BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY
(APPELLATE JURISDICTION)
Appeal No. 135 of 2010

Dated : 25th February, 2010

Coram; Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial member

In the matter:

Polyplex Corporation Ltd,
Lohia Head Road,Khatima-262308,
District Udham Singh Nagar,
Uttrakhand. …Appellant (s)

Versus

1. Uttrakhand Electricity Regulatory Commission,
   1st floor of Institution of Engineers(I) Building,
   Near ISBT, Majra,
   Dehradun (UA)
   PIN 248 002.

2. Uttrakhand Power Corporation Ltd.,
   Urja Bhawan, Kanwali Road,
   Dehradun (UA)
   PIN 248 001. …Respondent(s)

Counsel for the Appellant : Mr. Sanjay Sen
Ms. Shikha Ohri
Ms. Surbhi Sharma

Counsel for the Respondent: Mr. Pradeep Mishra
Mr. Manoj Kumar for R-2
Mr. Suresh Tripathy for R-1
Mr. Suraj Singh
Mr. Ghanshyam Yadav
Mr. Balakrishna

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

The Appellant who is a HT consumer of Uttrakhand Power Corporation Ltd. , the sole distribution licensee in that State, the Respondent No. 2 herein, and who in terms of the contract with the said Respondent No. 2 dated 21st March, 2005 is required to pay a time of the day tariff which is further based on load factor in addition to pay additional supply charges for continuous supply of power has preferred this appeal being aggrieved with the order dated 10th April,2010 passed by the Uttrakhand Electricity Regulatory Commission, the Respondent No. 1 herein, whereby the said Commission reduced the continuous supply surcharge to 10% on enegy charges for all the consumers under RTS 7 : LT and HT industry category who had opted for continuous supply thus giving a reduction which, according to the Appellant, was in violation of the directions contained in this Tribunal's order of remand dated 6th October,2009 passed in Appeal No. 85/2008.

2. In petition No. 4/2007 the Commission passed a tariff order on 18th March, 2008 determining retail tariff for various categories of consumers including the Appellant for the year 2007-2008and 2008-09 against which the Appellant preferred an appeal being No. 85/08 before this Tribunal on the ground that the Commission introduced multiple layers of discrimination so as to burden one category of the consumers with exorbitant tariff. The ground raised in that appeal was that the Appellant by virtue of the tariff order was to pay 20% additional energy charge for consuming power during restricted hours without the Commission disclosing in the tariff order the period of such restricted hours, that the said 20% higher charge was to be paid in addition to the Time of Day tariff which the Commission itself had abolished for non-domestic consumers that primarily included, commercial establishments and hotels and provided penalty only on a monthly basis of 20% higher energy charge which is called additional surcharge for violation of peak/restricted hour supply by non-continuous supply consumers and Rs.50/- per KVA per day for contracted demand which would operate only if the non-continuous supply users draw in excess of 15% of their contracted demand. This

resulted in increase of 67% in tariff and with rebates the increase came to about 63%. from the previous tariff. Further, the cross subsidy was increased from 31 paise per unit to 52 paise per unit which is an increase by 68%. These points were canvassed before this Tribunal in Appeal No. 85/08.

3. This Tribunal allowed the Appeal by a judgment and order dated 6.10.2009 and made the following observations:

''***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 shoks. 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 the 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."

''17The 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 this 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 1000 KVA and the 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***"**

4. The Commission after the matter was remanded to it again upon hearing all concerned passed an order of retail tariff for Uttrakhand Power Corporation Ltd. for the FY 2010-11 which is a 238 page document, but so far as the Appellant is concerned its reasonings are at pages 124 to 126 of the order and relevant observations of the Commission are reproduced hereunder:

''The Commission is , thus, required to re-determine tariff for the set of HT Industry consumers with contracted load above 1000 KVA and load factor above 50% and subjected to additional supply surcharge for continuous supply set of consumers keeping in view the observations made by Hon'ble Tribunal in the above judgment. The important observations that need to be considered for re-determination of tariff are Cross-subsidy and Tariff Shock. The Commission obtained the actual monthly billing data for the set of HT consumers with contracted load above 1000 KVA and load factor above 50% and

subjected to additional supply surcharge for continuous supply for the period FY 2008-09. Based on the actual billing data for this set of consumers, the extent of cross subsidy for this set of consumers works out to around 25%, while the cross-subsidy for entire HT Industry category at the tariffs approved in the Order dated March 18, 2008 works out to 17%.

The Tariff Policy stipulates the following as regards the cross- subsidy:

''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 subsidized categories excluding those referred to in para 1above 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 (emphasis added)"

From the above provision of the Tariff Policy, it is clear that the category-wise tariffs have to be within ± 20% of average cost of

supply by the end of year 2010-2011 and not the tariff for each and every consumer. Further, the Tariff Policy by way of illustration clearly stipulates that the tariff for cross-subsidising categories can be up to 20% higher that the average cost of supply. It also implies that where tariff for subsidizing categories is already within 120% of cost of supply, cross subsidy need not to be reduced further."

''Considering that cross-subsidy for this set of consumers being 25% slightly higher than limit of20% prescribed for the entire category in the tariff policy to be attained by 2010-2011 and tariff increase of 40% for this set of consumers, the Commission has re-determined the tariff as elaborated in he following section."

''For re-determination of tariff for the above said set of consumers, the Commission has examined the options of modifying (i) the demand charge, (ii) the energy charge and (iii) the continuous supply surcharge."

''As uniform Demand charges are payable by all HT consumers with contract load above 1000 KVA, any reduction in demand charges for HT consumers with contract load above 1000 KVA and load factor above 50% would lead to discrimination vis-à-vis the other

consumers with contract load above 1000 KVA but with load factor below 50% and hence, it will not be appropriate to reduce the demand charges only for specific consumers with load factor above 50%."

''The energy charges for HT consumers vary based on the load factor and energy charges for a particular load factor are same irrespective of the Contracted Load. Therefore, if the energy charges are modified for HT Consumers with load factor above 50%, it will be applicable to both sub-categories i.e. upto 1000 kVA and above 1000 kVA. Hence, charging the same only for consumers above 1000 kVA would lead to discrimination vis-à-vis the consumers with contracted load below 1000 kVA but with load factor above 50%".

''The Continuous Supply surcharge of 20% was applicable for all the consumers within TRS 7 Category who had willfully opted for continuous supply. Therefore, any reduction in Continuous Supply Surcharge only for set of consumers having load above 1000 kVA and load factor of more 50% would again result into discrimination. Further, if the Continuous Supply Surcharge is modified only for set of consumers having load above 1000 kVA and load factor of more 50%, the effective tariff of this set of consumers will be lower than

some of the consumers having load above 1000 kVA and load factor between 33% to 50%. Further, in such scenario, the effective tariff of this set of consumers will also be lower than the some of the consumers having load below 1000 KVA and load factor more than 50%."

''Considering the above aspects, the Commission is of the view that the re-determination of tariff can be best achieved by reducing the continuous supply surcharge for all the consumers who had opted for continuous supply and paid the continuous supply surcharge @ 20% of energy charges. Accordingly, the Commission reduces the continuous supply surcharge and approves the same as 10% of energy charges for all the consumers under RTS 7: LT and HT Industry Category who had opted for continuous supply".

''In accordance with the ATE Judgment, the Commission directs the UPCL to compute the amount to be refunded to all the consumers under RTS 7:LT and HT Industry Category who had opted for continuous supply for the period March1, 2008 to September, 2009 based on continuous supply surcharge of 10% approved in this Order and refund the amount to respective consumer within 12 equal monthly installments from April 2010 to March 2011".

''At re-determined tariffs, the cross-subsidy for the Set of Consumers with contracted load above 1000 kVA and load factor above 50% and subjected to additional supply surcharge for continuous supply reduces to around 16% and the tariff impact also reduces to around 30%."

''Based on the actual data, the impact of re-determination and amount to be refunded to consumers who had opted for continuous supply, woks out to around Rs.30 Crore. The Commission has added this estimated refund amount of Rs.30 Crore to UPCL's ARR for FY 2010-2011. The Commission directs UPCL to submit the consumer-wise amount to be refunded to he Commission within two months from the date of this Order".

5. Being aggrieved with the order dated 10th April,2010, the Appellant preferred this Appeal to raise the following points:

a) Though the Tribunal held in the earlier order dated 6th October,2009 that the Commission would re-determine the tariff in a manner that no tariff shock is caused to the Appellant and that hike in tariff can be to the extent of 15%., the Commission did not re-determine the tariff by

implementing Tribunal's directions and, on the contrary afforded relief only to the extent of 10% reduction of additional supply charges for the period between 1.3.2008 to 30.9.2009.

b) The Commission did not address the issue of bringing the tariff for the period for which excess payments were made to the level of 15% increase from the rates applicable in December, 2007.

c) The Commission's observation in the impugned order that the cross-subsidy for the present set of consumers is 25% which is slightly higher than the limit of 20% prescribed for the entire category in the tariff policy is not correct.

d) The Commission wrongly held that the tariff increase for the Appellant was 40% and has been brought down to 30%, while the Tribunal held in the previous order that the increase was 63% after adjusting the rebate. The Commission was precluded from re-assessing the percentage of hike once the Tribunal found it at 63%.

e) True to the spirit of the earlier order of the Tribunal, the tariff of the Appellant could not be increased beyond 15% for the relevant tariff years 2007-08 and 2008-09 because the Tribunal held that the tariff hike could only be to the extent of 15%. .

f) The impugned tariff order is applicable from 1st March, 2008. Therefore, in view of the Tribunal's order dated 6th October, 2009 all payments made towards tariff during the period in question is subject to adjustment but the Appellant was paying the additional supply arranging charges from 1.1.2008 on the basis of demand made by the Respondent. Therefore, refund has to be made of the charges paid illegally including the period of three months prior to the date of the order of tariff.

g) The quantum of relief given by the Commission after remand comes roughly around Rs. 75 lakhs to 80 lakhs being based on additional supply charge by 10% while the Appellant has a claim of Rs. 4,07,64,196/- or Rs.4,22,35,051/- . However, if the Appellant calculates on the basis of the order of the Tribunal dated 6th

October, 2009, then the amount refundable by the Respondent licensee is Rs.5,25,01,908/- ,as on 31st March, 2010, not as on 31st October, 2009. This amount is arrived at considering the increase only by 15% as held by the Tribunal.

h) The Commission was not required to address the issue of discrimination, as the relief given to the Appellant was based on the fact that the Appellant was being singled out to pay time of day tariff, load factor based tariff and additional supply charges throughout the year even when there was no load shedding. Therefore, there was no question of discrimination caused as a result of giving relief to a category that had been singled out and pursuant to intervention of this Tribunal such discrimination was being addressed. This is relevant in view of the fact there are only a few consumers who fall under the Appellant category which is a consumer having continuous supply with load factor over 50% and a contract load of 1000 KVA. The finding of the Commission goes against the final order of this Tribunal.

The Commission thereafter, only reduced the continuous supply surcharge and approved the same as 10% of the energy charges for all consumers who opted for continuous supply. This Tribunal did not direct the Commission to give such relief to all consumers by reducing the additional supply charge to 10% from 20%. Only the tariff of the Appellant category had to be re-determined in terms of paragraph 18 of the Order dated 6th October, 2009. The order of the Commission to retain 10% Additional Supply Charges goes against the order passed by this Hon'ble Tribunal in Appeal No. 85 of 2008. The relief given in the present order goes beyond the directions of the Hon'ble Tribunal.

i) Thus what the Commission was directed on remand was to re-assess the hike to the extent of 15% only and it did not cover the issue of load factor based tariff.

6. The Respondent No. 2, Uttrakhand Power Corporation Ltd. did not file any counter affidavit to the memorandum of Appeal but filed a written submission. According to it, the Commission re-determined

the tariff in total compliance with the Tribunal's judgment dated 6th October, 2009 passed in Appeal No. 85 of 2008. The Commission has worked out the cross-subsidy for this category of consumers as the Appellant is, which comes out around 25%, while the cross-subsidy for entire HT category in the tariff approved in the order dated 18th March, 2008 works out to 17%. The Commission rightly held that since the demand charges of all the consumers in HT category are the same it could not be revised as it would lead to discrimination. Accordingly, the Commission reduced additional supply surcharge on account of continuous supply from 20% to 10%. The Commission viewed that by the method adopted by it, the cross-subsidy for the set of consumers of HT category with contracted load above 1000 KVA and load factor above 50% and subject to additional supply surcharge for continuous supply is reduced to around 16% and the tariff impact is also reduced to 30%.

7. The Respondent No. 1, the Commission filed a counter affidavit contending inter-alia that the order in question was in conformity with the directions of the Tribunal in its judgment dated 6th October, 2009 in Appeal No. 85 of 2008. The Tribunal while directing re-

determination of tariff also put a rider that the tariff of any other category may not be adversely affected by such re-determination in the case of the Appellant. After re-determination, the Respondent No. 2 was required to refund the differential amount recovered from the above set of consumers. Thus, the Commission reduced the continuous supply surcharge of this class of consumers under RTS 7 from 20% to 10% and then directed UPCL to compute the amount to be refunded to the set of consumers under that category who had opted for continuous supply during the period from March 1, 2008 to September 30, 2009 and refund the additional amount so recovered in 12 equal monthly installments with effect from April 2010 to March, 2011. The Commission assigned reasons while reducing the surcharge from 20% energy charges to 10% of energy charges and we will examine the reasons presently as we proceed with this judgment. The Commission however, contended that the tariff increase for the Appellant to the extent of 40% was correct because in assessing the actual increase in average tariff the Commission obtained detailed monthly bills for the financial year 2008-2009 of the consumers having contracted load above 1000 KVA and load factor above 50% who had opted for continuous supply. The Tribunal has

nowhere put any restriction on quantum of tariff hike; it rather directed the Commission to re-determine the tariff in such a way so as not to affect the tariff of the other categories. Neither the Act nor the Tariff Policy, by which the Commission is to be guided, prohibits the increase of tariff for any category if it is on the basis of rise in average cost supply subject of course to gradual reduction of cross – subsidies and prevention of tariff shock to any category of consumers. The Appellant erroneously presumed that the Tribunal had directed the Commission to re-determine the tariff of the Appellant's category in such a way that the net tariff hike does not exceed 15%. Now, in order to carry out the mandate of Electricity Act, 2003 and the Tariff Policy for gradual reduction of subsidies, if the tariff for different categories were to be increased by the same quantum of increase in cost of supply then there would be no reduction in cross subsidies.

8. Charges levied prior to the impugned tariff order were never challenged and were also not the ground of appeal in Appeal No. 85 of 2008. As to the ground of the Appellant not being facilitated with hearing, it has been contended that though the Commission has red-

determined the tariff in the light of the observations made by the Tribunal a public hearing for the second time was not necessary and indeed, this is the view of this Tribunal in a judgment dated 23.5.2007 in the matter of M/s. Poddar Alloys (P) Ltd. Vs UERC. Section 62 (3) of the Act empowers the Commission to differentiate tariff according to the consumer's load factor, power factor, voltage and total consumption of electricity etc. Regulation 20 provides that tariff for various categories /voltage shall be benchmarked with and shall progressively reflect the cost of supply based on cost incurred prudently by the distribution licensee. The Tribunal in its order did not object to the load factor based tariff. On the contrary, inclusion of load factor is one of the criteria for defining the class of consumers whose tariffs are to be re-determined. The Commission estimated the quantum of cross-subsidy on the basis of figures approved in the tariff order. The highest level of cross-subsidization by HT category consumers who have opted for continuous supply was 17% only. The Commission analyzed actual consumption data for the financial year 2008-09 for the HT consumers having contracted load above 1000 KVA, load factor above 50% and who had opted for continuous supply. On an average level the quantum of cross subsidization for

this class of consumers was less than 25%. The Appellant compared tariff for the period 2007-08 without continuous power surcharge with tariff approved in 2008-09 with 20% continuous power surcharge. According to the Commission the Appellant tried to compare ‘’apples with oranges”. The Appellant had opted for continuous supply in the year 2007-08 and 2008-09 and was paying 20% surcharge during these years and had opted out from continuous supply for the year 2009-10. Thus for comparison of the FY 2007-08 with FY 2008-09 instead of taking or excluding continuous supply surcharge during these years the Appellant chose to ignore the same for 2007-08 and included that for 2008-09 thus showing higher tariff increase. The Appellant opted out from continuous supply in the year 2009-10 and again opted for continuous supply in the year 2010-11 when the continuous supply surcharge was reduced to 10% and normal hike in tariff was only 3%. It is contended that the Appellant compared two unequals by comparing tariff for the year 2007-08 without 20% surcharge with tariff for the year 2008-09 with 20% surcharge to arrive at figure of 67% tariff hike. 20% surcharge for continuous power supply was purely optional and the Appellant had opted for the same voluntarily. As regards the Tribunal’s observations in the

earlier judgment that there was increase in energy charges by 67% it is contended that this is not the finding of the Tribunal. The Commission cannot be precluded to show an analysis of figures so as to point out that such a percentage was the outcome of the Appellant's wrong calculation. The Tribunal's order itself shows that it was the figure worked out by the Appellant and accepted by the Tribunal since during hearing it was not opposed. During the hearing of the appeal no data was placed before the Tribunal by the Appellant to show how the increase came out to be 67%. As regards the observations of the Tribunal that the comparison was not disputed by the Respondents, it has been contended that during the course of proceedings in the said appeal the Commission submitted that the actual impact of tariff increase is around 40% for industries having load factor above 50% as against 67%. On actual data analysis the average cross subsidy of the Appellant was less than 25%. Accordingly, the Appeal has no merit.

9. The issues raised by the Appellant for consideration of this Tribunal are :

1.) Whether the impugned order passed by the Commission in Petition No. 14 of 2009 is in compliance with the directions issued by this Tribunal in Appeal No. 85 of 2008?

2.) Whether 10% reduction of additional supply surcharge by the Commission is in conformity with the directions issued by this Tribunal by its order dated 06.10.2009?

3.) Whether the finding of the Commission that the tariff increase by the impugned order dated 18.3.2008 was only to the extent of 40% is correct?

4.) Whether the Commission had an obligation to re-determine tariff for the Appellant category on the premise that the tariff of the Appellant category for the year 2007-08 and the year 2008-09 does not exceed 15% from the previous tariff?

10. Mr. Sanjay Sen, learned Counsel for the Appellant made extensive arguments based on what have been stated in details in the Memorandum of Appeal. The main thrust of the arguments advanced by Mr. Sen is that the Commission did not follow in letter and spirit the Tribunal's order wherein there was enough indication in express words that earlier tariff determination order was a shock to

the Appellant and that hike must not exceed 15%.. The Appellant made a comparison of the pre existing rates with the impugned rates to show that the increase was by 67% in energy charges which was reduced to 63% with rebate granted. Similarly, the Appellant has compared the cross subsidy and found that the cross-subsidy has increased by 68%. It is argued that 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 order. It is argued that the Respondent No.2 has calculated average cost of supply at Rs.2.86 per unit disputing the Appellant's figure which is Rs. 2.59. But on examination it is found that the average cost of supply for the 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 Rs. 3.06 for 2008-09 and therefore, there is no reason why it should dispute the figure of Rs. 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. It is submitted that 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.

12. With regard to the load factor, the argument goes on, 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.

13. Further, the Commission ignored the fact that the Tribunal has set aside the load factor based tariff as was introduced for the Appellant category of consumers. Again, the Commission ignored the fact that the Tribunal set aside 20% additional surcharge for continuous supply which amount was charged for the whole year even when there was no load shedding.

14. With reference to the Respondent's arguments that the observations made by the Tribunal in the order dated 6th October, 2009 are in the nature of obiter dicta, it is submitted that they are not so. The observations of the Tribunal on each of the points are in the nature of ratio. The Tribunal's findings that the increase in tariff was 63% is clearly a finding which cannot now be contradicted by the Commission. Further, reduction of demand charges of the Appellant category of consumers would not lead to discrimination vis-à-vis other consumers. There was no justification for the Commission to hold that reduction of demand charges to the Appellant category of consumers would lead to discrimination vis-à-vis other consumers.

15. Mr. Pradeep Mishra, learned Counsel for Respondent No.2 submitted that the Tribunal in its earlier order dated 6th October, 2009 never held with definitiveness that there cannot be any hike in tariff to the extent of more than 15% and this was not the finding of the Tribunal. What was agitated before the Tribunal in course of hearing of the Appeal No. 85 of 2008 was sudden abnormal rise in the level of cross-subsidy which, according to the Appellant, the National Tariff Policy does not approve of. It is submitted that the entire reasoning of the Appellant before the Tribunal in the earlier Appeal proceeded on the premise that the hike in tariff had been 63% and the Tribunal quoted the data but it was not shown how the data was arrived at, and even now there is no data presented at the time of hearing of this Appeal that the increase in tariff is still 63%. The argument of the Appellant that the Commission was obligated upon to go by letter of the Tribunal's order in search of reduction in the tariff even ignoring the question as to whether the different categories of consumers would be affected or not at the cost of the Appellant is unfortunate. The reduction in surcharge to the extent of 10% from 20% is in the totality of the situation sufficient relief to Appellant.

16. Mr. Suresh Tripathy, learned Counsel for the Commission submitted that the Appellant by presenting facts that the Appellant is required to pay a time of day tariff in addition to supply arranging charges for continuous supply of power is in fact seeking to invoke sympathy from the Tribunal which it is not so entitled to in as much as surcharge on account of continuous supply has not been thrust upon the Appellant. It is the Appellant's choice that it has been deriving benefit by surcharge on account of continuous supply of power to boost its own industrial production. Secondly, in course of hearing of Appeal No. 85 of 2008 it was the Appellant who presented a figure that tariff hike had been to the extent of 63% but no data was presented and the Commission also during hearing of the Appeal was not equipped with data so as to definitely to say that there was really an increase of 63% or, if it was not so, then at what figure it would stand for. Now, the Commission has correctly estimated that the cross subsidy for the set of consumers like the Appellant with contracted load above 1000 KVA and load factor above 50% and subjected to additional surcharge for continuous supply is reduced to around 16% and the tariff impact is reduced to around 30% and this finding of the Commission could not be disputed and contradicted by

the Appellant by placing any different or conflicting data. The Tribunal did not put any restriction in determination of the quantum of tariff hike.

16. Upon hearing the learned Counsel for the parties we think it appropriate to say at the very outset what the Tribunal actually held in its order dated 6th October, 2009 in appeal No.85 of 2008 . We pose the following questions:

a) Can it be said that the Tribunal held that in no case the impact of tariff hike must be felt beyond 15%?
b) Can it be said that the observation of the Tribunal that the tariff hike for the Appellant at 63% was in reality based on correct analysis of data?
c) Did the Tribunal hold that the Commission was not justified to determine the tariff in such a way that all the burdens like additional supply surcharge, TOD tariff on load factor, etc; must not be thrust upon the Appellant at a time?
d) Did the Tribunal really hold with definitiveness that the level of cross subsidy in the case of Appellant was intolerable ?

17. Fairly speaking, the Tribunal did never hold that tariff hike must not increase more than 15%. The Tribunal held on the basis of the table 6.22 of the previous tariff order that the average cost of supply in the year 2006-07 was Rs.2.70, while the figure comes to Rs.2.86 for the year 2007-08, and thus rise comes by 15% which cannot be objected to. This does not mean that the Tribunal directed the Commission to re-determine the tariff so that tariff hike must not exceed 15%. True, it was the Appellant who presented before the Tribunal in Appeal No. 85 of 2008 that by virtue of determination of previous tariff the rise was by 63%. True, Mr. Suresh Tripathy, learned Counsel for the Commission did not present any contradictory figure at that time when the earlier appeal was heard.. But during the hearing of this present Appeal, it could not be shown that at that point of time when the tariff was first determined before the remand the rise was by 63%. Now the Commission has presented an analysis of data and contradicted Mr. Sen's arguments to say that a wrong fact was provided to the Tribunal at that time. The Tribunal did not make any categorical observation that cross subsidy in the case of the consumers like the Appellant should be at

a particular level. Reading between the lines of the judgment of the Tribunal in Appeal No. 85 of 2008 it conveys an idea that given the facts and data it would appear that the tariff order particularly on the item of cross subsidy should be revisited with. It was an open remand giving scope to the Commission to arrive at a re-determination on the basis of the materials and data. Mr. Sen's submission that the Tribunal's order that re-determination of tariff should be in the light of the observation to the effect that tariff increase by 15% cannot be objected to is not an obiter dicta but a finding of the Tribunal is difficult to accept. The Commission wants to categorize this observation as obiter dicta, not stare decisis . For, if it was the decision of the Tribunal then there was hardly any point for re-determination on remand; secondly, such an observation cannot be categorized either as *stare decisi*s or as *obiter dicta*. It is known that the doctrine of *stare decisi*s is applied when the law is settled for a long long time (Ram Adhar Singh Vs Bansi, AIR 1987 SC 987), while an *obiter dicta* is an observation by a Court on a legal question; it is not a finding as a precedent because any such observation is unnecessary.(Madhav Rao Scindia Vs Union of India, AIR 1971 SC 530) These two doctrines are totally misplaced. The observation of

the Tribunal was one relating to a question of fact, but not a finding thereon.

18. The first argument of Mr. Sanjay Sen, learned Counsel for the Appellant that the Appellant has to pay the time of the day tariff, pay for the higher slab on account of higher load factor, to pay for additional supply surcharge for continuous supply resulting in abnormal cross-subsidy; and all these constitute a tariff shock to the Appellant is to our mind a misplaced one. The Appellant admittedly is an industrial consumer with HT connection having contracted load above 1000 KVA and load factor above 50%. Because the Appellant is an HT consumer with such contracted load above 1000 KVA and load factor above 50% it has opted of its own choice, for additional supply surcharge for continuous supply. It is the Appellant who chose to demand for continuous supply for which additional supply surcharge is payable Thus the comparison with previous year's tariff is to be made after including additional supply surcharge in the tariff for previous year and current year. Similarly, TOD tariff has been introduced considering the cost of power at different times of the day and to induce and give commercial signal to the consumer the

stagger load so as to shift load from peak to off-peak period. Thus, comparison of tariff for previous and current year has to be done for different time periods of the day viz. peak, off-peak and normal hours. There seems to be logic in the argument of the Commission that the question would be as to whether the order for re-determination of tariff is an order fixing cross subsidy within the permissible limit so that no grievance can rightly be caused to the Appellant. The Commission was not unmindful of the fact that such re-determination of the tariff must not cause any adverse effect to those categories of consumers who are not before us. The Tariff Policy postulates that the category-wise subsidy has to be within + 20 % of average cost of supply by the end of the year 2010-2011 and not the tariff for each and every consumer that is to say, if the tariff for subsidizing category is already within 120% of the cost of supply, the cross subsidy must not be increased beyond that point, and may or may not be reduced further. The Commission rightly found that the previous tariff order against which Appeal was presented reflected that the level of cross subsidy was higher than 20%. The Commission was examining whether demand charge, energy charge and/ or the continuous supply surcharge should be reduced on the plea that Appellant was

given a tariff shock. The Tribunal clearly held that re-determination of tariff must not affect the other categories of consumers. The Commission held that uniform demand charges are payable by all HT consumers with contract load above 1000 KVA; any reduction in demand charges for HT consumes with contract load above 1000 KVA and load factor above 50% would lead to a discrimination vis-à-vis the other consumers with contract load above 1000 KVA but load factor below 50%. We find no better logic to sustain this finding. Similarly, it could not be disputed that energy charge vary on the basis of the load factor, but is independent of contracted load. It is adequately presented that change in energy charge, if to be made, has to be made for both HT consumers upto 1000 KVA and above 1000 KVA which will not be a sound one.

19. The Commission found that continuous supply surcharge of 20% was applicable to all the consumers within RTS 7 category who had willfully opted for such continuous supply. The Commission held that any reduction in continuous supply surcharge only for a set of consumers like the Appellant will be discriminatory against the consumers with load factor, ranging between 33% and 50%. Hence,

the Commission suggested reduction of continuous supply surcharge for all the consumers, who had opted for continuous supply and paid the continuous supply surcharge @ 20% of energy charges. Accordingly, in respect of all the consumers, say, LT and HT industry category and who had opted for continuous supply , reduction was made to 10%. This has considerable impact upon cross subsidy which according to the Commission is reduced around 16%. The Commission in order to show that increase in the Appellant's class of consumers was to the extent of 40% contended that this figure was achievable on the basis of the detailed monthly bills for the year 2008-09 of the consumers having contract load above 1000 KVA and load factor above 50% who had opted for continuous supply. It could not be disputed now that the extent of cross subsidy for HT industry sub category would come to 17% which will be within the ceiling of ± 20% to be attained by 2010-11 as stipulated in the Tariff Policy . In fact, there would be no cause of grievance if in terms of the provisions of the Act and the Tariff Policy tariff is determined on cost plus basis subject to gradual reduction in cross subsidy.

20. In the earlier appeal, if we notice the order of the Tribunal carefully, the challenge and the main focus of the appeal was towards the additional supply surcharge of 20% which was in addition to TOD tariff and the load factor based tariff. Therefore, the contention of the Appellant was not against the time of the day tariff and load factor based tariff. To show the purported hike of 63% the Appellant computed an increased rate during peak hours, increase in the energy load and then made the comparison of the pre-existing rate with the rates those under challenge. On the other hand, the Commission observed that to assess the actual increase in average tariff, the Commission had obtained the detailed monthly bills for the year 2008-09 of the consumers having contracted load above 1000 KVA and load factor above 50% who had opted for continuous supply and on the basis of actual monthly bills the increase in tariff for this class of consumers was found to be around 40%. Annexure A to the counter affidavit of the Commission gives out details of the figures showing the extent of hike at 40%. On behalf of the Appellant nothing has been shown to show that the analysis is incorrect. It is justified to say that the Tribunal's observation that ''the 15% hike in tariff cannot be objected to by any consumer" cannot be said to be mandate to the

Commission directing the Commission not to give the impact of the tariff hike beyond 15% It was simply an observation which is now sought to be capitalized by the Appellant to argue that the Commission has been directed to implement its observation or the Order. In fact, the tariff on the basis of rise in average cost of supply, gradual reduction of cross-subsidy and prevention of tariff shock to any category of consumers is the spirit of the law and the tariff policy. Thus, 40% hike for class of consumers of the Appellant was inevitable. The Commission submitted that while average cost of supply for UPCL rose steadily from Rs.2.21/kwh in financial year 2003-04 to Rs.3.06/kwh in financial year 2008-09, the tariff for industrial category was not increased because of certain surpluses from the previous year until the order dated 18.3.2008 when all the surpluses were finally determined and adjusted. By no amount of reasoning one can raise any objection that the tariff of industrial category of consumers should be so fixed progressively after the financial year 2003-04 taking into account of the cost to supply plus principle.. It has been submitted that in fact majority of industrial consumers were actually getting subsidized instead of paying any subsidy as their tariffs remained stagnant while the cost of supply

surpassed their tariffs in the interregnum. It is the submission of the Commission that as the requisite increase in tariff for this category could not take place due to non-finalization of surplus amount they went unintentionally subsidized by about 30%. In order to set right this anomaly their tariff was first required to be raised by about 30% to bring them at the cost to serve level and then by the amount of desired cross subsidy of 10%. In support of this contention the following table has been given in the counter affidavit.

S.No.	NAME	Actual Consumption during FY 2008-09				Energy charge at old rates with 20% CPS
		Normal	Peak	Off-peak	Total	
1	2	3	4	5	6	7
1.	Polyplex Corporation Ltd.	11,285,400	7,730,800	9,494,500	28,510,700	68,328,579

Demand charge at old rates	Total charges at old rates with 20%CPS	Effective Rate at old rates with 20% CPS	Energy charge at new rates with 20% CPS	Demand charge at new rates	Total charges at new rates with 20%CPS	Effective rate at new rates with 20% CPS	Impact (New rates-old rates) both with 20% CSC
8	9=7+8	10=9/6	11	12	13=11+12	14=13/6	15=(14-10/10
6,750,000	75,078,579	2.63	95,398,447	9,600,000	104,998,447	3.68	40%

We find from the analysis as shown below of the data of the Commission that the level of the cross subsidy does not exceed the permissible limit. The Commission computed average tariff and cross subsidy by adding estimated continuous supply surcharge from opting consumers to HT Industrial category . Average cost of supply has been arrived at by dividing total revenue requirement of licensee by total sale during the period 2008-09 and average cost of supply comes to Rs.3.06/kwh. Average tariff has been arrived at Rs.3.49/kwh by diving total revenue projected from that category by total projected sale to that category as given below:.

Cross Subsidy at approved Tariff for FY 2008-2009 for Industrial Category

S.No.	Cateogory	Sales	Revenue	Average Tariff	Average cost of supply (ACoS)	Average Tariff/ACoS	Cross-Subsidy
		MU	Rs.crore	Rs/kWh	Rs/kWh	%	%
1.	LT industry	199	68.2	3.43	3.06	112%	12%
2.	HT Industry without continuous supply Surcharge	2261	788.2	3.49	3.06	114%	14%
3.	HT Industry (with continuous supply Surcharge)	2261	811.21	3.59	3.06	117%	17%
4.	Total industry (without continuous Supply Surcharge)	2460	856.5	3.48	3.06	114%	14%

21. The cross subsidy for the entire industrial category as well as HT industrial sub-category works out to be around 14% excluding the continuous supply surcharge; and if the continuous supply surcharge is considered then the extent of cross subsidy for HT industrial sub-category works out to around 17% which is well within the permissible limit.

22. We do not find any reason to discard or reject the analysis presented during the hearing of the Appeal. As the Commission in the year 2007-08 and 2008-09 approved load factor based tariff for HT industry, it assessed cross subsidy rightly at different load factors for consumers with contracted load above 1000 KVA and load factor above 50%. Necessarily, the extent of cross subsidy varies significantly at different load factors. The Commission took into consideration three factors namely:

a) Old tariff approved for the financial year 2006-07

b) Tariff approved by the Commission for the year 2008-09 with continuous power supply surcharge and

c) Tariff approved by the Commission for the year 2008-09 without continuous power supply surcharge.

While assessing the actual increase in the average tariff for the Appellant class of consumers, the Commission took into account energy charge which includes peak, off-peak and normal, demand charge and continuous supply surcharge based tariff and continuous supply period which was in vogue till February, 2008 and again these charges were prescribed in the tariff order dated 18.3.2008. It could not be established that by the impugned tariff order cross subsidy increased beyond 17%. It is submitted on behalf of the Appellant that consumers may be subjected to additional supply surcharge, can be subjected to time of the day tariff, can be subjected to imposing higher tariff for consumers who are capable of paying more than that so as to enable the utility to supply electricity to the poorer section of population, but this, does not mean that the Commission can simultaneously impose all these burdens on a consumer which results into a tariff shock. But if each of these

components is permissible under the law then the grievance of tariff shock is of no consequence. The argument is faulty. It is the Appellant, a HT consumer, who itself opted for additional supply surcharge on account of continuous supply. These components are distinctly unique and verily are very different from each other. The tables presented in the Annexure A to the Counter affidavit of the Commission could not be contradicted by the Appellant in the course of hearing of the Appeal and the Appellant did not submit that the average cost of supply was wrongly fixed at Rs.3.06 for FY 2008-09. Exception has been taken to the rate based on higher load factor. It is argued that there is reason behind showing that those who consume beyond the contracted load may be taxed at penal rate and there is also reason in imposing minimum consumption charge so that the utility is saved from situation of having purchased power for the consumers who eventually are unable to consume. It is contended that the higher load factor implies that the consumers consume nearly as much as it has contracted for and has paid demand charges accordingly and 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 consumers. We do not find it expedient to enter into academic discourse at this point. The matter of the fact is that cross subsidy has been arrived at considering different load factors. In the earlier order dated 6th October, 2009 in Appeal No. 85 of 2008 it does not appear that this Tribunal set aside the load factor based tariff. The submission of the learned Counsel for the Appellant that the question of finding discrimination amongst different class of consumers was uncalled for is not acceptable because Tribunal in earlier order in para 18 clearly held that re-determination must not affect adversely the other categories of consumers.

23. To summarize our reasonings, the central question is not whether in the case of the Appellant the tariff increase was then 63% as contended by the Appellant or is now reduced to 30% as projected by the Commission. As we have noted earlier in the course of hearing of the earlier appeal the grievance of the Appellant was in respect of the cross subsidy which has now been reduced to 10% in consequence of which it could not be said now that still the quantum of hike is 63% regardless of whether the Commission's version is or is not correct so far as the quantum of hike in case of the Appellant is concerned. The

manner in which reduction in cross subsidy has been attained has been beneficial to the consumers at large and the Commission was sensible enough to guard against the discriminatory treatment amongst different categories of the consumers while affording relief to the Appellant category of consumers. The argument of the Appellant that in the earlier order the Tribunal had set aside the load factor based tariff does not appear to stand in view of the fact that the Tribunal's judgment and order dated 6th October, 2009 does not show that the Tribunal set aside the load factor based tariff. It was argued before the Tribunal in the earlier appeal that the tariff hike was caused on account of the Appellant being charged at a higher rate on account of being subjected to TOD metering to make the Appellant to pay extra for the peak hours sales, additional energy and supply charge for drawing power without interruption even during load shedding throughout the year. The Tribunal observed'' *We do not want to enter into theoretical aspect of the two types of burdens*" and there is no place in the judgment where it has been observed that the load factor based tariff was wrong; on the contrary, no clear findings on the load factor based tariff has been given. The matter of the fact is that it is the Appellant who opted for additional surcharge

on account of continuous supply. Therefore, it is of no avail to cavil against the tariff hike. It is the version of the Commission that the Appellant had compared tariff of the year 2007-08 without 20% surcharge with tariff for the year 2008-09 with 20% surcharge, 20% surcharge which is now reduced to 10% was definitely an option for the Appellant. According to the Appellant, average cost of supply in the financial year 2008-09 was Rs.3.06 but in the financial year 2007-08 it was Rs.2.59 which the Commission disputes to say that it was Rs.2.86 per unit. Once we have found that the level of additional supply arranging charge which was indeed the subject matter of agitation in the earlier appeal is uniformly reduced to 10%, there is no point in debating as to whether in the financial year 2007-08 the average cost of supply was Rs.2.59 or Rs.2.86. The essence is that inclusion of the load factor is one of the criteria in defining the class of consumers whose tariffs are to be determined and the Tribunal not negating that inclusion cannot now be agitated.

24. Situated thus, we do not find that the Commission's order calls for interference. It has taken into account the totality of the situations and circumstances and re-determined the tariff by lowering down the

continuous supply surcharge and such re-determination has impacted in cross subsidy within the permissible limit.

25. Accordingly, the Appeal is dismissed without cost.

(Justice P.S.Datta) **(Mr. Rakesh Nath)**
Judicial Member **Technical member**

Dated 25th February, 2011

Index: Reportable/Non-Reportable

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