored in the cost of electricity including additional surcharge being levied on it alongwith other

costs, viz. raw material cost, salaries, overheads, etc. while pricing its product costs which includes profits also. The Petitioner would not be refunding the profits earned on its products to the sellers. The Petitioner now seeking refund of continuous supply surcharge/additional surcharge from June 2013 till March 2017 is not acceptable since the Petitioner was fully aware that it was paying a surcharge @ 15% of applicable energy charges on the power drawn through Open Access and the such surcharge was nothing but Additional Surcharge, since, the Commission in its Order dated 18.08.2011 had very categorically stated that **except for continuous supply surcharge**, open access consumers are liable to pay the open access charges namely cross subsidy surcharge, wheeling charges etc. The relevant extract of the Order is reproduced below:

*“Based on the above and considering the uncertain scenario of power purchase cost on a day to day basis, it has been considered that, since, embedded consumers of licensee, availing continuous supply option, are liable to pay the open access charges namely wheeling charges, transmission charges, cross-subsidy charges etc. **except continuous supply surcharge** of 15% while availing open access, a normative additional surcharge of 15% on prevalent energy charges as per Tariff Order, may be levied on energy drawn through open access by these embedded consumers availing continuous supply option and seeking to draw part or full of its demand through open access.”*

4.15. The Commission is of the view that had this issue of levy of additional surcharge been agitated before by the open access consumers then the onus to file the Petition for approval of additional surcharge before the Commission would have been on UPCL. However, since the issue was never agitated nor any clarification was sought by the Petitioner whether the Order of the Commission dated 18.08.2011 was applicable for FY 2011-12 only or was it applicable for the ensuing years as well, UPCL continued charging the same till it was discontinued by the Commission in its Tariff Order dated 29.03.2017. This action of the Petitioner seeking refund of the Additional surcharge from June 2013 till March 2017 seems to be an afterthought for deriving additional benefits as it continued taking the benefit of procuring cheaper power under open access by paying additional surcharge being charged by UPCL but also continued enjoying lower tariffs as

revenue through additional surcharge continued reducing the Annual Revenue Requirement of UPCL and consequently the tariff to be charged from the consumers were also lowered and not increased to a real extent.

- 4.16. In the light of the justification given above the embedded open access consumers alongwith other consumers of the State, subsequent to FY 2011-12, continued to enjoy lower tariffs. At this stage, it would be a very complex exercise to work out the power that remained stranded from FY 2012-13 to FY 2016-17 & based on it to work out the additional surcharge for that period and to give effect to the same in the previous tariff orders and also to effect revision of consumer tariffs w.e.f. FY 2012-13, hence, considering the fact that during the time the additional surcharge was charged by UPCL, the Petitioner continued paying the same, the Commission is not inclined to amend the same.

Further, reliance made by the Petitioner on Section 62(6) of the Act is not relevant as the same applies to excess recovery by a licensee of charges recovered exceeding tariff determined under Section 62 of the Act, i.e. tariffs for generation/transmission/retail sale or wheeling of electricity. Additional surcharge is nowhere covered in this section.

### **ORDER**

In light of the above, the Commission decides to reject the claims of the Petitioner. The Petition is hereby dismissed.

Ordered accordingly.

(M.K. Jain)  
Member (Technical)

(D.P. Gairola)  
Member (Law)