

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
**Appellate Jurisdiction, New Delhi**

Appeal No. 156 of 2007

Dated this 5<sup>th</sup> day of August, 2009

**Coram : Hon'ble Ms. Justice Manju Goel, Judicial Member**  
**Hon'ble Mr. A. A. Khan, Technical Member**

**IN THE MATTER OF:**

B. M. Verma  
Former Chairman & Managing Director  
C-275, Sheikh Sarai, SFS Flats,  
Phase-I,  
New Delhi – 110 017. ... Appellant

Versus

**Uttarakhand Electricity Regulatory Commission**  
80, Vasant Vihar,  
Dehradun – 248 006  
Uttarakhand .... Respondent

Counsel for the appellant(s) : Mr. M. G. Ramachandran,  
Mr. Anand K. Ganesan and  
Ms. Swapna Seshadri

Counsel for the respondent(s) : Mr. Suresh Tripathy  
Mr. N. K. Sahoo  
Mr. Azad Singh Chahal

## **J U D G M E N T**

**Ms. Justice Manju Goel, Judicial Member**

### Introduction:

I have had the privilege of reading the draft judgment of my esteemed brother Hon'ble Shri A. A. Khan, Technical Member. I could not persuade myself to accept the point of view of my learned brother and is therefore, compelled to write my own judgment. Since the analysis of facts is the very foundation for arriving at a conclusion, I have also enumerated the facts as I see them. I, therefore, render the judgment that follows:

02) The appeal is directed against the order dated 17.08.07 whereby the appellant was visited with a fine of Rs.20,000/- payable within 10 days of the order and further penalty of Rs.500/- for each day of delay in depositing the fine by the Uttarakhand Electricity Regulatory Commission in exercise of its power under section 142 of the Electricity Act 2003.

03) The sequence of facts relevant for consideration of the appeal is as under:

04) On 07.12.06 the Uttarakhand Electricity Regulatory Commission (the Commission for short) wrote to the Chairman and Managing Director of Uttaranchal Power Corporation Ltd., Urja Bhawan, Kanwali Road, Dehradun advising the Uttarakhand Power Corporation Ltd. (UPCL for short) to submit a plan for regulating supply and demand, area wise and consumer wise, under section 23 of the Electricity Act 2003. The appellant at the relevant time was the Chairman-Cum-Managing Director of UPCL. The letter is brief and has important bearing on the case. The relevant part of the letter is reproduced below:

*“Information is reaching to the Commission that UPCL is carrying out un-scheduled load shedding for consumers in recent months. In this connection, your attention is invited towards Commission’s directives that licensee must not carry out scheduled load shedding without the approval of the Commission u/s section 23 of the Electricity Act, 2003 and distribution of available power among different consumer be made in a transparent and in equitable manner.*

*Therefore, in order to suitably regulate the supply of different category of consumers, you are advised under section 23 of Electricity Act, 2003, to send a*

*comprehensive plan indicating the availability of power in the deficit month i.e. December, January and March, 2007, demand of consumers in these months and the plan for scheduled roistering, if required so, area wise and consumer category wise. This plan should reach the Commission by 15.12.2006 for its approval.”*

05) The appellant as Chairman-Cum-Managing Director sent a tentative plan of rostering of the available power vide a letter dated 03.01.07. Subsequently, on 08.01.07, another load shedding program on the lines adopted by NDPL was submitted by the appellant for approval of the Commission. The tabular statement annexed to this letter shows the schedule of load shedding area wise. A few exceptions mentioned therein are at Item No.3 – the Hydro Power Feeders and Item No. 4 – Nainital Town Feeders. Importantly “all Industrial Feeders emanating from 132 kV and 33 kV substations, SIDCUL Hardwar, SIDCUL Pantnagar, Munni Ki Reti etc. were shown as areas to be affected by power cut and no exception in this class was made. The Secretary of the Commission wrote on 09.01.07 conveying the concern of the Commission to the load shedding program. The relevant part of the letter is as under:

***“Subject : Schedule of load shedding for the period Jan-Mar, 2007***

Dear Sir,

*This has reference to UPCL's letter no. 114/CMD/UPCL/C-4 dated 08.01.2007 vide which load shedding program for Jan-Mar, 2007 has been submitted for approval of the Hon'ble Commission.*

*In this connection, I am directed to inform you that, the Commission after considering the UPCL's proposal on load shedding, has accorded its consent on it under section 23 of the Electricity Act, 2003. You are hereby directed to prominently publish the load shedding schedule for Jan-March, 2007 (as proposed in your letter and returned herewith with some minor correction) in leading news papers of Uttaranchal and also place the copy of the schedule on your website. A copy of the load shedding schedule, as approved, may also be sent to SLDC for ensuring them that no load shedding may be done over and above the approved load shedding schedule. Compliance of the above may be forwarded to this office.*

*Yours sincerely,*  
**( Anand Kumar )**  
*Secretary"*

06) The Copy of the load shedding plan was forwarded to the State Load Dispatch Centre (SLDC) for necessary action. An important feature of the load shedding schedule is the Item No. 18, in the annexed tabular statement, according to which “All Industrial Feeders emanating from 132 kV and 33 kV Stations, SIDCUL Hardwar, SIDCUL Pantnagar, Munni Ki Reti etc.” would undergo load shedding between 05:00 pm to 10:00 pm.

07) On 19.01.07, the appellant informed the Commission that a load shedding program, as approved by the Commission, has been implemented in the whole State. The second paragraph of the letter which is relevant for our purpose is as under:

*“Besides this, some industries, which are of continuous and other noncontiguous but have critical operations, have approached us to supply them electricity in this peak period in order to meet their supply/production targets for the year and they are ready to pay for peak power even at higher rates of Rs.8 but we shall restrict to the tariff order till it is revised.”*

08) The Commission responded vide a letter dated 25.01.07 but without giving any indication as to whether the continuous or noncontiguous but critical operations industries could be supplied

energy in the peak period. The main object of the letter of 25.01.07 was to approve a proposal to restrict industries their use in the evening peak hours to 15% of the sanctioned load to the industries. Another letter on that aspect was written by the Commission on 01.02.07. On 25.01.07, the Commission sent a letter to the Chairman-Cum-Managing Director of UPCL.

*“Chairman & Managing Director  
Uttaranchal Power Corporation Ltd.,  
Urja Bhawan, Kanwali Road,  
Dehradun.*

Sir,

*M/s. Khatema Fibres Ltd. vide their letter no. KFL/2006/2007/487 dated 19.01.2007 has alleged that UPCL has exempted the following industries from scheduled load shedding:*

- i) M/s. Century Pulp & Paper, Lalkua*
- ii) M/s. Kashi Vishwanath Steel Ltd., Kashipur,*
- iii) M/s. India Glycols Ltd., Kashipur*
- iv) M/s. Cheema Papers Ltd., Kashipur*
- v) M/s. Multiwal Paper Mill & Board Ltd., Kashipur*
- vi) M/s. Cheema Paper & Board, Bazpur*
- vii) M/s. J. J. Glass Works*

*You are directed to convey factual position in the matter by today evening and alongwith reasons for deviation from scheduled load shedding plan approved by the Commission.*

*Yours faithfully,*

*( Anand Kumar )  
Secretary”*

09) On 31.01.07, the appellant wrote to the Technical Member of the Commission with reference to a meeting held on 29.01.07. The letter is as under:

*“Dear Sir,*

*This is in reference to meeting held yesterday i.e. 29.1.2007.*

*It was agreed that list of Continuous Process Industries as defined by UPSEB will hold good till any new rules are framed. Keeping in mind the criticality of Chemical and Glass industries we had decided to give them power. This was also informed to you telephonically.*

*In regard to other Continuous Process Industries, we have asked for details from the industries for assessing their minimum load.*

*Yours faithfully,*

*( B. M. VERMA )  
CHAIRMAN & MANAGING DIRECTOR”*

10) The petitioner responded vide letter dated 01.02.07 to the letter dated 25.01.07 which is as under:

*“Dear Sir,*

*Kindly refer to your letter No.857/UERC/07 dated 25.01.2007 giving reference of Khatima Fibers letter of 19.01.2007 and desiring the information by that evening itself. You would kindly appreciate we would also need reasonable time for reply. I was away on 25.1.2006 and seen your letter on 27.01.2007 only and discussed with Hon’ble Member (Technical), UERC on telephone.*

*On 18.1.2007 it was brought to my notice that M/s. India Glycols and J.J. Glass and some other continuous process industries have been disconnected. The process*

*of Glass industry is such where any stoppage of supply leads to solidification of molten glass. The process is so designed if furnace once started is kept for years together necessitating two sources of electricity supplies. Hence the furnace is never allowed to shutdown. As such there are other continuous process industries too. I am enclosing herewith list of 22 Continuous Industries declared by the Govt./UPSEB. During the meeting held on 29.01.2007 it was decided the till the new rules & regulations are framed we shall operate this list.*

*All the continuous industries need to be given a minimum load essential to keep the process going. For the balance they shall be asked to make their own arrangements through captive power stations or by reducing load.*

*The exemption to following industries has been given considering their critical process and operation:*

- 1. M/s. IGL, Kahsipur*
- 2. M/s. BHEL, Haridwar*
- 3. M/s. ASI Glass, Roorkee*
- 4. M/s. ACE Glass, Rishikesh*

*Information from the field is being gathered for any deviation from the schedule.*

*Yours faithfully,*  
*( B. M. VERMA )*  
*CHAIRMAN & MANAGING DIRECTOR”*

11) The appellant wrote on 07.02.07 to the Secretary of the Commission on the subject “*Exemption from Load Shedding for Industries*”. The first three paragraphs of the letter are relevant for our purpose. The same are as under:

*“The load shedding schedule approved by Hon’ble UERC vide letter no. 753/UERC/Load shedding dated 09.01.07 has been implemented w.e.f. from 10.01.2007. As per provision in load shedding schedule the load shedding of all industrial feeders emanating from 132 KV, 33 KV substations, SIDCUL Hardwar, SIDCUL Pantnagar, Muni Ki Reti etc. are being done from 5 PM to 10 PM except 4 industrial feeders namely M/s. BHEL, M/s. IGL, M/s. ASI Glass & M/s. ACE Glass **as special case** (emphasis added) which has been intimated to Commission vide letter no. 594/CMD/UPCL/C-4 dated 01-02-07.*

*A good numbers of industries are approaching this office for exemption from load shedding. In their applications they have intimated that switching off power to their industries is causing dislocation of their production schedule. Till date, 27 nos. industries have already applied for their exemption and it is that expected that more application shall be pouring in.*

*The list of 27 applications is being submitted along with their minimum power requirement which is more than 15% of contracted load and because of this it can not be covered under the approval already given by Commission vide letter no. 857/UERC/07 dated 25-01-07.”*

12) The Commission, however, disapproved of the selective exemption made by the appellant. The Secretary of the Commission on 08.02.07 wrote to the appellant as Chairman-cum-Managing Director of UPCL as under:

*“Dear Sir,*

*Please refer your letter no. 703/CMD/UPCL/C-4 Dated 7.2.07 seeking exemption from load shedding to selected industries. In this connection, I am directed to*

*inform you that first paragraph of the said letter mentions exemption for power cuts having been given to certain selected feeders by UPCL. In this connection, it is being made clear that the Commission has not allowed any such exemptions to the approved schedule of power cuts. The Commission has all along been emphasizing on a transparent and uniform treatment for all consumers of a particular category and has not been in favour of selective treatment on case to case basis. Commission's position is being clarified in view of the misleading impression being conveyed in your above letter.*

*As stated earlier to maintain transparency and uniformity in treatment of consumers the Commission does not favour selective approach reflected in your above letter seeking to treat some selected industrial consumers more favourably than others. The Commission is, therefore, unable to accept your above recommendation and reiterates its position that all consumers of a particular category including industrial consumers should be treated equally without any discrimination. If actual availability of power with UPCL has indeed improved from what had been stipulated at the time of seeking Commission's approval, possible relief may be given from power cuts but*

*uniformly to all consumers without any favour or discrimination and with intimation to the Commission. While doing so, it should be ensured that while drawing power from the Northern Grid appropriate discipline is maintained and all conditions stipulated in Commission's letter dated 25.01.2007 shall be strictly adhered to."*

13) The appellant again wrote on 15.03.07, *inter alia*, informing that five industries are being exempted from load shedding and seeking further approval for the load shedding schedule for the period 15.03.07 to 31.05.07 namely, (1) M/s. India Glycol Ltd., Kashipur, (2) M/s. ASI Glass, Roorkee, (3) M/s. BHEL, Hardwar, (4) J.J. Glass, Rishikesh and (5) M/s. Bharat Electronic Ltd., Kotdwar. The Commission responded vide a letter dated 21.03.07, as under:

*"Dear Sir,*

*Please refer to your letter no. 1316/A&PN/UPCL/C-4 dated 15.03.2007 on the above subject. The Commission has been receiving reports that UPCL is not adopting a uniform and transparent procedure while imposing the power cuts approved by the Commission and has been granting exemption to industrial units on selective basis. This is despite, Commission in its letter dated 8.2.2007,*

*prohibiting any exemptions to the approved schedule of power cuts on selective basis. The Commission had in fact categorically directed UPCL to extend a uniform treatment to all consumers on transparent basis.*

*In the above background, I am directed to seek following information from you before your present request is considered by the Commission:*

- 1. List of Industries to whom exemption from the approved schedule of power cuts has been given by UPCL so far, stating the date from which such exemption is given, reasons for giving the exemption and details of tariff applied on such industries during exemption.*
- 2. Likely, availability of power during the hours when power cuts are proposed to be imposed.*
- 3. Categories of consumers on whom power cuts are now proposed to be implemented.*

*You are also requested to kindly send your petition in accordance with Commission's Regulations with the above details given in an affidavit, so that the same may be put up to the Commission."*

14) The information requested for vide letter dated 21.03.07 was submitted by the appellant in his submissions dated 30.03.07. The relevant part of the submission is as under:

*“7. That, the information as desired by Hon’ble Commission vide its letter No. 1062/UERC/07, dated 21.03.2007 are as given below:*

*There was a call at 9 PM on mobile of the CMD, when attending marriage, from Glass & India Glycol that there(sic) connection is being disconnected and if it is done their continuous process will be totally disrupted. For ten days it was allowed by PTCUL and suddenly there was insistence from PTCUL to give notice. Since he was satisfied & permitted on 20<sup>th</sup> Jan, 2007 night & bought(sic) to the notice of Member (Technical) & explained it personally subsequently.*

*A- As of now, the UPCL have allowed following industries to draw minimum power from 18.00 to 22.00 Hrs along with their DG sets running.*

- (i) Indian Glycols Ltd., Kashipur,*
- (ii) ACE Glass Containers Ltd., Rishikesh,*

- (iii) *Asahi India Glass Ltd., Roorkee,*
- (iv) *Bharat Heavy Electrical Ltd., Hardwar,*
- (v) *Bharat Electronics Ltd., Kotdwar*

*S. No. (i) to (iii) are the continuous process industries & S. No. (iv) & (v) are public sector industries of their strategic importance of the work in the interest of nation. The reasons as explained by the industries in their applications are state as below:-...”*

15) The Commission then sent a notice for show cause dated 13.04.07 with which it initiated proceedings under section 142 and 146 of the Electricity Act 2003. The entire letter is reproduced below:

*“Shri B. M. Verma  
Chairman & Managing Director,  
Uttaranchal Power Corporation Ltd.,  
Urja Bhawan, Kanwali Road,  
Dehradun.*

**SHOW CAUSE NOTICE**

*This is with reference to your submission dated 30.03.2007 regarding supply of electricity to industrial consumers on selective basis. You have admitted having allowed supply of electricity to some such consumers*

*when the same was restricted or denied to others and have tried to justify your action based on the process followed by such consumers. This plea does not stand scrutiny as you, the licensee, have never been authorized by the Commission to make exceptions based on the manufacturing process or any other aspect of individual industrial consumer's working. This was taken care of in the Commission's tariff order dated 12.07.2006. The relevant extract of the Commission's order is reproduced below:*

*"6. Restriction in usage*

*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 and 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 LT industry (upto 100 BHP), Rs.2.30/kVAh for the HT industry (above 100 BHP) 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.”*

*It is clear from above that any industrial consumer could opt for getting supply during the restricted hours and for that it is required to pay a higher tariff on all its consumption, whether during the restricted hours or outside, right from the date of first such restriction being imposed in the State till revised by the Commission. Such supply was to be given based on the option exercised by the consumer and not on your assessment of his requirement.*

*Further, the Commission, far from authorizing you to discriminate between consumers based on your judgment, had categorically directed you not to do so and enforce the restriction uniformly, without any bias or favour.*

*It is established from your own submission that you have deliberately and consciously violated both these directions and have discriminated between industrial consumers*

*based on your own views and judgments, and that you have done so without any authority, inspite of Commission's categorical directions for not doing so. This lapse on your part assumes even greater seriousness by your not realizing higher tariff prescribed by the Commission in the tariff order.*

*For your above violations of Commission's specific directions, the Commission proposes to take action against you under Sections 142 & 146 of the Electricity Act, 2003. You are, accordingly, hereby to required to show cause why the contemplated action should not be taken against you. Your reply, if any, should be filed on oath and should reach the Commission latest by 20<sup>th</sup> April, 2007. In view of the urgency and seriousness of the matter no extension of time will be allowed for whatever reasons and if you fail to file your reply within stipulated period, it will be presumed that you have nothing to say in the matter and further action will be taken as per law against you personally.*

*( Anand Kumar )  
Secretary”*

16) The appellant submitted a reply. In the reply, the appellant narrated the correspondence between the appellant and the Commission upto 25<sup>th</sup> January, 2007 before proceeding to describe the incidence which led to his protecting three industries against load shedding. It may be recalled that in response to the Commission's letter dated 25<sup>th</sup> January, 2007 the appellant, as Chairman of the UPCL, vide its letter No. 594 dated 01.02.07 had already conceded that four industries have been given exemption considering the critical process. The instructions by the appellant in this regard were given on 20.01.07 and the narration thereto is made in paragraph 14 of the reply, which is as under:

*“14. That it would be pertinent to mention here that the deponent received a series of crash messages over cell phone at about 9 PM on 20.01.2007 from M/s. IGL, M/s. ACE and M/s. Ashi Glass while attending a marriage party of daughter of one of the employee of UPCL. The messages were dashed to the deponent by these industries with their power supply cut by PTCUL rendering their process defunct and ruining the industries. This sudden development brings in the sharp focus that the power supply to these industries was being maintained by the PTCUL and in the night of 20.01.2007 only the instructions had been given by the deponent. It is ironical*

*and also paradoxical that the deponent has been served with this show cause notice for the sake of verbal instructions while before 20.01.2007, the supply was consistently maintained to the above noted industries after 9.01.2007 till 20.01.2007, but no notice has been served on the PTCUL for violation of the instructions. This is discrimination on the part of Hon'ble Commission showing unfounded bias against the deponent. In view of the predicament as reported by the industries, the deponent finding himself at the edge of the precipice was driven to act, on the basis of proposal already forwarded by UPCL for the kind approval of Hon'ble Commission and also in view of the policy promulgated by the erstwhile UPSEB vide its notification No. 92 dated 25.01.1999 (Annexure-M) which was issued u/s 49 of the Electricity (Supply) Act, 1948. It would be further relevant to state here that the continuous process consumers were provided the covering of protective load in the rate schedule HV-2 applicable for large and heavy power consumers at serial No. 13 of the notification. It was also provided that this protective load shall not be subject to any emergency rostering. At serial No. 14 a list of continuous process industries, enumerating 24 such industries was provided.”*

17) The appellant thereafter proceeds to give the subsequent development namely the steps taken to meet the power shortage and to regulate load shedding by making the schedule in advance and by publishing the same for information to the consumers.

18) In the rest of the reply, the appellant reiterated the severe power shortage in the State and absence of alternatives in the hands of the appellant. We extract below some parts of the reply which is indicative of the appellant's stand:

*“... After 09.01.2007 the power shortage statement would reveal that 10.01.2007 and onwards the availability of power stands at high negative figure and there was no alternative before the deponent being the Chief Executive of the Corporation to be constrained and to take decision in the emergent situation with few options. Needless to say that in the above given power shortage, deponent was in hard pressed situation.*

....

....

....

*That, it would be germane to state here that the above noted letter No. 703 dated 07.02.2007 by the licensee i.e. UPCL was responded by the Hon'ble Commission vide its*

*letter No. 921 dated 08.02.2007 (Annexure-Q) in which no specific reply to the problem faced by the UPCL was given. It would be pertinent to mention here that in letter dated 08.02.2007 of Hon'ble Commission no such direction have been given. This further restrained the already hard position of the deponent and responsibility of the judgment which he was constrained to carry on his shoulders in view of competing claims in the scenario of power scarcity.*

*... It would be pertinent to mention here that Hon'ble Commission was duly informed vide letter dated 15.03.2007 that Chemical, Glass industries, Power equipment manufacturer and Defence equipments manufacturer are being exempted from load shedding. The Hon'ble Commission instead of giving specific directions made certain queries ...*

*That, it would be very much pertinent to mention here that Govt. of Uttarakhand vide its letter No. 2336 dated 16.04.2007 (Annexure-T) gave directions to UPCL regarding availability of power to the 5 industries as mentioned earlier. The GoU while recognizing power of the appropriate commission u/s 23 of Electricity Act 2003 for making such arrangement for regulating power supply to*

*the consumers has directed the UPCL to file the petition before the Hon'ble Commission and also to inform other continuous process industries that they should also present their side of storey before the Hon'ble Commission. It would be germane to state that the copy of above noted letter containing above noted directions has been endorsed to Secretary, UERC with the request to identify the continuous process industries and ascertain appropriate minimum power requirement and also to pass appropriate order on tariff and determine the tariff. It has also been requested that the Hon'ble Commission may consider the maintenance of power supply to such industries in accordance with their minimum requirement.*

*... It is stated that the decision which were taken by the deponent in the hard pressed state of affairs when no option was available and the directions which were given by the Hon'ble Commission were vague and no clarification was brought forth inspite of several request as illustrated herein above by the deponent. The deponent has always been willing to comply with the directions given by the Hon'ble Commission and is again praying for explicit and clear instructions about the five industries and also about the specific load shedding.*

*It is further prayed that the Hon'ble Commission may give instructions that in view of acute power shortage these five industries should or should not be subjected to power cut and what should be the schedule of their power cut, if any."*

19) After having given the factual situation coupled with the explanation for the action, the appellant again gives specific response to the "two points" raised in the show cause notice.

*"i) It is to be submitted respectfully that the options had been exercised by the consumers as brought forth by UPCL to Hon'ble Commission vide letter no. 703 dated 7.2.2007 (Annexure-P) whereby a list of 27 applications from various Industries was submitted to the Hon'ble Commission alongwith their minimum power requirement for which more than 15% of the contracted load was required and it was also explained that because of this reason they could not be covered under the approval given by the Hon'ble Commission vide its letter no. 857 dated 25.1.2007. However, it may be further clarified that this letter dated 7.2.2007 was responded by the Hon'ble Commission vide its letter dated 8.2.2007 in which no*

*specific reply to the problem faced by the UPCL was given. It may be further submitted that the Executive discretion had to be applied in good faith keeping in view of the groaning power shortage faced by the State and the competing claims otherwise the Industries involving the continuous process would have been ruined and other industries such as BHEL, Hardwar and BEL, Kotdwar, which are of National and strategic importance would have suffered. ....*

*... However, as mentioned earlier no such Show Cause Notice has been served on PTCUL for the alleged violation of the directions of Hon'ble Commission. But ironically, the deponent has been single out by serving the Show Cause Notice and by being discriminated again for an act done in good faith and in the larger interest of public. Therefore, the deponent has not violated any directions as stated in the letter dated 13.4.2007.”*

*ii) In reply to the point no.2, it may be submitted respectfully that no discrimination between the consumers has been exercised. Whatever was done was to protect the industries from being ruined irrevocably and damaged beyond repair. It may be further submitted that in day to*

*day function when the specific directions are not available in becomes incumbent to apply executive discretion to tackle the situation.”*

20) The Commission heard the appellant. The appellant also made a written submission. The Commission passed the impugned order imposing a fine on the appellant. The issues relevant for the proceedings before the Commission, as found by the Commission, are listed in paragraph 13 of the impugned order, they are as under:

- (i) Whether Shri B. M. Verma has knowingly flouted Commission’s directions while imposing power cuts on industrial consumers in the State.*
- (ii) Whether such violations are only technical or have substantive ramifications.*
- (iii) Whether these actions have been taken inadvertently or deliberately with full knowledge that the same are in violation of Commission’s directions issued under section 23 of the Electricity Act, 2003.*

21) The Commission cites two orders which were violated: one order conveyed to the appellant vide a letter dated 08.02.07 and the other the order dated 12.07.06 which, *inter alia*, by paragraph 6, prescribed the rate schedule in case of imposition of restriction by the Commission towards the usage of electricity by industries in certain hours of the day. The Commission says that both the orders directed the appellant to maintain or adopt the nondiscriminatory approach and debar the utility from granting any selective exemption to any industry. The order dated 08.02.07 in which the Commission said “*that the Commission has not allowed any exemption to the approved schedule of power cuts*” and further the Commission reiterated that “*the Commission has all along been emphasizing on a transparent and uniform treatment to all consumers of a particular category and has not been in favour of selective treatment on a case to case basis*”. It may be mentioned here that by the letter dated 07.12.06, the Commission had invited the attention of the Chairman & Managing Director of UPCL that a licensee must not carry out scheduled load shedding without approval of the Commission and the distribution of available power among different consumers be made in a transparent and equitable manner. The Commission, on the basis of the previous correspondence, which have already been reproduced above, found that the appellant has favored a few industrial consumers by exempting them from stipulated restrictions and that these

exemptions were given not on any scientific basis but on only personal satisfaction of the appellant in violation of the Commission's order dated 09.01.07 and other related directions. The Commission also observed that while granting selective exemptions, the appellant had failed to comply with the provisions of the tariff order which required such consumers to be billed for their total consumption on 20% higher tariff from the date such restrictions were introduced for the first time. The Commission further observed that the violations have given considerable benefit to the selective consumers and that the same has been done at the cost of other industrial consumers as also all other categories. The Commission observed that a large number of other industrial consumers, as per the appellant's own submission dated 24.05.07, were willing to opt for continuous supply as per tariff order but were not given this benefit causing revenue loss to the UPCL. The Commission found that the violation of the Commission's order were deliberate which resulted in substantial benefit to some consumers and loss to others and indeed to the licensee. Dealing with the allegation of the appellant that no action was being taken against PTCUL, the Commission said that the primary responsibility for supply of electricity to consumers in accordance with law rests with the distribution licensee namely viz. UPCL and that if Commission finds that any other person or organization has also violated its order, appropriate action for the same shall be taken

and the same has no relevance on these proceedings. The Commission repeatedly refers to letter dated 08.02.07 in which the Commission said that it had not allowed any such exemption to the approved schedule of power cuts and therefore the appellant could not have nurtured the belief that his actions of giving exemptions enjoyed the approval of the Commission. The Commission accordingly found that the appellant had deliberately and with full knowledge violated provisions of Electricity Act 2003, the tariff order dated 12.07.06 and Commission's repeated directions to follow the nondiscriminatory transparent and objective approach. The Commission therefore imposed a fine of Rs.20,000/- on the appellant directing further that the appellant shall deposit this amount within ten days of the order failing which he shall pay an additional penalty of Rs.500/- per day on contravention of the order.

Decision with reasons:

22) We have heard the counsel for the appellant, Mr.M.G.Ramachandran and Mr. Anand Ganesan as well as the counsel representing the Commission namely Mr. Suresh Tripathy. We have also the advantage of the written submissions presented by the two sides. The points raised by the appellant to challenge the order of the Commission are as under;

- a) There was no specific direction of the Commission which attracted the impugned action
- b) The Commission did not pass any valid order under section 23 of the Electricity Act 2003 in as much as no such order could be passed without hearing the interested parties
- c) Assuming that the Commission had issued any direction, the same was issued to UPCL and not to the appellant and further that no direction could have been issued to the appellant as no provision in the Electricity Act 2003 provides for a direction to any individual person
- d) The Commission has no jurisdiction to impose a personal penalty on the appellant under the provisions of section 142 of the Electricity Act 2003
- e) The show cause notice was directed against the UPCL and not against the appellant and therefore the appellant could not have been punished pursuant to the notice
- f) No mens rea or contumacious state of mind has been shown

- g) The Commission had asked for a comprehensive plan indicating availability of power in deficit months and plan for scheduled rostering vide its letter dated 07.12.06 and in response to the same UPCL vide its letter dated 03.01.07 provided comprehensive plan in which the industries to be exempted had been shown. The exempted industries included “*Industries on 132 kV – 03 Nos. JG Glass, 33 kV Rishikesh*”. The three industries, intended to be exempted, in that letter were M/s. IGL, M/s. ASI Glass and M/s. Century Paper. The appellant thus did not act against the Commission’s load shedding roster.
- h) Vide letter dated 08.01.07, UPCL provided a draft load shedding program only for the purpose of publication in newspapers and therefore this letter did not naturally mention those industries which were required to be exempted
- i) The action of the appellant was immediately brought to the notice of the State Commission vide letter dated 01.02.07, sent by UPCL to the State Commission.

- j) The State Commission at no point of time issued any direction for disconnection of supply to the industries mentioned above
- k) There was a pre-existing practice of exempting continuous process industries from any load shedding and hence the action of the appellant cannot be faulted
- l) The appellant had his executive discretion in giving exemption to these industries, IGL etc., and therefore, cannot be guilty of violation of any order.
- m) The appellant acted in a bona fide manner in the best interest of the UPCL and the State of Uttarakhand

23) Now I will deal with each of these challenges to the impugned order.

24) In the notice to show cause the Commission mentions the tariff order dated 12.07.06, paragraph 6 of which dealt with restrictions in usage and prescribes for special tariff for those consumers who would opt for supply during restricted hours (continuous). The Commission said that it was clear from the paragraph No.6 that any industrial consumer could opt for getting

supply during the restricted hours and if in those hours any supply had to be given the option has to be exercised by the consumer as per the tariff order but could not have been given on the assessment of the consumer's requirement by the appellant. The Commission further says that the Commission had categorically directed the appellant not to discriminate between consumers based on his (appellant's) judgment. The Commission then said "*it is established from your own submission that you have deliberately and consciously violated both these directions and have discriminated industrial consumers based on your own views and judgment.*" Thus the Commission has mentioned one specific order that is of 12.07.06 and has referred to another direction generally, without specific date, which had directed that the restriction be followed uniformly without any bias or favour. So far as this direction is concerned one can refer to the letter dated 07.12.06 filed by the appellant himself in which the Commission categorically directs "*that licensee must not carry out load shedding without approval of the Commission under section 23 of the Electricity Act 2003 and distribution of available power among different consumers be made in a transparent and an equitable manner*". In fact, the correspondence necessary to be gone into in connection with the schedule of load shedding begins with this letter. After having directed that the available power be distributed in transparent and equitable manner, the Commission asked the UPCL to send a

comprehensive plan indicating the availability of power in the months of December, 2006, January and March, 2007 and the plan for scheduled rostering area wise and consumer category wise. The Commission eventually approved the load shedding roster vide its order approving the roster dated 08.01.07 and thus further fortified its direction for transparency, uniformity and equity in distribution of power. Hence, it does not lie in the mouth of the appellant to say that there was no direction whatsoever in respect of the transparency, uniformity or equity in imposing the restriction on supply of electricity. Therefore there is no merit in the first objection (a) of the appellant.

25) So far as the objections of the (b) is concerned, the appellant had not shown any Rules and Regulations requiring the Commission to hear the interested parties before passing an order under section 23 of the Electricity Act 2003. The appellant refers to orders made by other Commissions in the States of Maharashtra and Punjab. There is nothing to show that the Commission could not have approved the load shedding program submitted by UPCL/appellant without setting the matter for public hearing as is done while fixing tariff. I find no force in the plea that no order under section 23 of the Electricity Act 2003 was validly passed by the Commission.

26) Coming to point (e) we see that the notice is addressed to “Mr.B.M.Verma, Chairman-Cum-Managing Director, Uttaranchal Power Corporation Ltd., Urja Bhawan, Kanwali Road, Dehradun”. Our notice is attracted to the third sentence of this notice which says “*this plea does not stand scrutiny as you, the licensee, have never been authorized by the Commission to make exceptions based on the manufacturing process or any other aspect of individual industrial consumer’s work*”. At the end of the notice, the Commission says “*action will be taken as per law against you personally*”. It is true that the appellant Mr. B. M. Verma is not a licensee. The third sentence refers to “*you, the licensee*”. However the entire notice has to be seen and one sentence alone cannot be sufficient to understand the import of the notice. The notice is addressed to appellant individually. The last part of the notice also warns that action will be taken against the appellant personally. The notice, as seen in totality, is clearly issued to the appellant and not to UPCL. Apparently, the appellant also understood the notice to have been issued to him personally and responded accordingly.

27) Now we take up objections on (c) & (d). All directions in this matter were issued to UPCL and the correspondence was also addressed to the Chairman-cum-Managing Director of UPCL. The appellant responded to this letter in the capacity of Chairman-Cum-Managing Director of UPCL. However, the default is attributable to

the appellant personally. In response to the notice dated 21.03.07, calling for information about the industries exempted by the appellant, the appellant himself stated that it was he who received a call on 20.01.07 at 09:00 PM while he was attending a marriage when on telephone calls from Glass and India Glycol that he instructed PTCUL to continue power supply. Thus the appellant himself owns up the alleged violation of requirement to maintain uniformity and to have given favorable consideration to a select few to exempt them from load shedding on account of a telephone call received by him. The action could not be attributed to the Company in as much as the action to continue supply to the selected industries was never taken to the Board of the Company/Corporation for its approval. Nor did the UPCL working through its Board ever directed the continuance of power supply to the selected industries.

28) The appellant, being the Chief Executive Officer of UPCL, was responsible for compliance with all the directions issued to UPCL. He cannot be heard to say that no direction was ever issued to him and therefore he could never have violated any of them.

29) Section 142 of the Electricity Act 2003 makes any person contravening any direction issued by the Commission punishable. Section 142 is reproduced below:

**“142. Punishment for non-compliance of directions by Appropriate Commission.** - *In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.”*

30) The appellant being duty bound in his capacity as Chairman-Cum-Managing Director of UPCL to comply with these directions and having personally committed the act of giving favorable treatment to a select few is one person who contravened the directions issued by the Commission. His responsibility is covered by Section 142 of the Electricity Act 2003.

31) We can now take up issue relating to the merit of the case. They are at points (g), (h) & (i) above. The main thrust in appeal on merit is the letter dated 03.01.07. This letter was written in response to the letter of 07.12.06. The first part of the letter gives availability of power and demand for the same. It ends with saying that a tentative plan for rostering has been made. The tentative plan for load shedding is annexed to this letter. The tabular statement gives certain exempted areas which are as under:

*“Exempted Areas:*

*Project Feeders Hydro*

*Opoto Electronics (defence)*

*BHEL Hardwar*

*IIT Roorkee*

*Ramnagar Town*

*Nainital Town*

*Mussorie Town*

*Dehradun Town*

*Industries on 132 kV – 3 nos.*

*JG Glass, 33 kV Rishikesh*

*SIDCUL Hardwar*

*SIDCUL Pantnagar”*

32) However, on 03.01.08 itself, there was a meeting which was followed by a letter dated 08.01.07. The relevant part of the letter is as under:

*“We have already submitted the details indicating the unavailability of load shedding and the options for load-shedding under different scenarios to the Hon’ble Commission vide UPCL’s letter No.26/CMD/UPCL/C-4, Dated 03.01.2007. As per Hon’ble Commission’s direction issued in the meeting held on 03.01.2007, we are once again submitting a scheduled load shedding program on the lines adopted by NDPL for approval of the Hon’ble Commission.”*

33) In the schedule of load shedding, as mentioned earlier, all industrial feeders emanating from 132 kV and 33 kV have also been included without mentioning any exception. The program given in the letter dated 08.01.07 was approved by the Commission vide letter dated 09.01.07. The appellant contends that the letter of 03.01.07 sufficiently indicates exemptions given whereas letter dated 08.01.07 did not have to show the exemption because the schedule was for publication to inform those who were to be affected by the power cuts. Interestingly, when the notice to show cause was replied to, the appellant did not take this stand. In the reply, the appellant referred to the 03.01.07 letter as enclosing a tentative plan for rostering and order of priorities to maintain power supply. The appellant has also mentioned how in the meeting

dated 03.01.07 it was decided that the schedule would be published to inform people of the intended power cuts. The appellant specifically says *“the issue of continuous process industries alongwith all its complexities did not figure in the meeting, as the problem had not cropped up by that time.”*

34) The appellant not only contends that complexities of continuous process industries had not cropped up in the meeting of 03.01.07 but also says that his action to continue supply to the continuous process industries was taken only on 20.01.07. Till 08.01.07 no rostering was at all approved by the Commission for its approval and therefore there was no occasion to consider any rostering, read with the tariff order of 07.12.06, as order under section 23 of the Electricity Act 2003. When the appellant proposed that there would be some exceptions in his letter dated 03.01.07 the appellant named certain areas and towns. One industry known as JG Glass at 33 kV is named. None of the other industries, particularly ACE Glass and India Glycol Ltd. were at all mentioned in this list. The item *“industries of 132 kV – 3 nos.”* mentioned in the letter dated 03.01.07 could not be the three industries for whom the appellant ordered continued supply of power because the appellant could not have anticipated on 03.01.07 that those three industries only would give him crash telephone calls and ask for his intervention for continuing the supply of power. There is nothing

on record to suggest that the appellant had these three industries in mind on 03.01.07 itself. This item of “*industries of 132 kV – 03 Nos.*” were never spelt out. The appellant did not say that he had these particular industries in mind although what he now wants to set up is that by the letter of 03.01.07 he had obtained Commission’s approval for making exemptions for these particular industries. In fact, as the events went, on 03.01.07 itself there was a meeting and a fresh proposal was called for and was given. The question of continuous process industries did not even crop up in the meeting. The appellant did not point out to the Commission in the meeting that despite such rostering the UPCL intended to make certain exemptions in respect of specific industries. There is no proof that the Commission in any way approved of the roster annexed to the letter dated 03.01.07 or of the proposed exemption.

35) The appellant contends that by these industries were already included in the letter of 03.01.07 he directed PTCUL not to disconnect electricity on 20.01.07. This was not the stand taken by the appellant when he replied to the notice as indicated earlier. In the reply he merely says that he received crash messages from M/s. IGL, M/s. ACE Glass and M/s. ASI Glass while attending a marriage when he issued oral instructions to PTCUL for giving continuous supply to these three industries.

36) Letter dated 01.02.07 was written in response to the Commission's letter dated 25.01.07 asking for a factual position regarding exemption given to seven industries including JJ Glass, Century Pulp and India Glycon. The appellant in the letter dated 01.02.07, says that on 18.01.07 it was brought to his notice that JJ Glass, Indian Glycon and some other continuous process industries had been disconnected. With this letter the appellant included a list of 22 continuous process industries which had been so declared by the Government/UPSEB. He said then that the exemption to the following industries have been given: IGL, Kashipur, BHEL, Haridwar and ASI Glass, Roorkee and ACE Glass, Rishikesh. The appellant wrote on 07.02.07 *"As per provision in load shedding schedule the load shedding of all industrial feeders emanating from 132 kV, 33 kV sub-stations, SIDCUL Hardwar, SIDCUL Pantnagar, Muni Ki Reti etc. are being done from 05:00 pm to 10:00 pm except 4 industrial feeders namely M/s. BHEL, M/s. IGL, M/s. ASI Glass and M/s. ACE Glass **as special case** which has been intimated to Commission vide letter No. 594/CMD/UPCL/C-4 dated 01.02.07."* The Commission in response to this paragraph of the letter dated 07.02.07 wrote on 08.02.07 saying *"in this connection I am directed to inform you that first paragraph of the said letter mentions exemptions for power cuts having been given to some selected feeders by UPCL. In this connection it is made clear that the Commission has not allowed any such exemption to the approved*

*schedule of power cuts. The Commission has all along been emphasizing on transparent and uniform treatment for all consumers of a particular category and has not been in favour of selective treatment on case to case basis... The Commission, therefore, is unable to accept your recommendations and reiterates its position that all consumers of a particular category including industrial consumers should be treated equally without any discrimination".* It is futile for the appellant to say again and again that vide letter 03.01.07 he sought exemption to those specific industries or that the exemptions were ever approved of by the Commission.

37) It is to be noted that the no exception was done for SIDCUL Pantnagar & SIDCUL Hardwar although they were in the exempted list of 03.01.07. Clearly the appellant did not consider the schedule dated 03.01.07 to have been the approved schedule. Pleading that the letter dated 03.01.07 exempted the three industries IGL etc. is merely an afterthought.

38) There is no doubt that the appellant fully understood that there was no scope for any exception to the protocol approved on 08.01.07 and 09.01.07. The appellant for the first time on 15.03.07 asked for Commission's approval for the four industries mentioned above along with that of Bharat Electronic Ltd., Kotdwar. The approval was not granted. The Commission instead wrote letter

dated 21.03.07 which has been extracted above asking for further details of exemption given by the appellant. This time the appellant in response to this letter justified giving exemption to the three Industries viz. IGL etc. The justification is merely that in view of the continuous process of these industries if the power supply is disconnected they will suffer great loss. This, however, is not an explanation for making an exemption. The other continuous process industries were similarly placed and must have suffered great loss on account of load shedding or stoppage of the manufacturing process. The appellant did not say that he wanted to give exemption to a particular class of industries. He had already named 22 industries of continuous nature which had already been listed by the UPSEB. The appellant had not proceeded to exempt all the 22 industries as a class. Instead the appellant on the crash call exempted three industries. He has made no attempt to explain if the three industries as a class were different from the other 22 industries of the same nature. The appellant had thus not only violated the specific approved load shedding schedule which did not allow any exemption but also gave preferential treatment to some and did not act equitably.

39) The plea in (j) is that the Commission should have come out with categorical directives on receiving the complaint dated 19.01.07 and the letters of the appellant dated 01.02.07 and

07.02.07 to immediately stop the supply of power to the three favoured industries and that the offence could have been committed only if the appellant still did not stop the supply of power. I cannot subscribe to this view. The thrust of the Commission's directives was that power be distributed in transparent and equitable manner. As soon as the complaint was received the Commission said in so many words that it did not approve of the 'selective' approach. Nothing more was required to be stated to stop the power supply to these industries namely, IGL & Ors. as 'special' case. The Commission disapproved the action of the appellant not because IGL & Ors. were the favoured industries. The Commission's disapproval was to the selective approach and non transparent manner of the appellant. The appellant was a responsible officer. It is not his case that he did not fully comprehend the instructions of the Commission while approving the load shedding protocol or in the other correspondence in which the Commission directed that the distribution of available power should be made in a transparent and equitable manner. The appellant did not take such a stand even while defending himself before the Commission. It is too late in the day to say that the Commission was required to issue an instruction to him to stop supply of power to IGL & Ors. and that in the absence of such instructions he cannot be said to have violated the Commission's instructions. It has to be remembered that we as an appellate tribunal are considering whether the appellant had

violated the order of the Commission and whether he is liable for any penalty. The scope of the appeal before us does not requires us to examine what the Commission could have done to prevent the appellant from continuing the selective exemption. The notice to show cause and the consequent proceedings imposing penalty was certainly in the same direction. We are not examining whether the Commission was right or wrong in laying down the load shedding protocol. Nor are we here to examine what more the Commission could have done to give effect to the load shedding protocol. It does not lie in the mouth of the appellant to say that the Commission should in so many words have asked the appellant to immediately disconnect supply to these three selective industries over and above saying that the Commission did not favour such selective exemption.

40) As mentioned in point (k), one of the defenses adopted by the appellant is that it was always the practice that even when the utility was compelled to resort to load shedding the continuous process industries would continue to get power supply. This practice, assuming that there was one, cannot over ride an order of the Commission. Nor is it the case of the appellant that he understood the Commission's order to be conditioned by the prevalent practice. Secondly, assuming there was a practice to provide power to the continuous process industries even during

power shortage and consequent load shedding the practice was required to be uniformly followed and not selectively for three industries. It is not the case of the appellant that he followed the practice and asked PTCUL to continue supply of power to all the continuous process industries whoever they may have been.

41) A plea was fervently made during arguments that all the continuous process industries named in the list of 22 except the three favored by the appellant fell in Uttar Pradesh. This plea was not taken at any time when the Commission was considering the reply of the appellant. Nor was this plea raised in the grounds of appeal. In fact the letter dated 01.02.07 suggests that the 22 industries, the list of which was annexed to that letter, were in Uttaranchal. Further the letter dated 07.02.07 suggests invariably that the number of continuous process industries in Uttaranchal was more than these three as many of them had already applied to the UPCL for power during the load shedding hours.

42) The point (1) requires us to examine the plea of executive discretion. The thrust of the defense of the appellant before us are two:

- (i) the three favoured industries which were exempted from load shedding as a special case were already

included in the list of industries excluded from load shedding and, therefore, there was no violation of the order of the Commission

- (ii) the appellant exercised his “executive discretion” in granting exemption to the aforesaid three industries, IGL & Ors.

43) The two defenses are contradictory to each other and cannot go together. The learned counsel for the appellant submits that he is taking the two pleas in the alternative.

Did the appellant have any discretion in the matter which he could have exercised? Let us examine it from the point of fact and from that of law:

44) The learned counsel for the appellant could not show any law which leaves some executive discretion with the appellant after the Commission had approved of the load shedding protocol. It is to be noticed that the Commission has all along been insisting on transparency and equity in distribution of power. It was only in order to make the load shedding transparent and equitable that the load shedding protocol was approved and published. There is no room for thinking that despite such approval of the load shedding protocol by the Commission some executive discretion to implement

or not to implement in a selective manner was still left with the utility or its Chairman-cum-Managing Director. In fact, therefore, the appellant did not have any such discretion with him. Secondly, no provision of the Electricity Act or any other statute could be cited which provides the Chairman-cum-Managing Director of the utility or with the utility itself with the power of making any exception in the matter of compliance with the load shedding protocol of the Commission.

45) The discretion of any officer or authority is not the same as his whims and fancies. Nor can it be exercised on the basis of subjective satisfaction of the person in power. The discretion, if any, cannot be absolute and exercised in arbitrary and discretionary manner. The appellant may have considered the difficulty of the three industries, IGL & Ors. There is however, no claim on the part of the appellant that he considered the difficulty of the other similarly placed industries. Nor does he claim that he considered how the other consumers would be affected by supply of power to these industries. Nor does he claim to have considered the effect of additional purchase of power required for continuing supply to these industries. The sudden decision to extend power supply to IGL & Ors. was on simple consideration of their difficulty. Such exercise of power is arbitrary. Further the exercise of authority by the appellant was done in an entirely non transparent

manner without following any criterion and without any information to anyone else including those similarly placed and consumers of other categories whose interests were being affected by the decision.

46) It is to be noted that the decision of the appellant did not relate to the entire class of consumers who were the continuous process industries. The relief given was for a selective few. The Commission in its correspondence repeatedly reminded the appellant that the Commission did not favour any 'selective approach' and that '*distribution of available power among different consumers be made in a transparent and equitable manner*'. The action of the appellant amounts to distribution of largess. One is reminded of the Supreme Court judgment in the case of *Common Cause Vs. Union of India 1996 (6) SCC 530* in which the Supreme Court strongly disapproved the action of a minister in allotment of petrol pumps which he claimed to have done in exercise of his discretionary power. The allotments had been made on the grounds of poverty and unemployment of the allottees. The Supreme Court found that it was not known how the minister had selected them out of millions of poor and unemployed in this country. The Supreme Court held that the allotment were arbitrary and non-transparent. The appellant similarly selected three of the industries for giving the benefit of continued power supply simply because they had telephoned the appellant on his mobile phone and the

appellant, apparently, was impressed by their difficulties. This was certainly not a transparent and equitable exercise of discretion as is understood in law.

47) Now we come to the other defense namely, that the exception already existed for these three industries. I have considered this under point g. It is repeated for the sake of emphasis that the letter of 03.01.07 had in the exception list apart from “industries of 132 kV – 3 Nos.”, SIDCUL Hardwar and SIDCUL Pantnagar. The 03.01.03 letter if given effect to should have exempted SIDCUL Hardwar & SIDCUL Pantnagar from load shedding. This, however, was not the case as can be seen from the appellant’s letter dated 07.02.07 quoted in paragraph 11 of this judgment. It was not the immediate response of the appellant that he ordered for continued power supply to the three aforesaid industries, IGL & Ors. on account of these industries having been exempted vide the proposal letter dated 03.01.07. It was because of the telephone calls that he received while attending a marriage at around 9 Pm on 19<sup>th</sup> January, 2007 that he decided to continue electricity supply to them. He himself says in his letter dated 07.02.07 that M/s. IGL etc. had been given exemption as a ‘special case’.

48) The last question is whether there was mens rea and whether the appellant acted bona fide as raised in points (g) & (m). The

Commission has found that the appellant did not act bona fide. Nor can we say that he did so. The sequence of letters sufficiently shows that the Commission had drawn the attention of the appellant about the preferential treatment given. The appellant at no point of time took any corrective measures. Instead the appellant justified the preferential treatment given to the aforesaid three industries. Contumacious violations of Commission's directives have been fully established.

49) This Tribunal has held in the judgment in the case of UPCL Vs. UPERC in appeal No. 115 of 2007 that mens rea would be an ingredient of the offence for which anyone can be punished under section 142 of the Act. Mens rea in this case is clear. Deliberate and contumacious violation of the Commission's order is sufficient mens rea to attract the penal provision.

50) We finally come to the quantum of punishment. The Commission has imposed a fine of Rs.20,000/- However, the Commission has further stated that unless the deposit is made within 10 days of the order the appellant would be liable to pay additional penalty of Rs.500/- for each day of contravention of order of the penalty. A penalty of Rs.20,000/- is nominal and need not be interfered with. However, the penalty of Rs.500/- for each day of delay in making the deposit of fine is not possible to approve of.

Only when the contravention continues that the penalty for each day's contravention can be levied. Nonpayment of the penalty imposed under section 142 of the Act cannot attract penalty for each day of delay. We are, therefore, constrained to set aside the penalty imposed by the impugned order to the extent of Rs.500/- per day for each day of delay in depositing the penalty. The penalty imposed is limited to Rs.20, 000/-. With this modification, the impugned order is upheld and the appeal dismissed.

51) Pronounced in open court on this 5<sup>th</sup> day of August, 2009.

**( Justice Manju Goel )**  
**Judicial Member**

**Reportable/Non-reportable**