

THE ELECTRICITY OMBUDSMAN, UTTARAKHAND

M/s Air Liquide North India Pvt. Ltd.,
25-C Block, Community Center, Janakpuri New Delhi – 110058
(through its M.D., Shri Satish Kochhar)

Vs

1. The Chairman/Managing Director, UPCL, Urja Bhawan, Kanwali Road, Dehradun, Uttarakhand.
2. The Executive Engineer, Electricity Distribution Division (Rural), UPCL, Civil Lines, Roorkee, Distt. Haridwar, Uttarakhand.

Representation No. 08/2008

Order

1. This representation has been filed by M/s Air Liquide North India Pvt. Ltd. 25-C Block, Community Centre, Janakpuri, New Delhi (Petitioner) against the order of the Consumer Grievance Redressal Forum, Garhwal Zone (Forum) dated 12.03.2008. A copy of the representation was given to UPCL who has filed its reply on 21.05.2008. Subsequently on 20.10.2008 the petitioner moved an application for filing some documents existence of which had been denied by the respondent but the same were obtained by the Petitioner under the RTI Act. This request was objected to by UPCL but allowed by the undersigned vide order dated 12.11.2008. UPCL filed its response to the new submissions on 07.01.2009. On 14.01.2009 an application was filed on behalf of UPCL seeking to place on record the stay order passed by the Hon'ble High Court of Uttarakhand in Writ Petition no. 2165 of 2008 staying the operation of the order passed by the undersigned on 22.10.2008 in another case. UPCL requested only for the copy of the said order to be placed on file which was allowed.
2. Brief facts of the case are that the Petitioner has an Industrial unit for manufacture of Medical Oxygen and some other gases at AIS Industrial Area, Roorkee and has been sanctioned a load of 8 MVA on 03.08.2005. On 29.08.2007, UPCL raised an additional demand of Rs. 29.25 lac for the power used by the Petitioner during the period 10.01.2007 to 15.03.2007. In addition a penalty of Rs 2.60 crore was imposed on the Petitioner for violation of restrictions on usage of power by the Industry during this period. The Petitioner under threat of disconnection from UPCL was forced to

pay both the amounts. Aggrieved by this action of UPCL the Petitioner approached the Forum who, after hearing the two parties passed the impugned order on 12.03.2008, dismissing the Petitioner's complaint. Aggrieved by the same the Petitioner has filed the present representation.

3. It is not denied that in exercise of its power u/s 23 of the Electricity Act 2003, Uttarakhand Electricity Regulatory Commission (Commission) approved on 09.01.2007 regulation of supply of electricity by UPCL to all its consumers. This was to be done as per the rostering schedule approved by the Commission. Subsequently on 25.01.2007 the Commission also approved imposition of restriction on use of electricity by Industrial Consumers during the 17:00 to 22:00 hrs, subject to certain conditions. It is also not disputed that UPCL continued to supply, and the Petitioner continued to draw power during these hours in the relevant period i.e. 10.01.2007 to 15.03.2007. It is also not denied that the relevant Tariff Order of the Commission stipulates that in case of such restrictions being placed by the Commission, a consumer could opt for drawing continuous supply but will have to pay higher tariff. At the same time a consumer not using this option and violating such restrictions was liable to be penalised by way of penalty stipulated in the Tariff Order.
4. The Petitioner's contention is that his manufacturing process is such that continuous supply of power is required. It is for this reason that even while applying for the power connection the Petitioner had clearly requested for continuous supply on 20.04.2005 itself. Further on learning about the rostering of supply approved by the Commission on 09.01.2007, the Petitioner gave a letter addressed to the Chairman and Managing Director UPCL on 24.01.2007 requesting for permission to draw continuous supply. This letter also states that the Petitioner had requested for continuous supply even in the original application for electric connection. The Petitioner therefore claims that it had already opted for drawing continuous supply and therefore the higher tariff applicable to such consumers should only have been charged from him. Having repeatedly requested for such supply, he is not guilty of any violation of the restrictions on supply or usage and therefore the penalty imposed is unwarranted and should be struck down. It has also been argued on behalf of the Petitioner that the penalty of Rs. 2.60 crore has been imposed without considering all relevant facts and without giving the Petitioner an opportunity to explain his case and thereby even the basic principle of natural justice has been violated.
5. UPCL while not disputing that the Petitioner had sought continuous supply right in the beginning, has stated that no such commitment was made by UPCL while sanctioning the load or in the agreement executed between UPCL and the Petitioner. As far as the Petitioner's application of 24.01.2007 is concerned, UPCL denied having received any such letter. UPCL has claimed has thus that the Petitioner did not exercise the option for continuous supply stipulated in the relevant provision of the Tariff Order. Having not done so, the Petitioner by drawing power during restricted

hours violated these restrictions inviting in turn, the above penalty. Further the Petitioner having knowingly and willingly violated these restrictions, there was no need to give opportunity to put forth its case before imposing the penalty. It has also been argued on behalf of UPCL that the Petitioner's initial request for continuous supply made in 2005 or for that matter the latest request made on 24.01.2007 (existence of which had been denied by UPCL but a copy of the same has been procured by the Petitioner under the RTI Act and filed) cannot be treated as option for drawing continuous supply stipulated in the Tariff Order.

6. I have gone through the documents on the file, the arguments advanced by the two sides and the impugned order passed by the Forum. On the basis of this scrutiny of facts in this case it is found that :

- i) The Forum in its order dated 12.03.2008 has merely listed out the contentions and arguments presented by the two parties, and without examining at all the merit of such contentions, has disposed off the matter in mere two lines without giving the reasoning for its conclusions. It is normally expected that the Forum would examine each claim made by either party on the basis of the facts presented before it, relevant legal provisions and pass a properly reasoned and speaking order and not merely give its conclusions. In this particular case the conclusion drawn is contained in last three lines of the order and the same is that exemptions u/s 23 of the Electricity Act 2003 can be granted only by the Commission and not by the CMD UPCL and that the complainant had failed to establish that it was permitted to draw power during the load shedding period. If the reasons that compelled the Forum to come to this conclusion had been listed out it would have been easier to appreciate the logic and reasoning behind such conclusion.
- ii) Petitioner's claim about continuous supply and UPCL's contention regarding the penalty imposed on it both arise from the Tariff Order passed by the Commission. Para 6 of RTS 7 deals with this issue and the same is reproduced below

"In case, imposition of restriction towards the usage of electricity by the industry during certain hours in the day is effected by the Commission at any point of time, then the following rates charges shall start to be applicable.

- i) For consumers opting for supply during restricted hours (Continuous) – 20% increase in the Energy charge as given in Rate of charge. The new applicable energy charge shall be Rs. 2.95 /kWh for the I.T. industry (upto 100BHP), Rs.2.30 / kVAh for the HT industry (Above*

100BHP) and Rs. 2.85 /kVAh for steel units. Demand charge and other charges remain same as per rate of charge given above.

ii) For consumers not opting for supply during restricted hours (Non continuous) – Energy charge, Demand charge and other charges as per rate of charge given above.

iii) Peak Hour Violation Penalty shall get attracted. Consumers who do not opt for supply during Peak hours / Restricted hours (Non Continuous supply) shall not be allowed to use power in excess of 15% of their contracted demand. Any violation detected shall attract a penalty of Rs. 50 per KVA per day of the contracted demand, for the number of days of such violation. For the month of default, the consumer shall be billed at the rates specified at (i) above (for consumers opting for supply during restricted hours (Continuous)).”

The above provision does not visualise any permission to be sought by the Consumer either from UPCL or from the Commission. What is stipulated in this provision is that the Consumer wishing to draw continuous supply should opt for it and the consequence of such option is that such Consumer has to pay the higher tariff as stipulated above. If instead of doing so, he surreptitiously uses power during such periods, then the penalty stipulated above gets attracted. The Petitioner has claimed that the requirement of continuous supply had been clearly indicated in the original application filed in 2005 and the same has again been done in the letter dated 24.01.2007 addressed to the CMD. This amounts to the petitioner indicating its option more than once and it was for UPCL to start charging higher Tariff in view of this option. UPCL's argument is that these do not amount to exercising the option available in the above provision and hence the penalty has rightly been imposed. While making this distinction between the request for continuous power made by the Petitioner more than once and the option stipulated in the Tariff Order, UPCL has not been able to show any format or procedure that has been prescribed for exercising such option. It is therefore not clear how and when a request for drawing continuous supply during the restricted hours fails to or becomes the option stipulated above. The above provision of the Tariff Order relies mainly on the conduct of a consumer. A consumer wanting to draw supply is required to do so openly by opting for it and is to be charged a higher Tariff by UPCL. On the other hand a consumer not exercising this option, but found drawing

power surreptitiously during the restricted hours, would attract the above penalty.

Instead of arguing and debating the distinction between “request” and “option”, the Petitioner’s conduct and intention are that are relevant and important. The Petitioner, who as stated above, is merely required to intimate its option to UPCL, has gone beyond that and requested for permission to draw continuous supply on at least two occasions the latest of which was on 24.01.2007, that is after the schedule for rostering of supply had come into effect on 10.01.2007. UPCL was therefore well aware that the Petitioner needs and intends to draw continuous supply and indeed did supply power to the Petitioner during the restricted hours, but for some reason did not charge the higher tariff. It is important that the Petitioner is being given supply on a dedicated line that it shares with another industrial unit. With the rostering schedule coming into effect on 10.01.2007, UPCL had been authorized by the Commission to switch off supply on this dedicated feeder, but did not do so, presumably in recognition of the Petitioner’s need for continuous supply. Further on receipt of the Petitioner’s specific request, UPCL did not respond to it either in 2005 or even after 24.01.2007 indicating that continuous supply can be claimed but higher tariff will be charged for it. The above conduct of the Petitioner certainly does not suggest that he tried to take undue advantage, hoodwink UPCL and draw power surreptitiously calling for imposition of the penalty.

- iii) Many of these issues could have been clarified and perhaps addressed if before imposing the steep penalty of Rs. 2.60 crore, the Petitioner had been given an opportunity to explain its actions and put forth its case. It is a well recognized principle that even for imposition of much lesser penalties, the affected party is given such an opportunity of being heard. UPCL’s failure to do so in this case has transgressed the basic principle of natural justice and its insistence that no such opportunity is required to be given only betrays arrogance and high handedness.
- iv) Petitioner’s letter dated 24.01.2007 addressed to the CMD UPCL is an important document. It has been written after the rostering of supply was introduced on 10.01.2007 and clearly requests that supply may be made to it on continuous basis as originally requested. It is unfortunate that UPCL not only ignored this document, but denied its very existence and the same had to be ultimately procured by the Petitioner from UPCL itself under the provisions of the Right to Information Act for filing in these proceedings. If the Petitioner had been heard, this document could have been brought to the notice of the authority imposing the disputed penalty.

7. Each one of the above issues is important and relevant to merits of this case. Accordingly after taking into account the arguments presented by the two sides, the documents on the file and the issues listed above, it is found that UPCL's decisions to impose a cash penalty of Rs. 2.60 crore suffers from following infirmities:
- i) By not giving the petitioner an opportunity to explain its conduct and present its case before imposing the penalty, the well recognised principle of natural justice has been violated with serious consequences.
 - ii) Restrictions on use of power by industrial consumers during certain hours were approved by the Commission only on 25-01-2007. The penalty imposed has been determined on the basis of alleged violations by the petitioner right from 10-01-2007, when such restrictions had not been placed. This is the date when rostering of supply by UPCL approved by the Commission on 09-01-2007 came into force. However this had only authorised UPCL to cut off supply to different areas and consumers in accordance with the approved schedule. If due to sufficient availability of power in the grid, or any other reason UPCL did not stop supply to a certain area, the responsibility of such inaction is totally that of UPCL and the petitioner cannot be faulted with for drawing power during such periods as long as he was not put under any obligation for not doing so.
 - iii) The restrictions on usage imposed by the Commission on 25-01-2007 did place an obligation on the industrial consumers not to draw more than 15% of the sanctioned load in evening peak hours from 1700 Hrs to 2200 Hrs. There is nothing on record to show that the affected consumers were aware and informed of this obligation either individually or collectively. On the contrary the letters exchanged between UPCL and the Commission and which are on the file suggest that the matter remained under correspondence between UPCL and the Commission. Such being the case it is unreasonable to expect that even though power was available in the feeder, the petitioner should have restricted its draws to the stipulated extent, even without being informed of this obligation. Not having done so, UPCL's action of imposing a heavy financial penalty on the petitioner is clearly unreasonable and totally arbitrary.
8. For reasons given above, UPCL's order imposing on the petitioner cash penalty of Rs. 2.60 crore is not sustainable and the same is hereby set aside. UPCL is however free to consider this matter afresh, but only after giving the petitioner proper opportunity of being heard and after taking into account and evaluating all factual and legal issues relevant to this case. Keeping in mind the manner in which this matter has been dealt with in the past, fresh consideration of this case shall be done by an officer not below rank of a full time Director of UPCL. Fresh penalty may be imposed on the petitioner if it is found that the petitioner has knowingly and deliberately violated the relating

restrictions on usage of electricity by industrial consumers. In such an event, the petitioner will also be free to seek due relief from the Forum and if necessary from this office.

Dated: 11.05.2009

Divakar Dev
Ombudsman