ANNEXURE - VIII

Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 41, 42 and 43 of 2010

Dated: 31st January, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

Hon'ble Mr. Rakesh Nath, Technical Member

Hon'ble Mr. Justice P.S. Datta, Judicial Member

Appeal No. 41 of 2010

In the matter of

Polyplex Corporation Limited

Lohia Head Road

Khatima-262308

Uttarakhand

… Appellant(s)

Versus

1. Uttrakhand Electricity Regulatory Commission

   1st Floor of Insitution of Engineers (I) Building

   Near ISBT, Majra,

   Dehradun (UA)

   Pin-248 001…

2. Uttrakhand Power Corporation Ltd.

   Urja Bhawan, Kanwali Road

   Dehradun (UA)

   Pin-248 001

Respondent(s)

Counsel for Appellant(s)	: Mr. Sanjay Sen
	: Ms. Shikha Ohri
	: Ms. Mandakini Ghosh
Counsel for Respondent(s)	:Mr. P. Misra
	: Mr. Suresh Tripathy for R-1
	: Mr. Pradeep Misra
	: Mr. Daleep Kr. Dhyani for R-2

Appeal No. 42 of 2010

In the matter of

Kumaon Garhwal Chamber of Commerce
Chamber House, Industrial Estate
Bazpur Road, Kashipur
Distt: Udham Singh Nagar
Uttarakhand

… Appellant(s)

Versus

1. Uttrakhand Electricity Regulatory Commission
   1st Floor of Institution of Engineers (I) Building
   Near ISBT, Majra,
   Dehradun -248 001…
2. Uttrakhand Power Corporation Ltd.
   Urja Bhawan, Kanwali Road
   Dehradun -248 001

….Respondent(s

Counsel for Appellant(s)	: Mr. M.L. Lahoty
	: Mr. Pawan K. Sharma
	:
Counsel for Respondent(s)	:Mr. P. Misra
	: Mr. Suresh Tripathy for R-1
	Mr. Pradeep Misra
	Mr. Daleep Kr. Dhyani for R-2

Appeal No. 43 of 2010

In the matter of

M/s Greenply Industries Limited

Plot No. 2, Sector-9

Integrated Industrial Estate

Pantnagar, Uttarakhand

Appellant(s)

Versus

1. Uttrakhand Electricity Regulatory Commission
   1st Floor of Insitution of Engineers (I) Building
   Near ISBT, Majra,
   Dehradun -248 001
2. Uttrakhand Power Corporation Ltd.
   Urja Bhawan, Kanwali Road
   Dehradun -248 001

Respondent(s)

Counsel for Appellant(s)	: Mr. M.L. Lahoty
	: Mr. Pawan K. Sharma
Counsel for Respondent(s)	:Mr. P. Misra
	Mr. Suresh Tripathy for R-1
	Mr. Pradeep Misra
	Mr. Daleep Kr. Dhyani for R-2

JUDGMENT (ABRIDGED VERSION)

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

The above Appeals, Appeal No. 41 of 2010, Appeal No. 42 of 2010 and appeal No. 43 of 2010 have been filed by (1) Polyplex Corporation Limited, (2) Kumaon Garhwal Chamber of Commerce and (3) M/s Greenply Industries Limited respectively as against the common impugned Tariff Order dated 23.10.2009 passed by Uttarakhand State Electricity Regulatory Commission.

……

……

19. On the basis of these contentions urged by the Learned Counsel for the parties, the following questions may arise for conclusion:

(1) Whether the policy directions issued by the State Government on 25.09.2009 for mere consideration are binding on the State Commission while discharging its statutory finding on the determination of tariff under Section 62 of the Electricity Act, 2003 read with the Regulations framed thereunder?

(2). Whether any credence can be given to ARR, formulated, without adhering to the statutory provisions of the Electricity Act, 2003, National Electricity Policy, National Tariff Policy as also the orders and directions issued by this Tribunal from time to time?

(3). Whether the State Commission is bound to follow the directions of the State Government in relation to the allocation of the power purchase costs to various categories of consumers while determining tariff which is contrary to the provisions of the Electricity Act, 2003 and the Regulations made thereunder?

(4). Whether the State Commission's power to determine the tariff independently in terms of the legislative mandate can at all be curtailed by the State Government in exercise of the power under Section 108 of the Electricity Act, 2003?

(5). Whether the Commission cannot at all segregate the power purchase cost amongst different class of consumers so as to allocate cheaper resources of power to subscribe consumers such as private tube well, domestic etc?

(6). Whether the Commission could have allocated 15% loss at HT level, when it is admitted in Table 8.5 of the Impugned Order that the transmission losses are only to the extent of 1.86%?

(7). Whether the Commission has failed to appreciate that the cross subsidy adjustment cannot be the basis of tariff determination and that the effective cross subsidy has to be factored only after the tariff has been determined in accordance with the principles provided in the Electricity Act, 2003?

20. Let us now analyse each of these issues.

……

……

28. It cannot be debated that the determination of tariff is one of the core functions of the State Commission which is to be done in an independent manner. These functions have to be discharged by the State Commission by following the provisions of the Electricity Act, 2003 and the Regulations made thereunder. It is settled law that the State Commission alone has the powers to determine the tariff. In this context, a reference may be made to the Statement of Objects and Reasons of Electricity Act, 2003 for the purpose of appreciating the legislative scheme. The same is as follows:

"1.3 Over a period of time, however, the performance of the State Electricity Boards has deteriorated substantially on account of various factors. For instance, powers to fix tariffs vest with such Electricity Boards, they have generally been unable to take decisions on tariff in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross subsidies have reached unsustainable levels. To address this issue and to provide for distancing of Government from determination of tariffs, the Electricity Regulatory Commission Act was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which State Governments can create a State Electricity Regulatory Commission…."

" 3 With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the Regulatory Commission, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998, in a new self contained comprehensive legislation arose…."

Thus, the main object and reason of the reform legislation was to distance the role of the Government in fixation of tariff and to allow tariff determination by an independent regulatory authority which will follow a transparent process. This is at the very core of the reform legislation.

……

36. Let us now quote those decisions rendered by this Tribunal as well as the Hon'ble Supreme Court. They are as follows.

37. This Tribunal in its judgment dated 18.08.2010 Appeal No. 5/09 has analysed this issue and gave the following findings:

(A) "It is settled law as laid down by this Tribunal as well as by the Hon'ble Supreme Court, that all the policy directions are not binding on the State Commission since the State Government cannot curtail the powers of State Commission in the matter of determination of tariff ".

(B) The next judgment was rendered by the Tribunal in Appeal No. 4, etc. Of 2005 (SIEL Limited Vs. Punjab State Commission).

In this judgment, this Tribunal analysed this issue and held that State Commission is an independent authority and its finding is binding on the State Government and not vice versa. The same is as follows:

"The Appropriate Commission while determining tariff under section 61 of the Act is required to be guided by the factor and parameters enshrined therein. One of the factors on the basis of which tariff is to be determined is the consumer interest. Sub-clause (d) of Section 61 requires the Commission to safeguard the interest of the consumers and ensure that the recovery of the cost of electricity is effected in a reasonable manner. This was also one of the requirements under Section 2(2) of the Act of 1998.

The aforesaid provisions of the Act of 2003 and the Act of 1998 are not hedged in with the limitation that in case the State Government or any other authority has allocated an unwarranted cost to the generator or a licensee, it cannot be interfered with, even when such a cost may be imprudent and unjust and not in the interest of the consumers. Otherwise the cost loaded by the State Government on the Board will have to be allowed by the Commission for the purposes of tariff and the ARR of the Board. In case such a limitation is read into the aforesaid provisions, the purpose of the Act including section 63 will be frustrated. Since the Commission has the power to determine the tariff and the ARR of a utility, it has all the incidental and ancillary powers to effectuate the purpose for which the power is vested in it. Consequently the directions or orders of the Regulatory Commission made for the purpose of determination of tariff and ARR in consonance with the provisions of the Act are binding on all the concerned parties including the State and the Board.

There is nothing in section 61 and 62 of the Act of 2003 to show that orders relating to tariff will not bind the State Government. The State is not above law and it is bound to respect the mandate of the legislature. Otherwise tariff determination will not be in consonance with the various factors and parameters specified in section 61. The Commission is an independent statutory body and its directions being in terms of the Act are definitely binding on the Board whose de jure owner is the State. The ultimate end effect shall be on de jure owner viz. the State of Punjab."

(C) The next decision is (1995) 3 SCC 295 in Real Food Products Limited Vs. A.P. State Electricity Board, in which it is held as follows:

"Where the direction of the State Government, as in the present case, was to fix a concessional tariff for agricultural pump-sets at a flat rate per H.P., it does relate to a question of policy which the Board must follow. However, in indicating the specific rate in a given case the action of the State Government ,may be in excess of the power of giving a direction on the question of policy which the Board, if its conclusion be different, may not be obliged to be bound by."

(D) The next decision is 2001 (3) SCC 396 (Chittor Zilla Vyavasayadarula Sangham Vs. A.P. State Electricity Board & Ors. The relevant observation by the Hon'ble Supreme Court is as follows:

"It is clear that the Board would not be bound to follow every policy direction. …… It is for this and other reasons that the statute maintain this Board to maintain the surplus in every year. If it has to perform this statutory obligation, how can it do so, if it follows any such direction

which takes it away from it. It is true the Government can (sic has) has to cater to the popular demand in order to earn its legitimate favour, give any such policy direction, but it should have to be within a permissible limit."

(E) The next decision is (1996) 11 SCC 199 (Ester Industries Limited Vs. U.P. State Electricity Board & Ors.) The relevant observation made by the Hon'ble Supreme Court is as follows:

" 4. Section 78-A (1) of the Act postulates that in the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government. In other words, the Electricity Board has a statutory function to discharge in determination of the rates of tariff and terms and conditions subject to which the electrical energy be supplied to the consumers and enforcement thereof. This being a legislative policy, while exercising the power under Section 78-A policy directions issued by the Government may also be taken into consideration by the Electricity Board which has a statutory duty to perform. But so long as the policy direction issued by the Government is consistent with the provisions of the Act and the tariff policy laid down by the Board, it may be open to the Board to either accept it or not to accept the directions as such."

(F) The next decision is 2001 (8) SCC 491 (Union of India Vs. Dinesh Engineering Corporation). The relevant observation made by the Hon'ble Supreme Court is as follows:

"The Policy of the Board as contained in the appellant's letter dated 23-10-1992 proceeds on the hypothesis that there was no other supplier competent enough to supply the spares required without taking into consideration the fact that the writ petitioner had been supplying these spare parts for the last over 17 years to various divisions of the Indian Railways which fact has been established by the writ petitioner from the material produced both before the High Court and the Supreme Court and which fact has been accepted by the High Court. This clearly establishes the fact that the decision of the Board suffers from the vice of non-application of mind.

Of course, the Supreme Court has held in more than one case that where the decision of the authority is in regard to a policy matter, the Supreme Court will not ordinarily interfere. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in operation is formulated keeping in mind all the relevant facts and whether the said policy can be held to be beyond the pale of discrimination or unreasonableness, on the basis of the material on record. There can be no doubt that the equipment of the nature of a spare part of a governor which is used to control the speed in a diesel locomotive should be a quality product which can adhere to the strict scrutiny/standards of the Railways, but a perusal of the letter dated 23.10.1992 does not show that the Board was either aware of the existence of the writ petitioner or its capacity or otherwise to supply the spare parts required by the Railways, an ignorance which is fatal to the policy decision. Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision and violative of the mandate of Article 14 of the Constitution."

(G) The next decision is AIR 2002 Andhra Pradesh 210 (APSEB & Ors. Vs. Warangal Municipal Corporation). The Andhra Pradesh High Court has observed as follows:

"The immediate question that arises for consideration is whether the direction contained in the memo dated 21.2.1997 is a direction on any question of policy within the contemplation of sub-section (1) of Section 78-A of the Act. We are afraid that direction cannot be treated as a direction on any question of policy. What we find a direction without being supported by any reasoning that HT Category VI tariff should be applied to Municipal Water Works from 30.07.1996. Even then, it would have been enforced against the Board provided that direction does not violate the categorisation of consumers made by the Board by virtue of the statutory power conferred upon it under Section 49 of the Supply Act. As pointed out supra, supply of electricity to the water works carried on by the Corporations falls under the category I and not HT category VI and if that is so, merely because the Government directs the Board that HT VI category tariff would be applicable to Municipal Water Works from 30.07.1996, that cannot be treated as a policy decision taken by the Government and at any rate that cannot be enforced against the Board. We say this because the power conferred upon the State Government under S. 78-A of the Act is not power to exempt from the provisions of the Act and the Regulations made thereunder. Therefore, any direction that may be issued by the State Government by virtue of the power conferred upon it under sub-section (1) of S. 78-A of the Supply Act on any question of policy should be in consonance with the statutory provisions and the State Government by issuing such a direction cannot supplant the statutory provisions. The categorisation of consumers by the Board is a statutory action and that cannot be whittled down by the State Government by issuing directions under Section 78-A of the Act."

(H) The next decision is [(AIR 2008 (NOC) 1546 (All.)] (Maa Wind Vasini Industries Vs. Puranchal Vidyut Vitran Nigam Ltd.). The relevant observation made by Allahabad High Court is quoted below:

"Before the enactment of 1998 Act, the power to frame tariff was solely possessed by concerned State Electricity Board in accordance with Section 49 of 1948 Act. The said statutory power could not have been diluted in any manner even by the State Government though it possessed powers to issue directions on question of policy under Section 78-A of 1948 Act. The directions issued by State Government neither could be treated to be a part and parcel of the tariff framed by State Electricity Board under Section 49 of 1948 Act nor could have force of law on its own but required to be considered by the concerned State Electricity Board while framing its tariff and only when it resolves and decided to implement such directions in a particular manner, the same could have been enforced and not otherwise. After the enforcement of Reforms Act, 1999 and Act 2002 the only change which has taken place in the situation is that the tariff has to be determined and approved by UPERC but in discharge of its functions, UPERC shall be guided by such directions in matter of policy involving public interest as the State Government may give to it in writing. Consequently, under Act, 2001, read with Reform Act, 1999, in the matter of framing of tariff and realisation of charges from the consumers, the final authority lay with UPERC and neither

any supplier or the State Government, nor any one else has any jurisdiction or authority to make any alteration, modification, etc. in the aforesaid matter".

(I) The next decision is (2008) 3 SCC 128 (LML vs. State of U.P. and Others.)

The relevant observation made by the Hon'ble Supreme Court is as under:

"58. Having carefully considered the provisions of the Act as also the arguments advanced in this regard, we are of the opinion that under the 1998 Act, it is the Commission concerned and in the instant case the State Commission of West Bengal, which is the sole authority to determine the tariff, of course, as per the procedure in the said Act." The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permitted for the licensees, utility or anyone else to charge a different tariff."

38. The legal propositions that emanate from the above various decisions with regard to this point as referred to above are given below:

1. The State Commission is an independent statutory body. Therefore, the policy directions issued by the State Government are not binding on the State Commission. The State Government by issuing direction to State Commission cannot curtail the power of the State Commission in the matter of determination of tariff.

2. The State Commission has the powers to determine the tariff and to pass orders under Sections 61 and 62 of the Act relating to the tariff. These orders are binding on the State Government.

3. Since the State Commission has the power to determine the tariff and the ARR of utility, it has all the incidental and auxiliary power to effectuate the purpose for which the power is vested in it. Consequently, the directions or orders of the State Commission made for the purpose of determination of tariff and ARR are binding on all concerned parties including the State Government.

4. The State Government is not above the law. It is bound to respect the mandate of the legislature. Otherwise, the tariff determination will not be in consonance with the various factors and parameters specified in Section 61.

5. The State Commission is not powerless to issue orders and directions relating to the matters having a bearing on and nexus with the determination of the fixation of tariff and as such its directions shall be binding on all persons and authorities including the State Government.

6. It is true that the Government has to cater to the popular demands in order to earn its legitimate favour giving any such policy direction but it should be under permissible limit. While exercising the power of determination of tariff, the policy directions issued by the Government may also be taken into consideration by the State Commission which has statutory duty to perform under the Act but so long as the policy directions issued by the Government are consistent with the provisions of the Act, it may be open to the State Commission to either to accept them or not. Thus it is purely discretionary on the part of the State Commission with regard to the acceptability of the directions issued by the State Government in the matter of determination of tariff.

7. The State Commission shall determine the tariff for electricity (wholesale, bulk, or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies or licensees or from other sources for distribution and supply in the state. The reading of the provisions would make it clear that the terms and conditions for fixation of tariff shall be determined by the Regulations and while doing so the Commission shall be guided by the Regulations and the provisions of the Act but provisions of the Act and Regulation show that the Commission alone has the power to determine the tariff. The tariff approved by the State Commission is final and binding. The directions issued by the State Government is not binding on the State Commission. On the other hand, determination of tariff by State Commission for the various categories will be binding on the State Government.

……..

……..

58. As stated above, the entire order which has been passed by the State Commission determining the tariff for the Appellant category was purely based upon the policy direction purported to have been issued under section 108 of the Act, 2003 and not on independent consideration. Hence the conclusion arrived at by the State Commission entirely based upon the policy direction which is not binding on the State Commission, cannot be said to have any legal basis.

……

……..

60. We have categorically given our findings in the above paragraphs that the State Government directions are not binding on the State Commission since the State Commission is expected to decide the issue independently on the basis of the various criteria.

……

……..

Summary of our findings:

62. (1) The State Commission is independent statutory body. Therefore the policy directions issued by the State Government are not binding on the State Commission, as those directions

cannot curtail the power of the State Government in the matter of determination of tariff. The State Government may given any such policy direction in order to cater to the popular demand made by the public but while determining tariff the State Commission may take those directions or suggestions for consideration but it is for the State Commission which has statutory duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances. It is purely discretionary on the part of the State Commission on acceptability of the directions issued by the State Government in the matter of determination of tariff.

(2) From the perusal of the impugned order it is evident that the State Commission has fully accepted and acted upon the state Government's policy directions in the light of the legal expert's opinion holding that the State Government's directions is binding. Therefore, the finding given by the State Commission that the directions of the State Government under Section 108 of the Act is binding on the State Commission is wrong.

(3) The State Commission impugned order for determination of tariff by segregating the Power Purchase Cost for different categories of consumers is wrong. The Regulations, the Tariff Policy and National Electricity Policy would indicate that they do not recognise segregation of Power Purchase Cost for the purpose of allocation to different categories. In the present case the State Commission did not refer to these relevant regulations to justify that the determination of tariff made by the State Commission was consistent with the Regulations.

(4) In the impugned order while the power purchase cost has been segregated, the State Commission has not segregated all costs on voltage-wise basis. The reduction of loss level to an ad-hoc figure of 15% for HT Industrial Consumers and also liability of other costs such as O&M on average basis with segregation of power purchase cost is not proper.

(5) Thus the State Commission is not justified to only allocate high cost of power to the Appellant category without adjusting the other costs which will admittedly lower in case of the Appellant.

(6) It is clear from the order of the Government as well as the impugned order, the State Government in order to ensure increase in tariff of industrial consumers without affecting the agricultural, domestic and Government installation, devised the scheme of policy direction which was issued on 25.09.2009. This is mainly intended to strengthen the hands of the State Commission to insulate the order from any challenge since the same was purportedly based on the cost allocation principle determined under Section 108 of the Electricity Act, 2003.

(7) Thus, the entire impugned order determining the tariff for the Appellant category was purely based upon the policy directions purported to have been issued under Section 108 of the Act and not on independent consideration. Therefore, the conclusion arrived at by the State Commission in the matter of determination of tariff has no legal basis.

63. In view of our above findings, we deem it fit to set aside the entire tariff order and to remand the matter to the State Commission with a direction to re-determine the tariff on the basis of the existing Regulations and regulatory principles and the judicial pronouncement including those laid down by this Tribunal from time to time, without being influenced by any directions issued by the State Government. The State Commission may also consider the submissions of the Appellants regarding cost of supply, cross subsidy and increase in tariff with respect to the previous year. Accordingly ordered.

……
……