

Order No.1 of 2003

1. As per provisions of section 13 of the Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation & Modification Order 2001 (hereinafter referred to as Act) Uttaranchal Power Corporation Limited (hereinafter referred to as UPCL) is currently functioning as provisional licensee for transmission and supply of electricity within the state. UPCL has recently applied for issue of a regular licence for this purpose and final decision on the same is awaited. In the mean-time UPCL continues to function as a provisional licensee for transmission and supply of electricity in the State.
2. The Uttaranchal Electricity Regulatory Commission (hereinafter referred to as the Commission) was constituted on 5-9-2002 under Section 3 of the Act. Prior to creation of the Uttaranchal State, the electricity tariffs prevailing in the undivided UP state had been approved by the Uttar Pradesh Electricity Regulatory Commission. After creation of the Uttaranchal State but before establishment of the Commission, the State Government assumed the responsibility of fixing tariffs for different categories of consumers and the same were enforced with effect from 1-1-2002. These tariffs were prevailing in the State on the date of this Commission's constitution. No proposal for ratification or amendment to these tariffs has been made so far.
3. It came to Commission's notice that these prevailing tariffs have been modified by the provisional licensee on 25-10-2002. The Commission had not given approval for any such alteration and therefore took suo moto cognizance of the matter. A notice was accordingly issued requiring UPCL to show cause as to why these orders should not be interfered with and why action as per law should not be taken against the licensee for their illegal action. Reply to the above show cause notice was filed by the Director (Finance) on behalf of UPCL. The reply first dwells upon the justification for the benefits extended through the order dated 25.10.02. It then states clearly that certain portions of the prevailing tariff order were modified and substituted but then goes on to assert that UPCL has not determined or fixed any tariff. In view of the apparently self-contradictory reply copies of the following documents were summoned for perusal.
 - i. Relevant order dated 25-10-2002.
 - ii. Proposal put up to the UPCL's Board of Directors for approval.
 - iii. Decision of the Board of Directors as recorded in the minute book.
 - iv. UPCL's proposal submitted to the State Government in this connection.
 - v. State Government's approval of the above proposal.
4. In response some documents were received from UPCL on 19-12-2002 and scrutiny of the same throws up following issues:
 - i. Whether UPCL's order dated 25-10-2002 amounts to altering the existing tariff structure in the State.
 - ii. Whether UPCL were empowered to do so..
 - iii. Whether UPCL committed a bonafide mistake while issuing the above order or have consciously and deliberately violated the law.Above issues will be addressed one by one.
5. As stated earlier, the tariff currently prevailing in the State is the tariff approved by the State Government prior to establishment of this Commission. This stipulated 15% additional surcharge to be levied on consumers fed by independent feeders emanating for 440/220/132 KV sub-stations. Such consumers were assured minimum 500 hours of

supply in a month and a rebate was admissible in case of short fall in the guaranteed hours of supply. Such consumers did not have the option for not taking supply on an independent feeder. UPCL by their order dated 25.10.2002 have deleted this provision and substituted it by another provision which now provides that such consumers will have the option to be fed by an independent feeder or not. If the consumer opts for not being fed by an independent feeder, the 15% surcharge is not leviable. With the independent feeders physically in place how such options will be operationalised is a mystery that we are not going into in this order.

In their letter to the State Government dated 18-9-2002 UPCL have clearly stated that by removing this 15% surcharge the loss in revenue realisable from consumers belonging to this category is estimated to be Rs. 7.44 crores per annum. The proposal put up to the Board of Directors of UPCL also refers to the fact that this surcharge was originally introduced by the UP Electricity Regulatory Commission by their tariff order dated 7-7-2000. The same was retained in Uttaranchal in the tariff applicable from 1.1.2002. Since the surcharge has now been done away with by the UP Commission in their tariff order dated 1.9.2001, it has been proposed to the Board to amend point No.14 of the prevailing HV-2 rate schedule. The order issued on 25.10.2002 also specifically refers to UPCL's tariff rate list and amends the same.

6. Notwithstanding UPCL's statement on oath to the contrary the fact is that vide their order dated 25.10.2002 UPCL has substantially modified the tariff applicable to HV-2 category of consumers. As per UPCL's own estimate the changes so introduced would result in annual revenue loss of Rs. 7.44 crores. It is, therefore, clear that the changes introduced through this order dated 25.10.2002 are not insignificant or marginal corrections but have substantial financial implications. Therefore UPCL's plea that the tariff's structure has not been altered does not find support from facts or from UPCL's own document.

7. A similar issue has been examined in depth by the Hon'ble Allahabad High Court in C.M.W.P. No.40692 of 2000 between M/s L.M.L. Limited Kanpur and State of U.P. and others. Hon'ble High Court has observed that: -

*"The contention raised on the basis of circular dated 8-9-200 issued from the office of Chief General Manager (Commercial), UPPCL, is equally untenable. The provision in later part of paragraph 2 Ka thereof which lays down that 15 per cent surcharge would not be levied in case a consumer getting supply from an independent feeder emanating from 400/220/132 KV sub-station gave an option that he did not want a guarantee of 500 hours of supply in a month, is contrary to the tariff approved by the Commission. The Commission in its order approving tariff had merely provided that in case of shortfall in 500 hours of assured supply in a month, a rebate of 1 per cent for each 10 hours shortfall will be admissible on the total amount computed under "Rate of Charge" The circular while retaining this provision has made an additional provision to the effect that if such type of consumer gave an option that he did not want an assured supply of minimum 500 hours in a month, the 15 per cent surcharge shall be not levied. **This is clear alteration of the approved tariff, which is not permissible in law.** Sri Sudhir Agarwal, learned counsel for UPPCL tried to justify the circular by submitting that after a tariff has been approved by the Commission under sub-section (6) of Section 24, the holder of a supply licence, while publishing the tariff in the newspapers as required by sub-section (7) of Section 24, could alter the same and the*

only embargo is that the tariff implemented by the licensee should satisfy the requirements of clause (a), (b) and (c) of subsection (7). In our opinion, the contention raised is wholly fallacious. The scheme of Act which we have referred to in detail clearly shows that a tariff approved by the Commission alone can be implemented by a licensee and it has no power to alter or vary the same. The circular of UPPCL in so far as it is inconsistent with the tariff approved by the Commission is void and wholly inoperative in law. The petitioner, therefore, cannot get any advantage by exercising an option in terms of the circular by which it informed by registered post that it did not want an assured supply of 500 hours in a month."

The above finding leaves no room for any doubt that the order dated 25.10.02 amounts to altering the existing tariff structure in the State.

8. We now come to the next question that whether UPCL had the authority to make the above changes in the prevailing tariff structure. The Electricity Regulatory Commission Act 1998 (herein after referred to as the Central Act) came into force on July 2, 1998. Section 17 of the Central Act requires the State Government to establish the State Electricity Regulatory Commission. Chapter V of this act which lays down the powers and functions of the State Commission, clearly stipulates that the State Commission shall determine the Tariff for electricity, wholesale, bulk, grid or retail as the case may be. Uttaranchal Electricity Regulatory Commission was accordingly constituted through Uttaranchal (Uttar Pradesh Electricity Reform Act) Adaptation & Modification Order, 2001 (herein after referred to as the Act). Section 10 of this Act clearly states that one of the function of the Commission will be to determine the Tariff for electricity, wholesale, bulk, grid or retail as the case may be. Further Sec 15 of this Act in Para (5) (j) requires that the licensee will establish a Tariff in accordance with the directions of the Commission. Similarly Section 24 of the Act deals with the manner in which the Tariff that the Licensee can charge is to be determined. **Sub Section (8) of this Section clearly stipulates that the Licensee shall not implement any Tariff unless it has been approved by the Commission.**
9. Various provisions of the law referred to in the preceding Para bring out clearly the fact that after its establishment, this Commission alone has the authority to determine the electricity Tariff chargeable from any consumer in the State. UPCL, the provisional Licensee, is in fact prevented under law from implementing any Tariff unless it has been approved by the Commission. In this particular case substantial changes in the prevailing Tariff have been made by the UPCL without approval of the Commission. A reading of the provisions referred to in Para 8 above clearly establish that in issuing the Order dated 25-10-2002 of the UPCL was not only overstepping its authority but has also acted in complete violation of the provisions of Section 24 Sub-section 8, of the Act.
10. This matter has also been examined by the Hon'ble Allahabad High Court in C.M.W.P. No. 40692 of 2000. The Hon'ble Court had observed that "**.....the scheme of the Act which we have referred to in detail clearly shows that a Tariff approved by the Commission alone can be implemented by a Licensee and it has no power to alter or vary the same**".
11. In view of what has been stated in the preceding paras and of the unambiguous finding of the Honorable Allahabad High Court, it is clear that UPCL did not have the legal authority to alter the prevailing tariff and issue order dated 25-10-2002. The said order

having been issued without authority and in violation of law is ab initio void and wholly inoperative in law.

12. We now take up the question whether the UPCL in altering the Tariff structure has committed a bonafide error or has consciously and deliberately acted in a manner violative of law. The Agenda note put up before of the Board of Directors of UPCL on 18-10-2002 throws light on this issue. The said note states that:
" In this context, it would be relevant to mention that the powers for fixing the Retail Tariff applicable to the consumers under a Licensee are vested in the Electricity Regulatory Commission of Uttaranchal (ERCU). The Retail Tariff made applicable in UPCL w.e.f. January 1, 2002 was approved by the Government of Uttaranchal, as the Electricity Regulatory Commission was still not formed".
The above extract clearly shows that while taking this decision UPCL was fully aware of the legal position. It however chose to make these changes in the tariff knowing fully the legal infirmity of their action and its own obligations as a Licensee. Therefore any possibility of the UPCL having committed a bonafide error in taking this step out of ignorance or oversight is clearly ruled out.
13. It is clear from above that UPCL has issued the order dated 25.10.02 without legal authority and in clear violation of provisions of the Act and also of the Central Act. The said order is, therefore, ab initio void and wholly inoperative in law and should be treated as such. It is also clear that in issuing this order UPCL has contravened various provisions of the Act. Violation of provisions of the Uttaranchal (Uttar Pradesh Electricity Reform Act) Adaptation and Modification Order, 2001 attracts the punitive fines under section 28 and further penalties under Chapter XI of the Act.
14. The underlying objective of the Central Act and the Act of reforming the power sector and improving its health cannot be fulfilled if individual stakeholders are allowed to deliberately act in a manner contrary to the scheme envisaged in these laws. Any attempts to do so needs to be nipped in a manner that is effective and will deter all stakeholders from such adverturism in future. The Commission, therefore, takes a serious view of UPCL's illegal actions and hereby directs UPCL to show cause as to why punitive fine should not be imposed on it under Section 28 of the Act. UPCL is further directed to show cause as to that why further action under Chapter XI should also not be taken against the Corporation and its Officers for their illegal acts. Replies of the UPCL, if any, should reach the Commission within 15 days of receipt of this Order.
15. A copy of this order may also be sent to the State Government, for information and appropriate action.

Dated 15-1-2003

Divakar Dev
Chairman