

Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION
Petition No. 34 of 2019

In the Matter of:

Additional Surcharge levied by Uttarakhand Power Corporation Ltd. during the period 01st December 2014 to 31st March 2017 on open access power purchased by M/s Kashi Vishwanath Textile Mill (P) Ltd.

In the Matter of:

M/s Kashi Vishwanath Textile Mill (P) Ltd.
5th Km Stone, Ram Nagar Road, Kashipur, Udham Singh Nagar.

.....**Petitioner**

And

In the matter of:

Uttarakhand Power Corporation Ltd. Corporate Head Quarter, Victoria Cross Vijeyta Gabar Singh Urja Bhawan Kanwali Road, Balliwala Chowk, Dehradun.

.....**Respondent**

Coram

Shri D.P. Gairola, Member (Law)

Shri M.K.Jain, Member (Technical)

Date of Hearing September 9, 2019

Date of Order: October 15, 2019

This Order relates to the Petition filed by M/s Kashi Vishwanath Textile Mill (P) 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 the period 01st December 2014 to 31st March 2017.

1. Background

- 1.1. M/s Kashi Vishwanath Textile Mill (P) Ltd. is a Private Limited Company registered under the Companies Act, 1956 having its registered office at 5th Km Stone, Ram Nagar Road, Kashipur, Udham Singh Nagar, Uttarakhand and is manufacturer of synthetic yarn.
- 1.2. The Petitioner, in order to run its Mill, takes the electricity supply from UPCL having a contracted load of 3.2 MW and has opted for continuous supply option. Besides procuring electricity from the Respondent, the Petitioner also purchases power through open access as per section 42 of the Electricity Act 2003 (the Act) and the provisions of the Open Access Regulations.
- 1.3. During the period 01.12.2014 to 31.03.2017, the Petitioner had purchased 81,53,873 units of electricity through open access and the Respondent had charged 15% additional surcharged on the rate of ToD on the units purchased through open access.
- 1.4. The consumers availing Open Access under Section 42 of 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 on the Open Access Consumers. Relevant para of the said OA Regulations, 2015 reads as:

"23. Additional Surcharge

(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]

- 1.5. 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.*
...”

- 1.6. 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 w.e.f 01.04.2017.
- 1.7. 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 @ 15% of applicable energy charges on power purchased through open access, 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.
- 1.8. 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 being the same, i.e. 15% of energy charges,

therefore, additional surcharge and continuous supply surcharge is levied under the same head in the centralised billing system, i.e. continuous supply surcharge. Thereafter, the Commission in its *Suo-moto* 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."

- 1.9. In the same matter in year 2017, the Petitioner had filed a Petition before the Commission (Misc. Application No. 49 of 2017) seeking refund of Additional Surcharge levied by Uttarakhand Power Corporation Ltd. during the period 01st December 2014 to 31st of March 2017 on Open Access Power Purchased. The Commission disposed off the said Petition vide its Order dated 18.12.2017 stating that:

On the examination of the copy of Writ Petition filed by the Petitioner before the Hon'ble High Court of Uttarakhand it is evident that cause of action and relief sought by the Petitioner from the Hon'ble High Court of Uttarakhand and this Commission are same. In this regard, it is relevant to mention here Section 10 of The Code of Civil Procedure 1908 & the Rule of Res Sub Judice therein, bars the Courts to proceed with the trial of a matter/issue which is also directly and substantially in issue in a previously instituted matter, pending before the Court, between the same parties.

- 1.10. Meanwhile, the Hon'ble High Court of Uttarakhand vide its Order dated 30.04.2019 dismissed the aforesaid Writ Petition. The relevant portion of the said order is reproduced as below:

"...

25. In that view of the matter, the writ petition is dismissed with liberty open to the petitioner to approach before the Grievance Redressal Forum for redressal of his

grievance against imposition of additional surcharge for availing open access. Hence the writ petition deserves to be dismissed and accordingly same is dismissed."

- 1.11. The Petitioner in the light of the Order passed by Hon'ble High Court of Uttarakhand, filed the instant Petition before the Commission praying that the Commission may direct the Respondent to refund amount of Rs. 65,35,600/- paid as additional surcharge between 01.12.2014 to 31.03.2017 with interest at bank rate along with cost of expenses for filing this Petition.
- 1.12. Accordingly, the Commission fixed a hearing in the matter on 10.07.2019 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. On the request of the Petitioner the hearing was rescheduled to 09.09.2019.
- 1.13. Meanwhile, the Petitioner filed a review application before the Hon'ble High Court of Uttarakhand seeking liberty that he may also be permitted to either approach the Consumer Redressal Forum under Section 42 or before UERC under Section 94 of the Electricity Act, 2003.
- 1.14. The Hon'ble High Court of Uttarakhand vide its Order dated 16.07.2019 modified its earlier Order dated 30.04.2019. The relevant portion of the same is reproduced below:

"Subject to that limited modification, the Order dated 30.04.2019 is modified to the extent that apart from availability of remedy to the petitioner under Section 42 of approaching before the Consumer Grievance Redressal Forum, the petitioner may, either if so advised, it would be open for him to invoke the remedy available to him under Section 94 of the Electricity Act, 2003"

- 1.15. The Respondent vide letter dated 06.09.2019 submitted its comments before the Commission. Thereafter, a hearing was conducted in the matter on 09.09.2019 wherein both the parties were heard at length.

2. Submission of the Petitioner

- 2.1. The Petitioner has submitted that the Commission's Order dated 08.08.2011 was only for the financial year 2010-11 and not for further period, however, UPCL continued charging additional surcharge on the basis of the said Order of the Commission. The Respondent was charging 15% extra on the basis of office memorandum issued from time to time during the period 01.12.2014 to 31.03.2017.
- 2.2. The Petitioner further submitted that the Respondent has no justifiable reason or ground to impose additional surcharge on open access consumers opting for continuous supply option. The imposition of additional surcharge is arbitrary illegal, violates principles of natural justice, and the recovery thereof is not authorized by applicable Law or Regulations and the amount of additional surcharge collected is liable to be refunded to the Petitioner alongwith interest from whom it has been collected by UPCL.
- 2.3. Further, the Petitioner, substantiating its claim has referred to the prevailing Open Access Regulations and the relevant Orders of the Commission, which are already discussed in the above paras. In continuation to this, the Petitioner has also mentioned Section 42 (4), 86(a) the Electricity Act, 2003 and the formula laid down in National Tariff Policy for calculation of additional surcharge.

3. Submission of the Respondent

- 3.1. The Respondent submitted that the Petition is not legally maintainable as the Petitioner has no remedy available u/s 94 of the Electricity Act, 2003. According to the Respondent for the present relief the remedy available to the consumer is only u/s 42 of the Act as was held earlier by the Hon'ble High Court of Uttarakhand Order dated 30.04.2019.
- 3.2. Further the Respondent submitted that Petitioner has no cause of action and no ground for claiming any relief even otherwise the relief as claimed by the Petitioner cannot be granted in the present forum and requested the Commission that grievance of the individual consumers is to be dealt and decided by the

Consumer Redressal Forum and the Commission does not have jurisdiction in such matters.

- 3.3. The Respondent referred to the para 4.14 to 4.16 of the Commission's Order dated 05.08.2019 in the matter of refund of additional surcharge paid to UPCL on power purchased through open access during June 2013 to March 2017 by M/s Alps Industries Ltd and submitted that in light of the aforesaid Order of the Commission the instant Petition is not maintainable and liable to be dismissed.
- 3.4. The Respondent further submitted that the contentions and issues in the matter of M/s ALPS Industries (Petition No. 16 of 2019) and the present Petition are the same and requested the Commission to consider their earlier reply in the matter as part of the present reply.

4. Commission's view and decision

- 4.1. The Commission has considered and analyzed the submissions made by both the parties in the matter and has made its observations in the following paras:
- 4.2. Before delving into the claim of the Petitioner with regard to refund of the amount paid as surcharge between 01st December 2014 to 31st of March 2017, it is pertinent to first address the issue of maintainability as raised by the Respondent. The Respondent has claimed that the Petitioner does not have any remedy available under section 94 of the Act, and the remedy available to the consumer is only u/s 42 of the Act. Where section 94 of the Act talks about the general powers of the Commission to conduct inquiry and proceedings, Section 42 (5) & (6) provides remedy to a consumer to approach the Consumer Grievance Redressal Forum and Ombudsman if needed. However, it is observed that mere availability of a forum for a consumer to approach in distress does not bar the Commission to take up the matters where it finds imperative to act upon. In this regard, the Commission in its Order dated 05.08.2019 in the matter of M/s Alps Industries Ltd. vs. UPCL & Ors. (Petition No. 16 of 2019) has *inter-alia* dealt with the same issue of jurisdiction of the Commission and has referred to the various Orders of the Hon'ble Supreme

Court and Hon'ble APTEL and concluded that wherever there is violation of the provisions of the Act/Rules/Regulations or the Orders/directions of the Commission, the Commission has full powers to pull up the licensee. The relevant para of the aforesaid Order is reiterated below:

"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."

From the above it is beyond doubt that the Commission has full jurisdiction to entertain the instant Petition filed by M/s Kashi Vishwanath Textile Mill (P) Ltd.

- 4.3. With regard to second issue regarding the Petition being time barred under the Limitation Act, the Commission in its Order dated 05.08.2019 has referred to the Order of the Hon'ble Supreme Court of India in the case of AP Power Coordination Committee vs. Lanco Kondapalli Power Limited & Ors. (2016) 3 SCC 468. The relevant portion of the aforesaid Order is reproduced below:

"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.”

The Petition is akin to complaint filed by the consumer against the distribution licensee (UPCL) with regard to erroneous charging of additional surcharge on the Petitioner during the period of procurement of power under open access. Even if it is a dispute, such dispute cannot be adjudicated by the Commission under Section 86(1)(f), since adjudication under the aforesaid Section should pertain to dispute between licensees and generating companies, which is not the case here. Hence, such complaints have to be dealt by the Commission though exercising its regulatory powers provided under the Act/Regulations including examination of any violation of any provision of the Act/Regulations or cost benefit analysis in terms of tariffs recovered from consumers by the licensee. Since the matter is not an adjudication proceeding under Section 86(1)(f) of the Act, hence, not barred by the limitation Act in accordance with the above Order of the Hon'ble Supreme Court.

- 4.4. With regard to issue whether the levy of 15% Additional Surcharge, on the Petitioner, by the licensee, during the period 01.12.2014 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 to state that the Petitioner during the period 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. The Commission is of the view 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. Further, the Petitioner now seeking refund of continuous supply surcharge/additional surcharge from December 2014 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 Commission in its Order dated 05.08.2019 further opined that:

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.

- 4.5. In light of the above, the Commission does not find any merit in the Petition and decides to reject it. Hence, the Petition is hereby dismissed.

Ordered accordingly.

(M.K. Jain)
Member (Technical)

(D.P. Gairola)
Member (Law)