Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 85 of 2008 & I.A. No. 114 of 2008

Dated : 06th October, 2009

Coram : Hon'ble Ms. Justice Manju Goel, Judicial Member
Hon'ble Mr. H.L. Bajaj, Technical Member

IN THE MATTER OF :-

M/s. Polyplex Corporation Ltd.
B-37, Sector-1,
Noida-201 301
Gautam Budh Nagar, (U.P.) … Appellant(s)

Versus

1. **Uttarakhand Electricity Regulatory Commission**
1st Floor of Institution of Engineers (I) Building,
Near ISBT, Majra,
Dehradun, Uttarakhand
PIN – 248 002

2. **Uttarakhand Power Corporation Ltd.**
Urja Bhawan, Kanwali Road,
Dehradun. Uttarakhand
PIN – 248 001

3. **Kumaon Garhwal Chamber of Commerce & Industry**
"Chamber House" Industrial Estate,
Bazpur Road, Kashipur-244 713,
Distt-Udham Singhnagar
Uttaranchal .....Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen
Ms. Ruchika Rathi
Ms. Shikha Ohri
Ms. Mandakini Ghosh
Mr. Matragupta Mishra
Ms. Geetanjali Shankar and
Mr. Rana S. Biswas
Mr. Samiran Borkataky, Advs.

Counsel for the Respondent(s) : Mr. Suresh Tripathy and
Mr. Ghan Shyam Yadav
Mr. Miskhat Ali Khan for
UERC, Resp. No.1

Mr. Jaideep Gupta Sr. Adv
Mr. Pinaki Misra, Sr. Adv.
Mr. Shibashish Misra,
Mr. S. Chakhraborty for
Uttaranchal Power Corp. Ltd.,
Resp. No.2

Mr. V. P. Singh, Mr. Anuj Berry
Mr. Surjadipta Seth
Mr. Dushyant Manocha, Advs.
For Kumaon Garhwal Chamber
of Commerce & Industry, R-3

J U D G M E N T

JUSTICE MANJU GOEL, JUDICIAL MEMBER

01. The present appeal is directed against the tariff order of the Uttarakhand Electricity Regulatory Commission ('Commission' for short), dated 18th March, 2008 in petition no. 04 of 2007

determining tariff for the Uttarakhand Power Corporation Limited, the respondent No.2 herein and the distribution licensee in the entire State of Uttarakhand for the years 2007-08 & 2008-09.

02. The appellant is an HT Consumer of electricity and operates continuous process industry with consumption of electricity up to 5,000 KVA. On an average, the appellant pays Rs.9 Crores per annum towards electricity dues. The appellant's grievance is that the impugned tariff order has resulted in an effective increase of electricity tariff of the appellant by about 63 % from the previously existing tariff and has resulted in tariff shock. The impugned tariff order requires the appellant to pay the 20 % surcharge as additional energy charge throughout the tariff year for consuming power during restricted hours, whereas the Commission has not disclosed as to what those restricted hours were. Such an additional charge has been levied allegedly to recover any actual higher cost of power purchase. The appellant's grievance is that the levy is speculative without any supporting cost analysis. Further, it is alleged that the levy is against the law laid- down by this Tribunal that the tariff has to be worked out on the basis of the average cost of supply and the highest cost of power purchase cannot be loaded on particular category of consumers, namely, PIUs. Further the higher tariff, it is alleged, has resulted in increase in quantum of cross-subsidy payable by the appellant.

The appellant is further aggrieved that this 20 % higher energy charge is payable in addition to the TOD (Time of the day) tariff. The impugned tariff order has given a tariff design which has load factor based tariff such that the appellant with load factor above 50 % of the sanctioned load is made to pay a tariff at a higher rate as compared to those with a lower load factor. The appellant has given in the appeal petition an analysis of the cost and revenue situation of the respondent no. 2 and has pleaded that in view of the facts, the high rate of tariff imposed on the appellant under various heads is unreasonable and against law and is liable to be set-aside.

03. The appeal being against a tariff order, a public notice regarding pendency of the appeal was issued. All India Consumers Council (AICC), Uttarakhand, Dehradun and Industries Association of Uttarakhand responded to the public notice. However, no one eventuality appeared before this Tribunal to oppose the appeal. Kumaon Garhwal Chamber of Commerce and Industry was added as a respondent No. 3. The appeal is opposed by the Commission as well as by the respondent No.2. On behalf of the Commission, it is contended that the Commission has not introduced 20% higher energy charge in the impugned tariff order for the first time as such charge was in force since 2003-04, that the impact of levy of 20 % on higher energy charge and estimated revenue from such levy has been duly taken into consideration, that imposing of TOD tariff for

the industries and abolition of such tariff for others including non-domestic consumers is not an act of discrimination, that the Commission can differentiate between consumers on ground of load factor and that the tariff determined is absolutely according to law. The Commission refers to its tariff order, paragraph 8.3.6 in which the Commission took the view that the distribution licensee, in order to provide continuous supply to the industrial consumers, will have to contract for higher capacity with generating stations for which it will have to pay fixed charges for the entire year so as to obviate the need to purchase short-term power through UI route at high rates and therefore, there was merit in charging reasonable premium in energy charges throughout the year. So far as the issue of load factor is concerned, the Commission's suggestion is that the appellant enhances the sanctioned load and thereby reduces the load factor and get a lower tariff. It is contended that in view of power deficit scenario, it is not prudent to grant incentive for higher consumption. It is further contended that the distribution licensee has to purchase power on merit order principle which implies that as power purchase increases per unit cost of power increases which in turn increases cost of supply. Increase in load factor results in average power purchase cost for the licensee and hence there is rationale for levying higher tariff for those with higher load factors. The Commission refers to the impugned order to reiterate that the average cost of supply has increased from approved average cost of supply of Rs.2.30/kWh in 2003-04 to

Rs.3.20/kWh in 2008-09 and that the increase in the cost of supply is mainly due to increase in the power purchase requirement to meet energy requirement of a large number of new industrial consumers in the State so that the consumption of industries has increased from 26 % of the total consumption during 2003-04 to around 49 % of total consumption in 2007-08. The Commission contends that this necessitates purchase of costly power as well as purchase through UI over-drawl at more than Rs.5 per unit during peak hours. The Commission contends that on account of the rise in the cost of supply the industrial consumers were in effect getting cross-subsidized and hence the Commission considered designing tariff in such a way that the interest of various consumer categories was balanced. The Commission does not dispute that the respondent no. 2, licensee had surplus in the previous years but declines the suggestion that the surplus should have been taken into consideration while determining the ARR for the years 2007-08 and 2008-09.

04. The respondent No. 3 supports the appellant and adds more grounds to the appeal.

05. The appeal is opposed by the respondent No. 2 more or less on the same grounds as propounded by the Commission. The respondent No.2 is primarily concerned with recovery of its ARR

and contends that since it has not made any unfair enrichment, it should not be called upon to refund any amount to the appellant.

06. The question that has arisen for consideration before us is whether the Commission is justified in imposing an additional energy surcharge/additional supply surcharge at the rate of 20 % throughout the year on the appellant in addition to the time of the day tariff as well as the tariff on a higher slab on account of higher load factor. The appellant pleads that the Commission has not disputed that the tariff for the appellant in 2007-08 and 2008-09 has increased by 63 %. It is also not disputed that there was no approved load shedding schedule in the year 2007-08 although, it is contended that there was un-scheduled load shedding which may also be called disruption in power supply which may or may not be due to power shortage. It is also not disputed that 2006-07 was a revenue surplus year and that this surplus was not adjusted in the year 2007-08. The TOD tariff was withdrawn for several consumers including the hotels but were continued for the industries and for commercial establishments. The appellant has a grievance that withdrawal of TOD tariff for certain consumers while continuing the same for the appellant is discriminating. Nonetheless, the focus of petitioner's challenge is the additional supply surcharge at 20 % which is over and above the TOD tariff and the load factor based tariff (requiring the appellant to pay higher tariff on account of

higher load factor). To reiterate the appellant's case is based on a tariff shock by a rise in the electricity bill by 63 % and further that in view of revenue surplus, it was totally unnecessary to load the consumer viz. a continuous process industry, with the additional supply surcharge.

Decision with reasons

07. We have heard all the counsel appearing before us and have given our anxious thought to the issues involved. The tariff applicable to the appellant is available at page nos. 216 to 218 of the impugned order. For HT industry with contract load more than 1000 KVA the energy charge and demand charge with variable load factor are as under:-

Load factor	**Energy charge** (Rs. 1 KVAh)
Up to 33 %	2.20
Above 33% and Up to 50%	2.40
Above 50%	2.65

For peak hours the rate goes up from Rs.2.65/KVAh to Rs.3.30/KVAh and for off peak hours falls to Rs.2.50/KVAh. Additionally for using energy in the restricted hours, 20 % increase

in the energy rate is imposed. Hence the new rate applicable to the appellant is Rs.3.18/KVAh in normal hours, Rs.3.98/KVAh in peak hours and Rs.3.07/KVAh in off peak hours. The appellant has made a comparison of the pre-existing rates and the impugned rates in Annexure A3. The comparison shows increase by 67 %in energy charge. If rebate is also taken into consideration, the increase is by 63 %. This comparison is not disputed by any of the respondents.

08. The learned counsel for the appellant has taken us diligently through the impugned order. The total availability of power through long-term PPAs from UJVNL, NTPC,NHPC, others CGS, IPPs and UREDA projects and after taking into account the factor of banking, losses external to UPCL system, the net energy availability of UPCL(respondent no. 2) for 2007-08 is estimated at 6114 MU. As against this, the projected demand for 2007-08 is found to be 4596 MUs. The Commission noted that availability from firm sources of power was not expected to suffice for meeting the State requirements in the winter months and that the UPCL had projected the deficit of 590 MU during the winter months and consequent UI drawl which could be at Rs.3.45 per unit. The revenue gap estimated by the respondent no. 2 from the existing tariff was 542.23 Crores. The respondent no. 2 also estimated the average cost of supply to be Rs.3.70 per unit in 2007-08. Coming

to the analysis of the annual revenue requirements, the Commission specially took note of the HT consumers. The actual sale to HT consumers for 2006-07 was 1413 MUs. It is also noted that on account of comparatively lower tariff sales to the industries increased from 20.05 % to 38.08 % in the past 4 years. The Commission estimated the sales to HT Consumers to be 2113.34 MU in 2007-08 and 2261.27 MU in 2008-09. The total sale for 2007-08 was estimated at 4732.71 MU for 2007-08 and 5079.70 for 2008-09. The Commission took note that availability from UJVNL stations for 2007-08 was 3032.37 units from the CGS 3196.09 units and from IPPs and UREDA 90.95 units making a total of 6319 units. The Commission analysed that during the winter months, there would be short-fall which would require the UPCL to purchase 351.47 MU of additional power to meet the entire State's requirements. Out of this total deficit 227.64 MUs were stipulated to be made through UI. The Commission approved the balance 123.82 MU requirements also through UI purchase and estimated the cost at Rs.3.76 per unit.

09. The appellant points out that the availability of power was sufficient to meet the total power demand and that the short-fall estimated was only for the winter months and for the entire State as a whole. According to the appellant, in view of this situation there was no need to increase the tariff payable by the appellant to the

extent of tariff shock of 63 %. The respondent no. 3, supporting the appellant has emphasized the aspect of cross-subsidy. The appellant in annexure A-6 to the appeal has compared the cross-subsidy in the previous tariff order and the impugned tariff order and has found that the cross-subsidy has increased by 68 %. This calculation has also not been disputed by the respondent Commission. The appellant contends that the Commission has loaded the higher purchase cost of electricity on the appellant and the others falling in the same category on the plea that consumption by this group of industries has increased which is against the principles laid down by this Tribunal in its earlier pronouncements. Further the appellant contends that the cross-subsidy element has to be gradually brought down as per the mandate of the Electricity Act (hereinafter referred to as the Act) and that of the National Electricity Policy whereas the impugned order has raised the cross-subsidy element.

10. On behalf of the respondent no. 2 certain data has been furnished during arguments according to which the cross-subsidy level applicable vis-à-vis the appellant's category was only .4% which has increased to 16.96 %. However, this estimation also does not go in favour of the impugned tariff further. It may be mentioned here that the resp. no. 2 has calculated average cost of supply at Rs.2.86 per unit disputing the appellant's figure as given

in Annexure A-6 which is 2.59. On examination, we found that the average cost of supply for year 2008-09 which has been calculated from table 8.14 can be arrived at in the same method in which the figure 2.59 can be calculated from the table 7.20. The respondent No.2 does not dispute the figure of 3.06 for 2008-09 and therefore, there is no reason which it should dispute the figure of 2.59 as an average cost of supply for the immediate preceding period. Whatever may the figure be the fact remains that there is an increase in the cross-subsidy imposed on the appellant and its category.

11. The National Tariff Policy sets a target for tariff to be within ± 20 % of average cost of supply to be achieved by 2010 and this is required to be achieved by a gradual reduction in the level of cross-subsidy. The learned senior counsel for the utility Mr. Pinaki Misra submits that the cross-subsidy is within 16.96 % and therefore, within the prescription of the Act and the National Tariff Policy. One of the main reforms which the Act attempted to bring about was to reduce the cross-subsidy level which had become unsustainable. Accordingly section 61(g) of the Act prescribes that the tariff should progressively reflect the cost of supply of electricity and the cross-subsidy should be reduced in the manner specified by the appropriate Commission. The National Tariff Policy *inter alia* says

"Over the last few decades cross-subsidy has increased to unsustainable levels. Cross-subsidies hide inefficiency and loss in operations. There is urgent need to correct this imbalance without giving tariff shock to consumers. The existing cross-subsidies for other categories of consumers would need to be reduced progressively and gradually".

It further says :

"for achieving the objectives of electricity, the SERC would notify a roadmap within six months with a target that latest by the end of year 2010-11 tariffs are within ± 20 % of the average cost of supply".

12. The intention of the tariff policy is to ensure that those who are subsidized may pay nearly the same as the average cost of supply but in raising the tariff for this sector the Commission should go slow so as not to give a tariff shock. Neither the Commission nor the respondent No.2 has shown that the sudden increase in the level of cross-subsidy for the appellant and the category in question was required to achieve the targets set by the

National Tariff Policy. Further, the National Tariff Policy has also not justified a tariff shock for subsidizing category to the extent indicated above. Neither the Commission nor the respondent no. 2 has submitted any facts and figures which can justify increasing the cross-subsidy imposed on the appellant to the extent indicated above in order to gradually reduce the subsidy available with the subsidized category.

13. As mentioned in paragraph 7, the increase in the tariff rate payable by the appellant is 63 %. This is caused on account of the appellant being charged at a higher rate on account of higher load factor plus on account of being subjected to TOD metering to make it pay extra for the peak hours as well as additional energy/supply surcharge for drawing power without interruption even during load shedding throughout the year. Mr. Tripathi, counsel for the Commission, has cited judgment of the Supreme Court in *LMT Ltd. Vs. State of UP & Ors. AIR 2008 (SC) 1032* to justify additional supply surcharge for avoiding being subjected to load shedding. A consumer may be subjected to additional supply surcharge for supply during load shedding. Similarly, there can be justification for time of the day metering so as to impose higher tariff for the use of electricity when the demand is at its peak leading to shortage. There is also justification for imposing a higher tariff for industries which are capable of paying more so as to enable the utility to

supply electricity to the poorer section of the population. This, however, does not mean that a Commission can simultaneously impose all these burdens on a consumer which results into a tariff shocks. It has been submitted during arguments that the appellant having already been burdened with the 20 % additional supply surcharge all round the year for ensuring continuous supply, there was no need to the further impose of TOD tariff for that amounts to double taxing. We do not want to enter into the theoretical aspect of the two types of burdens. What we are to examine is whether the Commission is justified in suddenly enhancing the tariff for the appellant in the aforesaid manner. The average cost of supply in the relevant period has increased only by approximately 15 %. Table 6.22 of the impugned tariff order gives the average cost of supply as 2.70, in the year 2006-07. When this is compared to an average cost of supply in 2007-08 which is 2.86 (as given by the respondent No.2 during argument) the rise is by about 15%. Therefore, a 15 % hike in tariff cannot be objected to by any consumer, as that would be fully justified by the reality. The Commission has to design a tariff as per National Tariff Policy and the Act. However, the impugned tariff order so far as it fixes the tariff for the appellant and the consumers of its category cannot be sustained in view of the Act and the tariff policy.

14. There are two more points which we may like to note here. The first is about the plea of discrimination in continuing the TOD tariff for the appellant while it has been withdrawn from certain other consumers on the ground that those other consumers could not shift the time of their consumption. We do not want to enter into the controversy about discrimination because those other consumers are not before this Tribunal and in their absence this question cannot be adjudicated. The second is the issue of load factor in grading the tariff. The Commission has determined a tariff which requires a consumer with a higher load factor to pay at higher rate. The Commission also advised that the appellant can overcome its problem if it targets a higher demand and thereby, bring its own rate down by maintaining a load factor of below 30 % or below 50 %. The suggestion of the Commission does not appear to have much logic in as much as if this method is universally practiced the utility would be led to enter into the power purchase agreement of a much higher amount than it can eventually sell and thereby bring about a disastrous situation on its finances. Higher load factor implies that the consumer consumes nearly as much as it has contracted for and has paid demand charge accordingly. The utility stands to benefit by higher load factor because the utility is able to sell the electricity which it has arranged for meeting the demand of the consumer. If the load factor is lower the utility would find itself having contracted higher purchase from the generating companies than it would be able to sell to the consumers

and in that process may suffer loss. There is some logic in saying that those who consume beyond the contracted load, that is with load factor above 100 %, may be taxed at penal rate. Similarly, there is logic in imposing minimum consumption charge so that the utility is saved from a situation of having purchased power for the consumers who eventually are unable to consume and thereby leaving the utility with surplus power and consequent financial loss.

15. The Commission has cited a judgment of this Tribunal in the case of *M/s. Shree Dhanvarsha Steels (Pvt.) Ltd. Vs. Uttaranchal Electricity Regulatory Commission & Anr.*, appeal No. 214 of 2006, decided on 06.06.07. Having gone through the judgment we find that the facts of that case also showed a similar load factor based tariff viz. higher rate for higher load factor. That was not a subject matter of challenge. The restatement of fact in that judgment cannot be read as its ratio.

16. Before concluding we have to deal with an argument put-forth by the Commission and the respondent no. 2 that the appellant cannot seek any refund of the tariff already paid by it because the appellant has consumed electricity with full knowledge of the tariff payable. It has been pointed out that the appellant after filing the appeal requested the Court to await the decision on a review

petition filed by the respondent no. 3 and in the process delayed the disposal of the appeal. Mr. Suresh Tripathy has cited judgments to argue that a party cannot approbate and reprobate. In our opinion, these arguments are not applicable to the present appeal. The appellant has filed the appeal within the time allowed by the Act. During the pendency of the appeal he could only consume electricity at the impugned rates. Its consumption does not mean waiver of his challenge to the impugned tariff order. It cannot be said that because he has consumed electricity during pendency of the appeal he has voluntarily paid for its consumption at the impugned rates.

17. The respondent No. 2 has expressed its difficulty in refunding any amount eventually found to have been recovered in excess from the appellant and consumers falling in his category because currently it is facing a deficit. This situation can be met by making appropriate provision for a re-payment schedule and by creating regulatory asset, if necessary.

18. In view of the above, we allow the appeal and set-aside the impugned order to the extent of tariff fixed for the category of the appellant, namely, HT Industry with contract load above 1,000 KVA and load factor above 50 % and subjected to additional supply surcharge for continuous supply without adversely affecting the

tariff of any other category. The Commission shall re-determine the tariff for this category keeping in view the observations made in this judgment. The respondent No. 2 shall refund the amount found to have been recovered from the consumers of the aforesaid category on account of the re-determined tariff. Such refund will be made by adjustment against the electricity bills of the next 12 months. It will be open to the respondents to create regulatory assets, if necessary, to meet this liability.

19. With this I.A. No. 114 of 2008 also stands disposed of.

20. Pronounced in open court on this ***06th day of October, 2009***.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member

Reportable✓ / Non-reportable