

**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

**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.

APPEAL NO.41 OF 2010:

2. Facts of this Appeal are as follows:

3. Polyplex Corporation Limited is the Appellant, engaged in the manufacture of Polyester Chips/Film in Lohia Head, Katima, Uttarakhand. The Appellant who operates a continuous process manufacturing unit, is HT consumer of the sole Distribution Licensee namely,

Uttarakhand Power Corporation Limited, (the Second Respondent). The Appellant entered into an Agreement with Uttarakhand Power Corporation Limited for consumption of electricity upto 5000 KVA.

4. Uttarakhand Power Corporation Limited, the 2nd Respondent herein filed a petition before the Uttarakhand State Electricity Regulatory Commission praying for the determination of retail tariff for the year 2009 - 2010. After hearing the parties, the State Commission passed the impugned order dated 23.10.2009 determining the retail tariff. Aggrieved over the said determination of the retail tariff, Polyplex Corporation Limited, the Appellant has filed this Appeal No.41 of 2010.

Appeal No.42 of 2010:

5. The facts in Appeal No.42 of 2010 are given below:

6. Kumaon Garhwal Chamber of Commerce is the Appellant. The Uttarakhand Power Corporation Limited is the 2nd Respondent. The Appellant represents the interest of the trade, commerce and industry established in the State of Uttarakhand. Members of the Appellant constitute wide spectrum of industries falling in the category of HT and LT.

7. As per the Regulation and Under Section 181 of the Electricity Act, Uttarakhand Power Corporation Limited, (R-2) has to file the petition for determining the retail tariff for the year 2009-2010 on or before 30th November, 2008. After getting extension of time, the Respondent (2) filed the Petition for Retail Tariff on 15.12.2008. Ultimately, the State Commission passed the impugned Tariff Order dated 23.10.2009. Aggrieved over the said order, Kumaon Garhwal Chamber of Commerce, the Appellant has filed this Appeal.

Appeal No.43 of 2010:

8. The facts in Appeal No.43 of 2010 are as follows:

9. M/s Greenply Industries Limited, Uttarakhand is the Appellant. Uttarakhand Power Corporation Limited is the 2nd Respondent herein. The Appellant is a Public Limited Company dealing in manufacture of plywood, black board, flush door, particle board, laminates and veneers, etc. It is a leading exporter of high pressure laminates. Its products are exported to the markets of Europe, USA, Australia, etc.

10. The State of Uttarakhand, in order to attract large scale industrial development announced a new industrial policy, pursuant to which the Office Memorandum was issued extending the tax and other incentives to the new industrial units to be set up. Being attracted by the aforesaid incentives, the Appellant decided to set up an integrated composite

plant for manufacturing plywood, particle board, etc at Pantnagar, Uttarakhand. Accordingly, in the first phase, the Appellant set up its units with a capacity of 30,000 M³ per annum of particle board and 90,00,000 square meters NA per annum of plywood with a total investment of more than 70 crores. While setting up the said units, the Appellant applied to the Uttarakhand Power Corporation Limited, the 2nd Respondent, for the sanction of electricity load through 33 KV. The sanction was given accordingly. Encouraged by the exemptions and incentives due to the industrial policy, the Appellant decided to establish a 2nd unit to manufacture fibre board with an investment of Rs.250 crores.

11. In the meantime, the 2nd Respondent Uttarakhand Power Corporation Limited filed a petition for fixing the tariff in respect of the year 2009-2010. The State Commission after hearing the parties passed the

impugned Tariff Order dated 23.10.2009. Being aggrieved over this order, the Appellant has filed this Appeal.

12. Since in all these Appeals, the impugned order is the same, this common judgment is being rendered.

13. The learned counsel for the Appellants in all these Appeals would raise the following common grounds:

(A) The policy directions dated 25.9.2009 issued by the State Government for allocating the cheaper power to the subsidized category in the matter of determination of tariff are not legal and the State Commission should not have blindly accepted the same holding that they are binding on it.

(B) The loss of 15% is applied on HT industries by Commission as against the pooled average loss (20.32%) whereas the other costs are taken on pooled average basis rather than voltage wise. HT

loss should have been transmission loss of 1.86% only.

(C) The cross subsidy has been increased by the State Commission for HT Industry while it is required to gradually reduce it.

(D) The State Commission had specified the load factor based tariff in the impugned order in contravention of the direction of this Tribunal rendered in the order dated 6.10.2009 in Appeal No.85 of 2008.

(E) The Operation & Maintenance expenses have been incorrectly determined by inflating it by growth in number of consumers.

14. On these grounds, the elaborate arguments were advanced by the learned Counsel for the Appellants. In justification of the impugned order passed by the State Commission, the learned Counsel appearing for the

State Commission as well as the Learned Counsel for Uttarakhand Power Corporation Ltd. (R-2) have made their submissions at length.

15. We have heard the learned counsel for the parties and also perused the records. We have given our thoughtful consideration to the submission made by the respective parties.

16. Now let us deal with each of the grounds which have been urged by the Appellants as stated hereinabove.

17. The first ground urged by the Learned Counsel for the Appellants is that the State Commission, solely on the basis of the policy directions issued by the State Government dated 25.09.2009 under section 108 of the Electricity Act, 2003, has determined the tariff by bifurcating the power purchase cost for supply to

different categories of consumers in the State of Uttarakhand. According to the Learned Counsel for the Appellants, the State Commission is not bound by the policy directions issued by the State Government under section 108 of the Electricity Act, 2003 and of course, the State Government, as a stake-holder, may have a right to make suggestions in tariff matters and the State Commission may consider those suggestions of the State Government as a stake-holder and take an independent view of the matter without simply obeying the directions issued by the State Government under section 108 of the Electricity Act. In addition to this point, the Learned Counsel for the Appellants have raised other incidental issues contending that those issues have not been correctly decided by the State Commission.

18. On the other hand Learned Counsel for the Respondents including the State Commission have

emphatically contended that the State Government has the power to issue any policy direction even in respect of the tariff determination by the State Commission and when such directions are issued, the State Commission in discharge of its functions is duty bound to comply with those directions, as the State Commission is not the appropriate body to question the rationale behind the policy directions and Section 108 of the Electricity Act, 2003 leaves no option to the State Commission but to comply with the directions issued by the State Government and as such the conclusions arrived at by the State Commission on the basis of the directions issued by the State Commission under Section 108 of the Act is justified. They further submitted that State Commission has decided the other incidental issues also in the correct perspective.

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.

21. According to the Appellants policy directions are not binding as the State Commission, which is an independent statutory authority. According to the Respondents, the policy direction is binding on the State Commission. It is noticed in the present case

that the State Commission, before acting upon the policy directions dated 25.09.2009 issued under Section 108 of the Act by the State Government, approached the former Chief Justice of Uttarakhand High Court to get a legal opinion with regard to the binding nature of the policy directions on the State Government. On the request of the State Commission, written opinion was given by the former Chief Justice of Uttarakhand High Court. In his legal opinion he opined that since the directions issued by the State Government under section 108 of the Electricity Act, 2003 relate to the matters of policy involving public interest and as this section mandates the State Commission to be guided by all such directions of the State Government, the State Commission is bound by these directions of the State Government. Thus he has given a categorical opinion that the directions issued by the State Government in the matter of determination of tariff are binding on the Sate

Commission while it discharges its statutory functions of determination of tariff under powers vested in it by the provisions of the Electricity Act, 2003.

22. Admittedly, this opinion given by the former Chief Justice of Uttarakhand High Court was taken by the State Commission as the basis for determination of tariff by following the directions given by the State Government which is said to be policy direction issued by the State Government.

23. Let us first quote Section 108 of The Electricity Act, 2003.

“108. Directions by State Government.

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving

public interest as the State Government may give to it in writing.

(2) *If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final*".

24. Let us now refer to the alleged policy directions issued by the State Government in the letter dated 25.09.2009 to the State Commission as under:

“a. The electricity generated by UJVNL and the share of free power of the State made available to UPCL shall be allocated to State consumers in the following order of priority:

- i. Private Tube Well**
- ii. Domestic consumers**
- iii. Government categories**
- iv. Other Consumers.**

b. The tariff for different categories of consumers shall be calculated by considering the cost of power as per the above allocation. The Commission may, however, apply order in the above priority on State and outside projects as it deems fit.”

25. On the basis of these directions given by the State Government, mandating the State Commission to allocate on the basis of prescribed priority and to calculate the cost of power as per the said allocation, the State Commission allocated to State consumers in the order of priority as specified in the directions and calculated the loss level to the tune of 15% at HT level to arrive at the cost of power purchase at HT level for different categories of consumers getting supply at HT in accordance with the policy directions and based on the average other cost of UPCL computed category-wise cost of supply. The loss at LT level was worked

out to 26.18% for arriving at power purchase cost for various LT categories.

26. The grievance of the Appellant is that the conclusion arrived at by the State Commission, as referred to above, was not on the basis of independent consideration but was purely based upon the directions issued by the State Government which is not a correct approach as the said directions are not binding upon the State Commission as laid down by this Tribunal and the Hon'ble Supreme Court.

27. Let us now analyse this point.

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.

29. In this context, it would be appropriate to refer to the other sections of the Electricity Act, 2003. Let us now refer to those Sections. Section 3 of the Act provides for notification of the National Electricity Policy and Tariff Policy. These policies are to be notified by the Central Government in consultation with the State Governments and the Central Electricity Authority. This provision makes it clear that the State Government does not have the jurisdiction to issue any policy direction in the matters of tariff. Of course, the State Government has a right to be consulted during preparation of the tariff policy, by the Central Government.

30. The next section is section 61 of the Electricity Act, 2003. As per this section, the Appropriate

Commission has been vested with the jurisdiction to frame Tariff Regulations specifying the terms and conditions for determination of tariff. While framing such Regulations, the Appropriate Commission is to be guided by various factors as specified in section 61 of the Electricity Act, 2003 including National Electricity Policy and Tariff Policy. Therefore, the guidance available to the State Commission on tariff matters is from the Electricity Policy and the National Tariff Policy and not from the directions of the State Government. As such, the State Government cannot issue a policy direction on tariff matters. If such a policy direction has been issued, it is not binding upon the State Commission especially when it is inconsistent with the National Electricity Policy/ Tariff Policy.

31. Section 61 provides that the State Commission shall be guided by the principles and methodology

specified by the Central Commission for determination of tariff applicable to Generating Companies and Transmission Licensees. Section 65 of the Electricity Act, 2003 also provides that no direction of the State Government regarding grant of subsidy to any consumer or class of consumers in tariff determination by the State Commission shall be operative if the amount on account of subsidy, as decided by the State Commission is not made to the utility in advance and the tariff fixed by the State Commission shall be applicable from the date of the issue of the orders of the State Commission in this regard.

32. In terms of the above sections, there is a statutory policy that occupies a field, i.e. electricity tariff. There is no scope for the State Government to issue policy directions on tariff matters. The Parliament has allocated such powers to the Central Government which is to issue the policy. While preparing these

statutory policies under section 3 of the Act, the legislature has provided for consultation with the State Governments. Thus the State Government's power to issue independent policy directions on tariff matters stands exhausted. All that the State Government can do, is to give its views on the tariff matters during the consultation process with the Central Government.

33. In the aforesaid legislative scheme, we have to appreciate the scope and object of the Electricity Act 2003 and the purported directions issued by the State Government thereunder. Section 108 of the Act is a general section without any non-obstante clause and so it cannot be permitted to override a special provision relating to the tariff as contained in section 61 of the Act, 2003. In the legislative scheme relating to tariff, the role of State Government is only envisaged on the issue of subsidy as provided under section 65 of the Act.

34. The law provides that if the State Government wishes to give to any category of consumers a tariff lower from that which is determined by the State Commission, the State Government can do so subject to the payment of subsidy in advance. In other words, the law provides that the State Government's obligation to pay subsidy cannot be decided by a policy direction under section 108 of the Act, 2003.

35. Of course, the State Commission will have the authority to consider the suggestions of the State Government while determining the tariff but not in terms of directions under section 108 of the Act. As a matter of fact, the State Government is a major stakeholder in the power sector. Therefore, its suggestions have to be considered and due weightage should be placed on the same. However, to proceed on the basis that the State Commission is bound to follow the same

goes against the scheme of the Electricity Act, 2003. This issue has already been decided by this Tribunal and the Hon'ble Supreme Court.

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.

39. In the light of the above guidelines and legal position, let us now discuss the facts of the present case.

40. In the present case, we are concerned with the question whether it is proper for the State Commission to simply follow the policy directions dated 25.09.2009 issued by the State Government in the purported exercise of power under section 108 of the Electricity Act, 2003 while determining the tariff. In the light of the scheme and the legislative scope, as mentioned in the preamble and Objects and Reasons of the Act and also the various guidelines which have been given, as referred to in the above decisions, two aspects of section 108 of the Act are required to be considered for the purpose of interpreting the scope and effect.

41. Firstly the Section 108 does not start with non-obstante clause. Therefore, it has to be consistent with overall scheme of the Act and it should not be permitted to defeat any other provisions of the statute. Secondly, section 108 itself recognises that Government policy is only a guidance to the State

Commission. Therefore, the State Commission is not bound by the said policy directions. In other words, the State Government, through a policy cannot take away the core statutory function of the State Commission to determine the tariff. This will defeat the whole object of the Reform legislation and eventually undermine the office of the State Commission to freely determine the tariff in accordance with the principles enshrined under section 61 of the Act.

42. Under Section 61 of the Electricity Act, 2003 in relation to tariff the Appropriate Commission has been vested with the jurisdiction to issue tariff regulations specifying the terms and conditions for determination of tariff. While issuing such regulations, the Appropriate Commission is to be guided by various factors specified in Section 61, including the National Electricity Policy and the Tariff Policy (see Section 61(i). Therefore, the guidance available to the State

Commission on tariff matters is from the National Electricity Policy and the Tariff Policy. The State Government cannot issue a policy on tariff matters. If such policy has been issued, it cannot be inconsistent with the National Electricity Policy or the Tariff Policy.

43. The relevant aspects of the Tariff Policy are as follows:

“2.2 The Act also requires that the Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERCs) shall be guided by the tariff policy in discharging their functions including framing the regulations under Section 61 of the Act.

2.3 Section 61 of the Act provides that Regulatory Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff

applicable to generating companies and transmission licensees.

“3.0 EVOLUTION OF THE POLICY

The Tariff Policy has been evolved in consultation with the State Governments and the Central Electricity Authority (CEA) and keeping in view the advice of the Central Electricity Regulatory Commission and suggestions of various stakeholders.”

“8.2.1 The following aspects would need to be considered in determining tariffs:

(1) All power purchase costs need to be considered legitimate unless it is established that the merit order principle has been violated or power has been purchased at unreasonable rates. The reduction of Aggregate Technical & Commercial (ATC) losses needs to be brought about but not by denying revenues required for power purchase for 24 hours supply and necessary and reasonable

O&M and investment for system upgradation. Consumers, particularly those who are ready to pay a tariff which reflects efficient costs have the right to get uninterrupted 24 hours supply of quality power. Actual level of retail sales should be grossed up by normative level of T&D losses as indicated in MYT trajectory for allowing power purchase cost subject to justifiable power purchase mix variation (for example, more energy may be purchased from thermal generation in the event of poor rainfall) and fuel surcharge adjustment as per regulations of the SERC.

(2)

(3) Section 65 of the Act provides that no direction of the State Government regarding grant of subsidy to consumers in the tariff determined by the State Commission shall be operative if the payment on account of subsidy as decided by the

State Commission is not made to the utilities and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard. The State Commission should ensure compliance of this provision of law to ensure financial viability of the utilities. To ensure implementation of the provision of the law, the State Commission should determine the tariff initially without considering the subsidy commitment by the State Government and subsidised tariff shall be arrived at thereafter considering the subsidy by the State Government for the respective categories of consumers.”

“8.3Tariff design: Linkage of tariffs to cost of service.

It has been widely recognised that rational and economic pricing of electricity can be one of the major tools for energy conservation and sustainable use of ground water resources.

In terms of the Section 61 (g) of the Act, the Appropriate Commission shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity.

The State Governments can give subsidy to the extent they consider appropriate as per the provisions of Section 65 of the Act. Direct subsidy is a better way to support the poorer categories of consumers than the mechanism of cross subsidizing the tariff across the board. Subsidies should be targeted effectively and in transparent manner. As a substitute of cross-subsidies the State Government has the option of raising resources through mechanism of electricity duty and giving direct subsidies to only needy consumers. This is a better way of targeting subsidies effectively.

Accordingly, the following principles would be adopted:

- 1. In accordance with the National Electricity Policy, consumers below poverty line who consume below a specified level, say 30 units per month, may receive a special support through cross subsidy. Tariffs for such designated group of consumers will be at least 50% of the average cost of supply. This provision will be re-examined after five years.**

- 2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within +20% of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy. For example if the average cost of service is Rs. 3 per unit, at the end of year 2010-2011**

the tariff for the cross subsidised categories excluding those referred to in para 1 above should not be lower than Rs. 2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs. 3.60 per unit”

44. Based on the aforesaid legal mandate, the State Commission in the present case has notified the UERC (Terms and conditions for determination of Distribution Tariff) Regulation 2004 as amended in 2006. The said regulations, inter-alia, provide as follows:

“8. Availability of Power.

(1) For the tariff year, monthly availability of power shall be ascertained on the basis of the following:

(a)

From Central/State Sector Generating Stations

(i) Distribution licensee's share in the allocated and unallocated capacity if any, of the Station;

(ii) Likely availability of energy from each generating station based on projections given the generators and the historical data of supply from the generators; or

(iii) The PLF/Generation targets for the Station fixed by Central Electricity Authority; or

(iv) The historical performance of the station adjusted for any planned maintenance or shut-downs

(b) From other sources:

(i) Distribution licensee's banking arrangement with any other distribution licensee, Board or trading licensee.

(ii) Distribution licensee's agreement with any other distribution licensee, Board, generating

company or trading licensee regarding purchase of power.

10. Power Purchase Cost

- (1) The existing and proposed power purchase/banking/trading agreements approved by the Commission shall be considered for the power purchase cost.**
- (2) For the tariff year, the distribution licensee's requirement of power purchase for sale to its consumers shall be estimated based on the sales forecast, the transmission loss and target distribution loss level for the tariff year.**
- (3) For the tariff year, the cost of energy available from State Generating Stations shall be taken as that approved by the Commission for purchase from the Station and that of energy from Central Sector Station shall be taken as per the Central**

***Electricity Regulatory Commission orders.
The cost of energy from other sources shall be
as per the power purchase/banking/trading
agreements as may be approved by the
Commission***

***(4) For the tariff year, the power purchase cost
for distribution licensee's requirement for
sale to its consumers shall be estimated on
the basis of merit order principle.***

***(5) The inter-state transmission charges shall be
estimated as per orders of the Central
Electricity Regulatory Commission, while the
intra-state transmission and wheeling charge
shall be estimated as per orders of the
Commission***

20. Cost standard.

***The tariff for various categories/voltages shall be
benchmarked with and shall progressively reflect
the cost of supply based on costs that are***

prudently incurred by the distribution licensee in its operations. Pending the availability of information that reasonably establishes the category/voltage-wise cost of supply, average cost of supply shall be used as the benchmark for determining tariffs. The category-wise/voltage-wise cost to supply may factor in such characteristics as the load factor, voltage extent of technical and commercial losses etc.

Provided that for protecting interest of other consumers, tariff for any category of consumers could be evolved in a manner that prevailing market conditions get reflected in it suitably”

45. In the aforesaid legislative background, we will have to test the impugned order to determine whether the finding of the State Commission was correct in accepting the policy directive dated 25.09.2009 as binding.

46. In the impugned order, the State Commission refers to the legal opinion of the former Chief Justice of Uttarakhand High Court on this issue and then fully relies upon the gist of the legal opinion to come to the finding that the direction of the State Government are binding on the Commission while it discharges its statutory functions for determination of tariff. In other words, it is clear from the reading of the impugned order that the State Commission proceeded as if the directions of the State Government is binding without any independent consideration.

47. Further, the perusal of the whole impugned order reveals that the State Commission has fully accepted and acted on the opinion of the former Chief Justice of Uttarakhand High Court to the effect that whether the State Government's direction is binding. There is no other discussion on the efficacy of the formula

proposed by the State Government relating to the segregation of the power purchase cost and the allocation of electricity generated by the GUVNL and the share of free power through certain preferred consumers while the high cost power was allocated to other consumers such as industrial and commercial consumers.

48. As a matter of fact, the State Commission, as correctly pointed out by the Learned Counsel for the Appellant, does not even consider it necessary to test the formula proposed by the State Government. This is a clear departure from the past practice for determination of tariff on pooled cost basis which is consistent with the Regulations framed by the State Commission. The State Commission, in the impugned order, after accepting the opinion of the former Chief Justice of Uttarakhand High Court, has simply applied the formula and in an ad-hoc manner apportioned the loss level with a view to lessen the overall burden of the formula on industrial consumers. This process does

not follow any regulatory principles. In other words, it is an ad hoc application of the Government formula without any discussion on the merits and demerits of moving away from the principle of determination of tariff based on pooled cost of power.

49. According to the Appellant, the loss of 15% applied on HT industries by the State Commission is not pooled average loss (20.32%), whereas the other costs are taken on pooled average basis. This finding, it is stated, is against the Tariff Policy and Tariff Regulations. The perusal of these Regulations and the National Tariff Policy and National Electricity Policy would make it clear that they do not recognise the segregation of power purchase cost for the purpose of allocation to different categories. The very fact that the past tariff orders were all based upon the pooling of the power purchase cost would demonstrate that the said procedure was not consistent with the applicable

Regulations. Admittedly, in the present case, the State Commission did not refer to these Regulations to justify whether the determination of tariff was consistent with the Regulations. As a matter of fact, there is no discussion on this aspect at all in the impugned order. Thus the State Commission determined the tariff by segregating the power purchase cost, which is contrary to its own Regulations.

50. In this context, it would be appropriate to refer to the decision rendered by this Tribunal in the case of Mumbai International Airport Private Limited Vs. MERC in Appeal No. 106/08 by the order dated 26.02.2009 wherein it has been held as follows:

“This Tribunal has been consistently taking the view that no particular category of consumers can be made to pay higher tariff on the excuse that those consumers were responsible for

purchase of costly power. The purchase of costly power depends upon the total consumption in the area of distribution of the distribution licensee. No particular category of consumers can be blamed for such increase. The appellant particularly wants to show from the data available in the Commission's order that the increase in consumption of the category – HT-II (from which HT-III has been carved out) has not increased as rapidly as certain other category of consumers. It has also to be seen that increase in total consumption can be caused either by increase in the number of consumers or the increase in the consumption of each individual consumer.”

51. The above referred decision clearly lays down that no particular category of consumer should be made to pay higher tariff on the reason that those consumers

are responsible for costly power and the purchase of costly power depends upon the total consumption in the area of distribution of distribution licensee and as such no particular category of consumer can be blamed for such increase. This principle, which has been laid down by this Tribunal, has not been taken into consideration by the State Commission while deciding this issue.

52. In the present case, the State Commission has discussed in relation to adjustment of loss levels to allegedly reduce the impact on the industrial consumers who were to bear the high cost of power as a result of the State Government formula. There is no legal basis in adjustment of the loss level. In case the power purchase cost is being segregated, the State Commission is to segregate all costs on voltage-wise basis. Admittedly, this has not been done. The reduction of loss level to only 15% on ad-hoc basis is

not proper. There is no dispute whatsoever in the fact that the impugned order admits that the UPCL/R-2 has not worked out the actual voltage-wise/category-wise loss since the same has not been provided to the State Commission.

53. Thus it is clear there is no basis for partial allocation of costs. The State Commission should have proceeded on average cost basis or determined the cost on fully allocated basis. The State Commission has failed to segregate the operational and maintenance cost, employees expenses, interest depreciation, etc. including administration and general expenses. Without doing this exercise, the State Commission is not justified to only allocate the high cost of power purchase to the Appellant category without adjusting the other costs which are admittedly lower in the case of the Appellant.

54. The next issue raised by the Appellant is increase of cross subsidy. The test is whether the cross subsidy contribution of the Appellant has gone up in the current tariff year over the last tariff order. According to the Appellant in the present case, the tariff for the Appellant has gone up by 17% over the last tariff order. In the Impugned Order the State Commission has not carried out the exercise on cross subsidy for various categories of consumers. The State Commission has recorded that since the tariffs are being implemented only for half of the year any attempt to work out cross subsidies would lead to incorrect and distorted picture and has proposed to carry out this exercise with the new cases in the next tariff process. However, the Learned Counsel for the State Commission during the arguments presented that the cross subsidy in case of HT industry has reduced compared to the previous year.

55. It is also pointed out by the Appellants that the State Commission has not taken note of the sequence of events leading to the direction of the State Government issued on 25.09.2009. The State Commission had increased the tariff for the Appellant category of consumers by 63% by the order date 18.03.2008, resulting in a tariff shock. This order was set aside by this Tribunal in Appeal No. 85/09 by the order dated 06.10.2009. But this was not taken into consideration by the State Commission while passing the impugned order on 23.10.2009.

56. According to the Appellant, in order to ensure increase in tariff of industrial consumers without affecting the agricultural, domestic and government installation, the State Government devised a scheme of policy direction which was issued on 25.09.2009. This scheme, it is alleged, 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 a cost allocation principle determined under section 108 of the Act 2003.

57. We observe that the State Commission in the Impugned Order has recorded that it had not received the copy of the Judgment of this Tribunal dated 6.10.2009 and after examination of the Judgment and obtaining the necessary data for the distribution licensee would separately taken up this matter of re-examination of the tariff the Appellant Polyplex Corporation Ltd. as per the Tribunal's Judgment. Subsequently the State Commission has issued order revising the tariff of the Appellant. The Appellant has again filed an Appeal against this order which is under consideration in the Tribunal. Thus we do not want to give any finding of the specific issue of tariff as applicable to the Appellant Polyplex Corporation Ltd. However, in our view, the State Commission does not

have the power to segregate and allocate the generation to specific category of consumers.

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.

59. It is submitted by the Learned Counsel for the Respondents raising another issue that the State Government which issued the policy directions in this case should have been made as a party and as the State Government being the necessary party has not been impleaded, the Appeal is not maintainable. We are not

able to accept this contention, in view of the decision of the Hon'ble Supreme Court in 2010 (6) SCC 541 Transmission Corporation of A.P. Vs. Sai Renewable Power Pvt. Ltd. This submission, on the basis of the decision of the Hon'ble Supreme Court, does not deserve consideration since in the present case, the Appellant has not challenged the State Government policy direction. In fact, the argument advanced by the Learned Counsel for the Appellant is that the State Government's directions are not binding on the State Commission which is an independent statutory body. When such being the case, the State Government need not be made as a party in this Appeal. We are only concerned with the question whether the State Government direction is binding on the State Commission or not.

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.

61. It is true that the State Commission can also consider the suggestions made by the State Government through a notification. But the decision of the State Commission cannot be exclusively on the basis of the said suggestion or directions issued by the State Government.

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 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.

64. Before parting with this case, we are to refer to an important aspect which we have noticed in this case. As mentioned above, State Commission while considering the issue of determination of tariff has to take note of the various factors as an independent body. The State Commission need not obey whatever the State Government says through the policy direction under section 108 of the Act. On the other hand, the State Commission may take note of the various criteria suggested by the parties and consider the suggestions made by the Government in the process of determining the tariff. Instead of adopting

this practice, the State Commission in the present case rushed to get the legal opinion of the former Chief Justice of Uttarakhand High Court with regard to the question whether the directions issued under section 108 of the Act by the Government is binding on the State Commission or not.

65. In our view, the State Commission would have avoided to resort to getting the legal opinion with reference to this issue. Whenever directions are issued by the State Government under section 108 of the Act, the parties must have been given an opportunity to place their views before the Commission with reference to this direction. The State Commission very well can engage a lawyer as Commission's Counsel or amicus curie counsel, to assist the State Commission by bringing to its notice all the legal position as on date with reference to the said issue. He can be heard in the open forum where all the authorities rendered by the judicial forum could be referred to in the presence of

the other parties. In that event, the other parties would be able to know the position of law as projected by the Commission's Counsel and, in that event they would have got the opportunity to place their views before the State Commission, either in person or through lawyers with regard to that issue. Admittedly this opportunity had not been given. Moreover, the State Commission, after getting the opinion, has not intimated to the parties about the said opinion to get this view and on the other hand, the State Commission has arrived at the conclusion merely on the basis of the legal opinion obtained from former Chief Justice. This is not a correct procedure. Therefore, the State Commission, in future, instead of getting opinion from legal expert for clarification of the said legal issue, may appoint a counsel to explain and enlighten the State Commission with regard to the legal position on the basis of the authorities rendered by this Tribunal as

well as by the Hon'ble Supreme Court in the open forum in the presence of the necessary parties.

66. We hope at least in future the State Commission, without resorting to obtain the written legal opinion from any legal expert, and to merely act upon it would engage or appoint a lawyer requesting him to place authorities to explain the legal position before the State Commission in the presence of the parties who can also be heard on the said issue.

67. As indicated above, we set aside the order impugned and remand the matter to the State Commission for re-determination of the tariff on the basis of the existing Regulations and the regulatory principles and also in the light of the observations made above.

68. Accordingly the Appeal is allowed. No order as to costs.

**(Justice P.S. Datta)
Judicial Member**

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Dated: 31.01.2011

REPORTABLE/NON-REPORTABLE