

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad – 500 004

=====
**Order on partial waiver of penal charges levied as per the
Restriction and Control (R&C) measures - Approval granted.**

- - -

Proceedings No.APERC/Secy/154/2013

Dated 08-08-2013

Read the following:

1. Proceedings No. APERC/Secy/144/2013 dated 31-07-2013
2. Proceedings No. APERC/Secy/08/2013 dated: 17-04-2013.
3. Proceedings No. APERC/Secy/16/2012-13 dated: 01-11-2012.
4. Proceedings No. APERC/Secy/14/2012-13 dated: 14-09-2012
5. Proceedings No. APERC/Secy/13/2012-13 dated: 07-09-2012
6. CGM(Comml)/SE(C)/ DE(C) /ADE(C)/D.No. 1624/12 Dated 29-08-2012.

1. The Commission has issued various Restriction and Control (R&C) orders cited in the above references due to the then prevailing power shortage scenario.

2. There was continuous power shortage witnessed due to lack of adequate generation from scheduled generating stations and lack of availability of adequate power from external sources through long-term / short-term purchases within southern region and congestion of corridor to procure power from northern grid.

3. The DISCOMs were resorting to load shedding depending on the contingency. These measures to regulate the supply and consumption of electricity were found to be inadequate considering increase in the consumption and shortfall supply of power. Hence, there was a compelling situation to introduce restrictions on consumption through "Restriction and Control"

measures (R&C) as contemplated under Section 23 of Electricity Act, 2003.

4. Accordingly, the Commission had conducted a public hearing on 11.01.2012 and elicited the objections and views of all the stakeholders. Orders on R&C measures were not issued due to lack of sufficient data on category of consumption and DISCOMs were able to manage shortages by resorting to unscheduled power cuts.

5. As a result of such load management, at times the power was not even made available even to the dedicated feeders. When the shortage was known certain and that instead of unscheduled load reliefs, restricting the usage of power depending on the nature of industry, extent of usage of consumption was considered best option to address the shortages and protect grid safety while keeping the feeders alive.

6. The Commission after receiving the letter dt:29.08.2012 from DISCOMs introduced the "Restriction and Control" measures (R&C). Having seen in recent past, failure of the grid in Northern part and Eastern part of India, its consequences both on the generation and transmission, the Commission considered that in order to protect the stability of the grid, R&C measures have to be issued immediately.

7. The orders of R&C measures were accordingly issued on 07.09.2012 restricting the consumption for the following categories:

HT I (A) Category - Industries (General)

HT I (B) Category – Ferro Alloys (Industrial category)

HT II Category - Others

LT III (A) above 20 HP capacity and & LT III (B) Industrial category

LT II (C) Advertisement & Hoardings

8. As a result, the obligations of DISCOMs to provide reliable power supply, automatically stands suspended.

9. The Commission also considered that in case there is a violation of these measures, a penalty of 3 to 5 times depending on off peak period and peak period was incorporated in the orders, as a deterrent measure.

10. On the representation of DISCOMs, the R&C measures were amended by order dated, 14.09.2012 revising the load factor from 0.7, 0.8 and 0.9 depending on the category and nature of industry.

11. Subsequently, the DISCOMs represented, that there is deliberate violation of consumption by some of the consumers as the penalty payable is lower than the cost that would have been incurred as a result of self generation of power through captive generating sets. Sensing further danger to the stability of the grid and that the violations have to be curbed, the Commission considered that a harsh deterrent measure was required in place of benevolent existing penal measure of 2 to 5 times penalty. Accordingly, the Commission considered to enhance penal charges through its modified order on 01.11.2012.

12. Subsequently, supplementary orders were passed on different dates based on the representations of consumers, representations from the DISCOMS and on suo moto, recognition of the need for suitable amendments of the R&C orders on some of the following issues:

- a) Necessity of exempting agro based industries
- b) Seasonal industries
- c) Continuous process industries
- d) Essential public utility services
- e) Seed processing industries
- f) Solvent extraction plant
- g) Poultry Farms including hatcheries and poultry feed mills

13. In some of the category of consumers, for example, agro based industries, the Commission gave specific orders on different dates depending on the absence of uniform treatment of such category by the DISCOMs. This process resulted in getting the exemption of the same category of consumers at different times. The request for exemption from the first day onwards when R&C measures introduced was not accepted as there cannot be any retrospective exemptions to any categories though they were exempted at a later date. Exemptions were to be given with only prospective effect.

14. The R&C measures were introduced for the first time by the Commission. The Commission is also new to monitor the enforcement of such concept and operations. A specific defined criteria for exempting any category of consumers that stands

the test of times could not be developed (and probably cannot be developed).

15. The DISCOMs also at different levels of operations and different places of operations could not give a uniform knowledge to communicate to consumers appropriately in time.

16. The DISCOMs requested the Commission vide letter dated 11-10-2012, to permit them to disconnect the power supply immediately after detection of violation of the R&C measures. They stated that they cannot control the demand on the system, unless they are given power to disconnect. The DISCOM proposed the following scheme of disconnection.

- i) 48 hours disconnection for first violation.
- ii) 7 days disconnection for second time violation.
- iii) 15 days disconnection for third violation.
- iv) One month disconnection for fourth violation.

17. The Commission approved the Control measures vide para 18 of the R&C order dated 01-11-2012 and the said para reads as follows:

"18. Control measures:

(a) No consumer shall exceed the PDL during peak or off peak period. If any consumer exceeds the PDL by a quantum less than or equal to 5% of PDL, the Distribution Licensee shall issue a warning notice for first violation in a month. For any subsequent violation, the service will be disconnected with out notice for 24 hours.

If any consumer exceeds the PDL by a quantum exceeding 5% of PDL, the Licensee shall disconnect the service connection for the following time period immediately after detection of violation:

- i) 48 hours disconnection for first violation.
- ii) 7 days disconnection for second time violation.
- iii) 15 days disconnection for third violation.
- iv) 1 month disconnection for fourth violation.

(b) Penal charges for non-compliance of R&C measures:

The Clause 213.6 (8) and Clause 213.3 (4) (iv) of Tariff Order 2012-13, specifies the penal charges to be paid by a consumer for exceeding the contracted demand. In view of the shortage scenario and in order to maintain grid discipline and equitable distribution of available power among different consumer categories, the following penal charges are approved in place of clause 213.6(8) and Clause 213.3(4) of Tariff Order 2012-13 in addition to the measures mentioned in para (a) above.

- I. Demand Charges on excess over Permitted Demand Limit (PDL) shall be billed at the rate of 5 times of normal tariff, if the Demand consumed is less than or equal to 5% of PDL in a month.
- II. Demand Charges on excess over Permitted Demand Limit (PDL) shall be billed separately for peak and off-peak at the rate of 6 times of normal tariff for exceeding the PDL beyond 5% of PDL.

- III. For HT-II Consumers, energy charges on excess over PCL during off-peak period shall be billed at the rate of 5 times of normal tariff. Energy charges on excess over PCL during peak period shall be billed at the rate of 6 times of normal tariff consumed during that particular peak time period i.e., 18:00 Hrs. to 22:00 Hrs. of that day.
- IV. For HT-1 consumers, energy charges on excess over PCL during Off-peak period shall be billed at the rate of 6 times of normal tariff.
- V. Consumers opting for 18 days power supply, shall be billed at the rate of 6 times of normal tariff for exceeding PCL during off-peak hours of power holiday period.
- VI. For HT-1 consumers, energy charges on excess over PCL during peak period shall be billed at the rate of 7 times of normal tariff consumed during that particular peak time period, i.e., 18:00 Hrs. to 22:00 Hrs. of that day.”

18. The DISCOMs never implemented the disconnection provision. Had the DISCOMs exercised the disconnection of power, the Consumers would not have drawn much power. The DISCOMs kept quiet and allowed the consumers to consume power. Due to this the consumers had to pay huge penal charges. The penal charges are also not levied and communicated in the immediate bill. The penal charges bills were served after a lapse of four months.

19. The Consumers were given three types of options under which the consumers can avail supply depending on their requirement. The three options are mentioned below.

Option-1:

Power supply throughout the month with 60% contracted demand during off peak hours and 10 to 30% contracted demand during peak hours depending on the nature of industry.

Option-2:

18 days power supply at a stretch and power holiday of 12 days. During 18 days power supply, 100% contracted demand during off peak hours and 10 to 30% of contracted demand during peak hours is permitted depending on the nature of industry. During power holiday period of 12 days, 10% of contracted demand is permitted for maintenance.

Option 3:

Staggered power supply for 18 days, like four days power supply in a week with 100% contracted demand during off peak hours and 10 to 30% of contracted demand during peak hours. During power holiday period of 12 days, 10% of contracted demand is permitted for maintenance.

20. The option is left to consumer's choice. But the DISCOMs have not given this option to some consumers and the DISCOMs have decided the option of giving supply on their own.

The DISCOMs have failed to implement the above two provisions, that is,

- i) Effecting disconnection for violation of R&C order as approved in para 18(a) of R&C order dated 01-11-2012.

- ii) Options of availing power supply by consumers as mentioned in para 19 above.

High Court Writ Petitions:

21. Some of the consumers have filed writ petitions before the Hon'ble High Court. The summary abstract of the contentions in the writ petitions are as under:

a). The Commission has acted only on the representation of the DISCOMs on the availability of power and did not take the views or objections of the consumers. Accepting such unilateral representations of the DISCOMs is arbitrary. The orders of APERC therefore are against public policy, illegal, improper and contrary to the provisions of law. The DISCOMs without resorting to disconnection of power, whenever R&C restrictions are violated, insisted for payment of penalties. Thus, in the interest of justice, petitioners are requesting the Hon'ble Court to issue appropriate orders due to irreparable damages and uncompensatable losses.

b). They should be exempted from R&C measures as they would also fall under the same category of consumers who had been accorded exemption for similar category / type of industries by the Commission.

c). It would be difficult to use electricity upto sanctioned level of Contracted Maximum Demand (CMD) for technical reasons and if penal charges are payable, running of business units will be highly difficult besides being uneconomical, incurring

non-recoverable losses and thus affected the industrial consumers in the state.

d). The accidental overdraws should not be violated with excessive penalty. Such huge penalties are putting the unbearable financial burden. They were not able to pay such penalties.

e). The impugned proceedings of R&C resulted in collecting huge amounts under the garb of penalties. The balance of convenience lies with the consumers and requested for removal of such extreme hardship.

f). There is no defined eligible criteria or rational basis for exempting certain classes of electricity consumers from application of impugned proceedings.

g). The consumers had questioned the legality of the order as the Commission failed to offer opportunity of hearing to the petitioners before deciding the request made by petitioner thereby violated principles of natural justice. Penalty cannot be imposed unless there is clear sanction in law.

h). The captive consumers wanted a specific consideration for them to meet its additional requirements as they depend on grid only in exceptional circumstances.

i). The DISCOMs have ignored their obligations to ensure the continuous power supply to the consumers while making every effort in procuring the energy from all the sources. The DISCOMs have failed in procuring the required energy for all the

consumers and the failure of obligation on the part of the DISCOMs as per the General Terms and Conditions of Supply, cannot be transmitted to the consumers through imposition of restrictions and huge penalties levied on such violations. The levy of imposition of penalties for no fault of consumers and requiring them to pay huge amounts within short time is violation of natural justice.

j). There were calculation mistakes in the levy of penalties. There are also mistakes in recording the load factor, wrong billings due to corrupted memory chips.

k). The consumers are always threatened with disconnections if the huge amounts are not paid within the shortest time. The consumers are allowed to utilise far lower than the shortage of power that is projected by the DISCOMs.

l). Some of the perishable goods industries have represented that if consumption is reduced to the level indicated in the R&C measures, it will be impossible to rebuild the stock of the raw material and the completion of manufacturing in such conditions process would render the incompleteness of finished products.

m). Some industries were discriminated and exemptions were not given.

n). Commission granted exemption to some categories of consumers from different dates. They should be given exemption from the date on which R&C measures are introduced. There is specific prayer of some of the consumers for exemption of their own industry on the criteria followed by

the Commission to the effect that the exemption should be given from the day R&C measures are introduced not from the day when the Commission has subsequently identified the need for exemption and issued the orders.

o). The formula for implementation of R&C measures has to be informed in advance to the consumers as it involves lot of procedure to be followed to implement these measures. Therefore it is obligatory on the part of respondents to inform in respect of R&C measures on usage of power in advance.

22. Some of the representations before APERC are summarised which are as under:

- a. There is no effective and immediate communication on the orders of R&C measures to the consumers.
- b. There are errors in drafting formulae resulting in anomalies. Therefore anomalies have to be removed.
- c. Exemption has to be given for industries which have critical nature of operations.
- d. There are wrong billings and discrepancies in billings.
- e. Meter reading problems both with reference to time and dates.
- f. The power allowed and the CMD allowed is not sufficient for even minimum requirement of certain industries.
- g. There were many claims for exempting the various essential utility services, public utility services, continuous

process industries, seasonal industries and agro-based industries, educational institutions, railways, mobile towers.

- h. The consumers claimed that the penalties were paid under protest without prejudice.
- i. The settlement of power bills with reference to open access and operation of R&C measures.
- j. The DISCOMs followed the instructions of R&C that were favourable to them immediately and whatever the orders that were unfavourable to them were not honoured with immediate effect.
- k. The shortage of power was not proportionately allocated to the industry and other consumers. As a result they were getting far lower availability of power.
- l. The cumulative penalties are levied without giving any indication about the excess drawl by the DISCOMs and without even physically disconnecting for first violation.
- m. The time granted for payment of huge penalties is so short and sudden that it would be impossible for them to pay such huge penalties within stipulated time.
- n. Unilateral representation of DISCOMs against public policy was considered by Commission.

- o. Bill for excess consumption, MD charges also being levied for the whole month, but not for the day on which any excess is noticed
- p. The loads in any industry are not controllable to precise at some points to avoid recording of M.D. excess over the limits specified in R&C orders.
- q. Penal charges on MD should be for period of overdrawl and penalty for such day and not for entire spell.
- r. There may be accident excess drawls due to unanticipated technical factors.
- s. Segregation of the charges into peak and non-peak periods not followed.

23. Commission examined the consumers difficulties and objection on R&C measures in detail. Commission considers to review the above deficiencies, operations and implementation by the DISCOMs, and to suitably address the consumers demand for removing excessive and harsh penalties while causing no financial loss to DISCOMs.

24. The restriction and control measures have been removed the day the power situation had improved due to hydel generations. The DISCOMs had represented for the removal of the R&C measures on 31.07.2013 and on the same day orders were given by APERC without any time of delay removing R&C measures.

(b). There are many defences by consumers on uncontrollability, lack of interactions with DISCOMs, foreseeability, procedural and other affirmative defences by consumers.

25. Whatever may be reason of failure, when R&C measures violated, penalty is leviable. Intention also cannot be taken into account.

26. Statements of facts are varying between DISCOMs and consumers regarding communication.

27. Excessive penalty served the purpose of restraining power consumption and protecting the grid.

28. Penalties levied are disproportionate and excess. Penalties levied for strong deterrence and they are tariff based.

29. Due to complexity and unanticipated issues in implementation, mitigation is needed in the form of lower incidence of financial costs.

30. In view of these detailed circumstances examined, rights and obligations of both DISCOMs and consumers, it is considered to reasonably exercise its powers / authority to provide appropriate relief in the form of part waiver of penalties.

31. Commission has jurisdiction to levy penalty under Section 23 read with 86(f) of Electricity Act, 2003. Commission has also power to waive the penalty.

32. Reliance is placed on the orders of Appellate Tribunal for Electricity (APTEL) on 24.02.2011 in case of Chattisgarh State Power Distribution Co.Ltd, Raipur Vs 1.Arasmeta Captive Power Co.Ltd & 2. Chattisgarh State Electricity Regulatory Commission in Appeal No.25 of 2010.

33. Relevant extracts of order:

"a. The waiver of penal demand charges is within the regulatory control of the State Commission. When the authority has the right to impose penalty, equally it has got the right to vary, waive and modify such a penalty for the justified reasons.

b. The waiver of penal demand charges is within the regulatory control of the State Commission. Therefore, the State Commission on the valid reasons decided to waive the penalty".

34. Penalties levied are not arbitrary and unjustified.

35. The Commission took the following stand before Hon'ble High Court.

a. The restrictions imposed by the Commission is for certain period only, but not on perennial basis in view of the shortage of electricity. The imposition of higher rates of penalty is only to sanction the rigour of ration by making persons who exceed the quota liable to pay higher rates to see that there is equal distribution of power among all the consumers.

b. The Hon'ble High Court was pleased to uphold the restrictions imposed by the Commission in the writ petition no.29621 of 2012 by an order dated:19.11.2012.

c. The Hon'ble High Court while disposing of another writ petition by same order had directed that the Commission should look into case of seasonable industries. Consequently the Commission has re-considered the issue as per the directives of this Hon'ble High Court order dated:19.11.2012 and revised orders were issued on 24.12.2012.

36. The imposition of penalties is not merely a punishment but is intended to put a restriction by making persons who exceed the quota liable to pay higher rates. It is also worth mentioning that in the absence of any deterrent the consumer will be at liberty to violate any order which seeks to impose any restrictions. Since the system for power supply is itself a unified entity (integrated one), the flow of power is always there. This may result in violation of the restrictions imposed and result in inequitable distribution of power supply available in the system. Over drawl by individual consumers contrary to the specified restrictions would also result in technical problems for the distributor as well as consumers. Therefore, the contentions are untenable about introduction of R&C measures.

Existing legal position:

37. The Commission is of the view that while the penalties are leviable for violations under the provisions of the Act, 2003, which are in respect of Act, rules and regulations. The penalties under the impugned order are a deterrent charge for exceeding the specific quantify of demand and energy and it is not in a true sense a penalty as is available under criminal law. It is only

civil penalty. It is not punishment for wrongful conduct. It is to deter them not to use power beyond what is authorised to protect the grid.

38. These penalties are the conditions imposed under the tariff order for violation of power drawn in excess of the contracted demand. Such penalties have been upheld by this Hon'ble Court by order dated:19.11.2012 in W.P.No.29621 of 2012 filed by M/s. Sriramagiri Spinning Mills Limited. The said judgment was rendered by relying upon the judgment of the Hon'ble Supreme Court in M/s. Adoni Cotton Mills Limited vs APSEB reported in 1976 (4) SCC 68. The said judgment in the said case, which is relevant in the present context, is as follows:

"The terms and conditions contain the power of the Board to enhance the rates. Section 49(3) of the 1948 Act states that the Board has power to fix different tariffs for the supply of electricity having regard to the geographical position of any area, the nature of the supply and public purpose for which supply is required and any other relevant factors. The expression "any other relevant factors" is not to be construed ejusdem generic because there is no genus of the relevant factors. The combined effect of Section 49 of the 1948 Act and the terms and conditions of supply is that having regard to the nature of supply and other relevant factors particularly when there is shortage of electricity the Board has power to enhance the rates. If there is shortage of electricity there is to be restriction on supply. The Board can disconnect supply if the quota is exceeded. The imposition of higher rates is only to sanction the rigour of ration by making persons who exceed the quota liable to pay higher rates" (emphasis added).

The above is statutory and legal position regarding authority for the Commission to levy penalty.

39. It is respectfully submitted that the levy of penalties is a consequence which descends on any person when there is violation of a condition imposed. It need not necessarily be the set out in the Act or Regulation. Furthermore, the penalty in the impugned proceedings is a charge upon the exceeding of a particular act of drawing power. It is not a strict sense penalty as is sought to be portrayed by the petitioner and it is not in nature of criminal laws.

40. The Hon'ble High Court in some cases made the following order. The order in the case of WPMP No.23817 of 2013 in WP No.19463 of 2013 filed by M/s.Venkateswara Steel Works "Subject to payment of 50% of the penal charges demanded for the months of September to June, 2013, within three weeks from today by the petitioner company there shall be a direction to the APCPDCL not to disconnect the power supply. Any amount already paid by the petitioner company in this regard shall be given due credit while computing the sum payable under this order".

41. The Commission has considered all the representations of DISCOMs, objections of consumers and contentions raised in writ petitions.

42. This is a maiden R&C order by the Commission on the express request of DISCOMs due to acute shortage of power situation.

43. The Commission will not and cannot deny some of the very genuine technical problems, and behavioural processes both by DISCOMs and consumers for impossibility in complying R&C

measures. Commission can only mitigate the financial hardship that is caused.

44. Whatever may be the cause of excess drawl, and how so ever genuine it may be, the consumer who consumed excess power, cannot be equated with those who strictly adhered to R&C measures. The regular tariff cannot be considered for excess unauthorised consumption.

45. Penalties are tariff based and justified in view of shortage of power and deterrent during R&C measures.

46. It was not possible to foresee and provide expressly for all combination of circumstances that can arise in implementation of maiden R&C regulations by this Commission. Exceptional circumstances in individual cases cannot also specifically be addressed. There were self-corrections carried out in R&C measures as and when genuine issues were brought to notice of the Commission. Third party sales through open access were allowed. Cross subsidy charges were removed for open access consumers. Depending upon availability of additional power, consumption restrictions were partially relaxed through subsequent orders. Expensive power supply scheme was introduced on 03.1.2013 and DISCOMs supplied high cost power to willing consumers. Further, R&C measures is not a continuous process.

47. As penalties levied were not to penalise consumers with disproportionately harsh penalties, but to safeguard grid and also supply power to all the consumers on equitable basis.

48. These penalties were not intended as source of revenue to DISCOMs. These penalties not only saved grid which was the main objective but also ensured supply to all the consumers in equitable manner. Penalties levied are considered disproportionate and excessive. The benefit of availing additional power through violation of R&C measures is to be compensated with only equitable proportionate penalty. In public interest, a part waiver of penalty is considered to reduce the undue burden on account of harsh and excessive penalties in form of financial costs for all the consumers. It is considered by Commission to reasonably exercise its authority to provide appropriate relief in the form of partial waiver of penalties. The impairment of consumers ability to do business with high cost of penalty is also the concern of Commission.

It is considered to make partial waiver of the penal charges levied on all the consumers from the day R&C measures were introduced by order dt:07.09.2012.

49. Considering these circumstances in which the whole process of introduction of R&C measures, failure of strict inspection, monitoring and enforcement by way of disconnection and serving notices by DISCOMs, erroneous interpretations and prolonged delays in levy of penalties, its excessive financial burden on consumers, the Commission has decided to waive penalties to the extent of 50% specified in the R&C orders.

The relief thus provided is transparent, non-discriminative and balanced. This is not an anticipated relief for any consumer. It is not financially detrimental to DISCOMs as they do not incur

any loss if 50% of penalty is waived. Such financial mitigation to consumers thus is not bringing any financial loss to DISCOMs.

50. Accordingly, the Commission hereby waives 50% of penal charges for all consumers for whom R&C measures were made applicable vide Order Dt:07.09.2012 and all orders issued from time to time including the last Order Dt:17.04.2013.

51. This is only one time waiver.

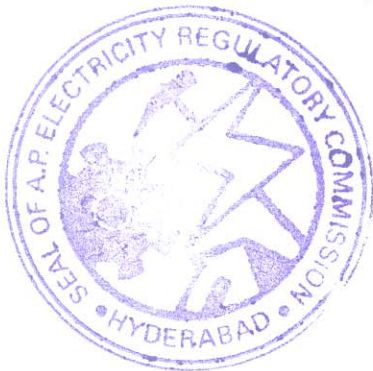
52. The refunds arising out of waiver of 50% penalty shall not be refunded and the same shall be adjusted against future bills.

53. No interest shall be payable on any refundable amounts.

54. This part waiver shall not give any right to canvass for total waiver of penalty from the day R&C measures were introduced.

This order is signed by the Commission on 8th day of August, 2013.

(BY ORDER OF THE COMMISSION)




Commission Secretary
SECRETARY
A.P. Electricity Regulatory Commission
Hyderabad.