

Before

UTTARANCHAL ELECTRICITY REGULATORY COMMISSION

Petitions No. 3, 5 & 7 of 2003

**Filed by M/s Amrit Varsha Udyog & others, M/s Tehri Steel & others and M/s
Kotdwar Steel & others against Uttaranchal Power Corporation Ltd.**

In the matter of:

Preliminary objection raised by Uttaranchal Power Corporation Ltd. on constitution and jurisdiction of the Commission.

In the matter of:

Uttaranchal Power Corporation Ltd.
Urja Bhawan, Kanwali Road,
Dehradun

Coram

Sri Divakar Dev Chairman

Date of Order 15th October 2003

INTERIM ORDER

This order is being made to decide the preliminary issue of authority and jurisdiction of this Commission to hear and decide the matters raised in petitions nos. 3, 5 & 7 of 2003 filed before this Commission by Amrit Varsha Udyog and others. Brief facts of this matter are given below:

- a) M/s Amrit Varsha Udyog and 11 others filed a petition against penalties of about Rs. 2.51 crore imposed on them by Uttaranchal Power Corporation Ltd. (UPCL) for violation of peak hour restriction and demand of additional security of about Rs. 3.20 crore from them. The petitioners' contention is that no such penalty is leviable under the legally valid tariff applicable in the state. The tariff under which this penalty has been calculated and imposed has not been fixed in accordance with provisions of The Electricity Regulatory Commissions Act, 1998, UP Electricity Reforms Act, 1999, Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation and Modification Order, 2001 or for that matter the Electricity Act, 2003. The petition was admitted for hearing on 12.03.2003. UPCL filed its WS on 28.04.03. An objection about the constitution and jurisdiction of this Commission was raised by UPCL's counsel during the hearing on 07.07.2003. The Commission decided to first hear and dispose off this preliminary objection and fixed hearing on 04.08.2003 for this purpose. UPCL meanwhile filed a writ petition before the Hon'ble High Court who were pleased to direct this Commission to hear both the sides and decide whether it has the authority and jurisdiction to entertain, try and dispose off the petition filed in connection with the petitioners' bill including the penalty imposed on them.
- b) M/s Tehri Steel and three other petitioners filed petition no. 5 of 2003 against penalty imposed on them for violation of peak hour restrictions. It was contended that no such restrictions on use of electricity during peak hours were applicable to the petitioners and also that no penalty for violation of these restrictions was leviable under the legally approved tariffs. Further the UPCL has imposed penalty in accordance with tariffs unilaterally fixed by them in complete violation of relevant provisions of law. The petition was admitted for hearing on 29.05.2003. On 07.07.2003 an objection was raised on behalf of UPCL about the constitution of this single member Commission and about its jurisdiction to hear and decide the matter raised in the petition. The Commission decided to hear both the parties on this preliminary objection on 04.08.2003. Meanwhile, UPCL, the OP, filed a writ petition before the Hon'ble High Court who were pleased to direct on 18.07.2003 that the Commission may hear both the parties and decide with preliminary objection

- whether it has the authority and jurisdiction to entertain, try and dispose off the petition.
- c) M/s Kotdwar Steels and 11 other petitioners filed petition no. 7 of 2003 before this Commission against levy of 15% independent feeder surcharge in their bills for March, April & May. The petitioners' contention was that for years their units were being supplied electricity through a common feeder and not through independent feeders and therefore they were not required to pay the independent feeder surcharge. UPCL has now suddenly imposed 15% surcharge on each one of them for their bills for the months of March, April & May 2003. They had approached the concerned officer of UPCL against this arbitrary imposition of surcharge but did not get any relief from him. They were also not allowed to deposit the amount excluding the disputed surcharge. The total amount payable by the petitioners works out to Rs. 41.5 crore. The petition was fixed for hearing on admissibility on 07.07.2003. On that date it was contended on behalf of UPCL that the Commission was not properly constituted and did not have the jurisdiction to hear and decide the matter raised in the petition. The Commission therefore decided to hear the parties on this preliminary issue on 04.08.2003. UPCL in the meantime filed a writ petition before the Hon'ble High Court who were pleased to direct on 18.07.2003 that the Commission may hear both the parties and decide the preliminary issue whether it has the authority and jurisdiction to hear and decide the matter raised by the petitioners.

2. The Commission issued notices to UPCL and the petitioners in all the three cases to the effect that in compliance of Hon'ble High Court's directions, the Commission will hear them on this preliminary issue of jurisdiction on 16.09.2003 requesting them to make their submission in writing along with relevant supporting documents. Petitioners and UPCL filed their written submissions in all the three cases and with the consent of all parties, it was decided that the matter of jurisdiction being common may be taken up together for all the three petitions. Further with consent of both the parties following issues were framed:

- a) Whether the Commission has been constituted in accordance with provisions of law or in violation of the same.
- b) Whether the Commission has the Jurisdiction to and is authorized to hear and decide the issues raised in the petition.

3. Both the parties were required to make their submissions with respect to the above issues and file such documents as they want on the next date of hearing that is 29.09.2003. The State Government under whose order the Commission was constituted were also given notice and asked to give their submissions with respect to issue no. 1 above. On that day UPCL's earlier counsel was replaced by Sri Amit Kapoor. UPCL's request to the effect that they want to withdraw the submissions filed on the previous date of hearing by the then counsel and file fresh submissions was considered and since the same was not objected to by the petitioners, it was accepted. Accordingly fresh submission was filed on behalf of UPCL and copies of the same were made available to the petitioners. The State Government in response to the Commission's notice sent a letter to the Secretary of the Commission stating that according to them the constitution of Commission was fully in accordance with the provisions of The Electricity Regulatory Commissions Act, 1998, Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation and Modification Order, 2001 and The Electricity Act, 2003. The matter was fixed for final hearing on 08.10.2003. On that day UPCL changed their counsel once again and Sri S.M. Jain appeared in place of Sri Amit Kapoor. In view of the 8 week's time limit fixed by the Hon'ble High Court Sri Jain was good enough to argue the case on 08.10.2003 itself. In the latest submission it has been stated on behalf of UPCL that they do not want to press the preliminary issue pertaining to constitution of the Commission raised by them earlier before the Commission and also before the Hon'ble High Court.

4. Commission has carefully gone through the record and has heard the arguments presented by Sri S.M. Jain on behalf of UPCL and by Sri Sudhir Agrawal on behalf of the petitioners. Sri Agrawal has argued that even though the OP does not wish to press his earlier objection pertaining to constitution of this Commission, issue no. 1 framed earlier may also be considered and decided as it has been agitated before the Commission as well as Hon'ble High Court who have been pleased to direct the Commission to decide the issue with respect to both

its authority as well as jurisdiction. It may be recalled that the objection raised in this connection was that Uttaranchal Electricity Regulatory Commission being a single member Commission and not having any judicial member has been constituted in violation of the Hon'ble Supreme Court's directions given in West Bengal Electricity Regulatory Commission's case(2002 Vol. SCC 715).

5. It has been argued on behalf of UPCL that the matters raised by the petitioners in these three petitions are billing disputes and the same should be decided by the grievance redressal machinery of the licensee and that the law does not authorize this Commission to hear and decide the same. In this connection it has been claimed that the Electricity Supply (Consumers) Regulation, 1984 were notified by the erstwhile UPSEB in exercise of powers under section 49 and 79 of The Electricity (Supply) Act, 1948. These are statutory regulations and regulation no. 23 provides adequate remedy to consumers in such matters. These regulations have been adopted by UPCL, the licensee, on 31.03.2002. In accordance with well-settled law on the subject, the Commission can not hear and decide the dispute unless the alternative available remedy has been exhausted. It has been further argued that Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation and Modification Order, 2001 (UAO) lists out the Commission's functions in section 10 and the same do not cover the disputes raised in these petitions. Such disputes are therefore to be raised and decided only by the authority (Executive Engineer) specified in regulation 23 of 1984 regulations and the Commission does not have the authority or powers to hear and adjudicate upon such matters. In this connection reliance has been placed on Hon'ble High Court of Uttaranchal's order in writ petitions no. 235(M/B) and no 910(M/B) of 2003 filed by M/s Arpit Steels and another and also on the Hon'ble Gujarat High Courts decision in Mardia Chemicals Vs. Gujarat Electricity Board (AIR 2002 Gujarat 318).

6. It has also been argued on behalf of licensee that Electricity Act, 2003 in section 42(5) provides for the licensee to create a forum of redressal of consumers' grievances. Similarly section 42(6&7) provide for appointment of Ombudsman by the Commission. Therefore according to them, since the Commission does not have the authority or jurisdiction to consider the matter and since grievance redressal machinery stipulated in section 42(5to7)

has not been established, the only arrangement available to the consumer to agitate their grievances is the arrangement made by the licensee in accordance with regulation 23 of the Supply Regulations 1984, referred to above.

7. Sri Sudhir Agrawal has argued on behalf of petitioners that the Hon'ble Supreme Court in their order pertaining to West Bengal Electricity Regulatory Commission (2002 Vol. SCC 715) has nowhere stated that the regulatory commissions should necessarily have more than one member or for that matter they should necessarily have a judicial member. What the Hon'ble Supreme Court has stated in this order pertains to constitution of a proper appellate body to hear appeals against Commissions' orders and the same has been incorporated in the Electricity Act, 2003. UPCL's contention in this regard is therefore factually without basis and misleading. While adopting the Uttar Pradesh Electricity Reforms Act, 1999 in the newly created State of Uttaranchal, the UAO has consciously provided for constitution of only a single member commission as stipulated in section 3 of this order. Further the Electricity Regulatory Commission Act, 1998 and now the Electricity Act, 2003 only stipulate that the State Commission shall consist of not more than three members including the chairperson. They do not stipulate any minimum number of members nor do they stipulate that the Commission should necessarily have on it a judicial member. Therefore, the constitution of the Commission has been done in a manner, which fully meets the requirements of law and the Commission's authority to hear and decide the petitions can not be questioned on grounds of defective constitution.

8. It has been further argued that regulation 23 of the Supply Regulations, 1984 is confined to assessments that the Executive Engineer may make after the hearing the consumer. The need for making such assessments arises only when the energy meter is defective or not working and therefore the actual energy consumption is not known. No such assessment is required to be made when the meter is functioning and therefore grievances relating to such bills based on actual consumption are not covered under regulation 23. In this connection it has been argued that in the very case of Arpit Steels referred to in UPCL's submission when the matter was taken to this authority specified under regulation 23, it was rejected on the ground that such matters do not fall within the ambit of this particular regulation. Further

UPCL is not a successor to UPSEB but is a company which has entered into the business of supply and distribution of electricity independently. Accordingly it has not automatically inherited rules and regulations of UPSEB and the same do not become applicable to the business of UPCL. It has also been argued that UPCL's claim that these regulations have been adopted by them on 31.03.2001 does not give them any statutory status because on that date UPCL was at the best only a registered company under the Companies Act. The business of supply and distribution of electricity was acquired by UPCL from UPPCL only after Government of India's Order in November 2001. It acquired the status of provisional licensee for supply and distribution of electricity under UAO only on 01.01.2002. Therefore, without being even a provisional licensee and without being in the business of supply and distribution of electricity on 31.03.2001, if supply regulation of 1984 framed by UPSEB are adopted by the any company they do not automatically acquire status of statutory regulations.

9. It has also been argued that section 78 of The Electricity (Supply) Act, 1948 empowered the state Government to make rules. Similarly section 79 authorised the board to make regulations Section 55(1) of the UP Electricity Reforms Act protects only the rules made under the Electricity (Supply) Act, 1948 and no such protection has been extended to the regulations framed by the Electricity Board under section 79 of the same Act. For reasons given above The Electricity Supply (Consumers) Regulations 1984 framed by erstwhile UPSEB ceased to be statutory regulations after the UP Electricity Reforms Act 1999 was passed. In absence of such statutory status these regulations, even if adopted by the licensee, would at the best amount to an in-house departmental arrangement for addressing such issues. Such in-house arrangements are often made by companies for certain specified tasks. Recognizing any such arrangement as statutorily prescribed exclusive machinery for redressal of consumer grievances would not be correct and such a view will only deprive consumers of a fair opportunity to seek relief against arbitrary actions of the licensee. To say that such grievances can be taken only to this in house authority and the Commission can not look into them is neither legally correct nor just.

10. Shri Agarwal has further argued that the issues raised in these three petitions are not assessments covered by regulation 23. The issues raised are whether restrictions on use of

electricity during peak hours for which they have been penalized are applicable to the petitioners, whether petitioners who are being given supply on shared feeders can now be suddenly deemed to be getting supply on independent feeders and required to pay 15% surcharge and most of all whether the tariff determined by the licensee himself and applied on the petitioners is legally valid tariff and similar related matters. These are not matters that can be considered and satisfactorily decided by any in-house grievance redressal machinery. On the contrary it has been argued that the licensee's consciously and deliberately changing the tariff fixed by UPERC in complete violation of law and enforcing the same on consumers is a serious enough matter to be dealt with by the Commission who may apart from giving suitable relief to the petitioners take a view on steps to prevent such delinquency on licensee's part in future. Licensee's contention that such grievances are to be considered and decided only by their in-house departmental machinery and by nobody else is neither just nor in tune with the spirit and objectives of various laws framed for reforming the electricity sector. The very objective of reforming the sector is to change the present authoritarianism arising out of monopolistic functioning and bring about greater transparency and accountability in the system. Contrary to all this the licensee is trying to revert back to the system prevailing 20 years back and is aiming to only stifle consumers' voice. This is a contrary to what statutes like the Electricity Regulatory Commissions Act, 1998, UP Electricity Reforms Act, 1999, Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation and Modification order, 2001 and now The Electricity Act, 2003 aim to do. Instead of bringing about greater transparency in licensee's operations and accountability for its actions and giving voice to the consumers which these statutes aim to do, the licensee is wanting to function in a manner which prohibits any scrutiny and correction of its actions or permits the consumers to air their genuine grievances and get relief. In this connection Sri Sudhir Agrawal has drawn attention to some specific provisions of UAO relating to the expectations that law has from the Regulatory Commission. These are as follows:

- (i) Section 10(k) of UAO amongst other things requires the Commission to ensure a fair deal to the consumers.
- (ii) Section 15(5) (j) read with section 15(10) of the UAO require the licensee to calculate and realize its charges only in accordance with directions of the

Commission. Not doing so amounts to violation of these conditions and in turn gives rise to disputes to be determined by the Commission under section 15(5) (c) of the UAO.

- (iii) Section 24(9) of the UAO unambiguously requires the Commission to ensure compliance of terms and conditions of the licence by the licensee in relation to charges for the sale of electricity. Realizing charges not leviable or based on tariffs other than tariffs determined in accordance with Section 24(8) of UAO is a clear violation of terms of licence with respect to sale of electricity and the Commission is not only authorized but specifically required by this section to look into such matters and ensure compliance.
- (iv) Section 26(1) of the UAO again requires the Commission to intervene in case of any contravention of terms and conditions of the licence by the licensee. The issues raised in these petitions clearly involve contravention of tariff related conditions of the licence and this section requires the Commission to take note on such contraventions and intervene.
- (v) Section 34 (1) read with section 30(1) of the UAO again clearly stipulate adjudication by the Commission on disputes of the kind raised in these three petitions.

11. In view of the above unambiguous provisions contained in the UAO and keeping in mind the spirit of this act and other legislations like the Electricity Act, 2003, licensee's contention that the Commission does not have the authority or jurisdiction to hear and dispose off these petitions is misconceived and without any basis.

12. Commission has carefully considered the arguments presented by the two sides and has also gone through the record and rulings quoted by the licensee's advocate. The issues raised in the three petitions involve detailed examination and decisions on subjects like the precise restrictions applicable to use of electricity by the petitioners; the penalty devolving on them in case of violation of such restrictions; the legal validity of licensee's tariffs fixed by the licensee itself amending the tariff approved by UP Electricity Regulatory Commission and indeed the

manner in which these charges have been suddenly levied on some of the petitioners without even giving them a hearing. These are not routine issues which can be satisfactorily addressed by any in-house committee or individual functionary of the licensee's organization. For instance the decision to unilaterally amend the tariff prescribed by UPERC is a decision taken by the management of the company and its propriety or legality can not be looked into and decided by any subordinate authority. Therefore to term these matters as simple billing disputes and confine their consideration to any departmental functionary of the licensee really amounts to denying the petitioners reasonable opportunity of airing their grievance and of a fair, independent and objective view being taken on the same. This is totally opposite to what the entire process of reforms in the electricity sector endeavours to do. Far from bringing about transparency and accountability in licensee's operations such view would only give rise to and perpetuate arbitrary and un-restricted exercise of authority by the licensee. The Electricity Act, 2003 and the UAO both do not permit such functioning of the licensee and on the other hand aim to regulate the discretion available to the licensee particularly in areas like performance standards and realization of charges from electricity consumers. It is for this reason that the regulator has been authorised to and in many cases required to keep an eye on the licensee's working and if required intervene effectively to ensure a fair deal to consumers and other stakeholders.

13. Commission has also carefully gone through the specific provisions of the UAO referred to by the petitioners' advocate. A simple reading of these provisions clearly bring out the fact that the Commission undoubtedly has jurisdiction entertain these petitions and is indeed required by law to intervene and ensure full and proper compliance of conditions of licence given to UPCL. Combined reading of these provisions clearly bring out that the Commission has not erred in any way in admitting these petitions for hearing and Commission's action in this regard is fully in accordance with law.

14. Commission has also carefully gone through the case law quoted by UPCL's advocate. In case of Arpit Steel the Hon'ble High court has not entertained a second writ and stated that the forum of appeal is still available to the petitioner in that case. Nowhere has the Hon'ble High Court gone into and decided issues that have any bearing on the questions that

have been raised in this preliminary objection raised on behalf of UPCL. It is incorrect to say that the Hon'ble High Court has gone into and decided this issue as has been claimed. Similarly in the case of Mardia Chemicals vs. GEB, the issue before the Commission and then before the Hon'ble Gujarat High Court was not of charges that can be legally realized from the consumer, but related to disconnection notice given by GEB and the Commission itself did not see any reason to intervene. Hon'ble Gujarat High Court's decision in this particular case does not therefore add strength to the objection raised by UPCL.

15. On the issue of constitution of this Commission it is awkward for the Commission to give any finding. However, the Commission has taken note of the arguments presented by Sri Sudhir Agrawal and has carefully gone through the relevant provisions of The Electricity Regulatory Commissions Act, 1998, Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation and Modification Order, 2001 and The Electricity Act, 2003. The Commission has also taken note of the communication received from the State Government and concluded that there is no apparent infirmity in the Commission's constitution and the same appears to be in conformity with the relevant provisions of these acts.

16. For reasons discussed above, there is no merit in the preliminary objection of UPCL and the same is hereby rejected. Copies of this order may be placed in files pertaining to petitions no. 5 & 7 also.

Divakar Dev
Chairman