

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

Case No. HERC/PRO – 50 of 2020

**Date of Hearing : 08.12.2020
Date of Order : 27.01.2021**

IN THE MATTER OF:

Petition under Electricity Act, 2003 Section 86 (1)(f) read with Haryana Electricity Reform Act, 1997 read with power purchase agreement dated 12.07.2012.

Petitioner

M/s. Gemco Energy Limited

Respondent

Haryana Power Purchase Centre, Panchkula (HPPC)

Present On behalf of the Petitioner, through Video Conferencing

Shri R.K. Jain

Present On behalf of the Respondent, through Video Conferencing

Smt. Sonia Madan, Advocate

Quorum

**Shri Pravindra Singh Chauhan,
Shri Naresh Sardana,**

**Member(in chair)
Member**

ORDER

Brief Background of the case

1. The petitioner has invoked the jurisdiction of this Commission under Section 86 (1)(f) of the Electricity Act, 2003 read with PPA executed on 12.07.2012 between the petitioner and the respondent. The petitioner has prayed to direct the Respondent to withdraw its demand notice dated 06.07.2020, for the period from April, 2017 to March, 2020, for the Principal Amount and Interest (Rs. 6,10,82,803/- as principal and Rs. 1,29,54,808/- as interest), on account of reduced fuel cost in the HERC RE Regulations, 2017, as compared to the fuel cost in the Order dated 09.10.2015.
2. The Petitioner has submitted as under:-
 - a) That the project of the Petitioner in terms of the PPA was commissioned on 24.08.2013.
 - b) That HPPC by its email dated 30.06.2020 (hereinafter "Email") wrote to GEMCO that it was releasing payment against the energy bill for the month of April, 2020 @ Rs. 8.00/kwh instead of Rs. 8.56/kwh. The break-up provided by HPPC in the said email is as under:-

Fixed Cost: Rs. 2.40 per kwh (Fixed cost corresponding as per initial order dated 09.10.2015).

Variable Cost: Rs. 5.60 per kwh (Generic variable cost determined as per the recently determined tariff).

- c) That it is in clear violation of the terms of the PPA which mandate that tariff cannot be unilaterally altered by HPPC. Further, this unilateral alteration of tariff was done without raising any dispute in terms of the PPA and during the period of the Covid-19 pandemic thereby adversely affecting the financial condition of the Petitioner.
- d) That on 04.07.2020, the Petitioner wrote to HPPC stating that unilateral deduction and alteration of the tariff was without the approval of the Commission and therefore, requested for the release of the deducted amount by HPPC.
- e) That HPPC in further contravention of the provisions of the PPA and during the Covid-19 pandemic, without any prior discussion sent letter dated 06.07.2020 (1st Notice) wherein HPPC illegally demanded Rs. 6,10,82,803/- (Rupees six crores ten lakhs eighty two thousand eight hundred and three only) as principal along with Rs. 1,29,54,808/- (Rupees one crore twenty nine lakhs fifty four thousand eight hundred and eight only) as interest. This amount purported sought to be recovered by HPPC pertained to the financial years 2017-18, 2018-19 and 2019-20 and corresponded to April, 2017 to March, 2020 (hereinafter "Period").
- f) That in response to the 1st Notice, the Petitioner due to the Covid-19 pandemic sought more time to respond with communication dated 20th July 2020.
- g) That on 28.07.2020, GEMCO replied to the 1st Notice issued by HPPC. In the said response it was clearly stated that as per Articles 2 and 3 of the PPA the tariff for the project of GEMCO was as per the rates determined by HERC from time to time and if there is any dispute regarding any bill then the same had to be raised by HPPC within a period of 30 days. Admittedly, in the present case HPPC is seeking recovery of past amounts which have already been paid by it without any demurer and the present claims for recovery are barred in terms of the PPA as no prior dispute regarding the bills has ever been raised by HPPC before. Therefore, the recovery sought by HPPC for the Principal Amount and Interest is completely de hors the provision of the PPA and the Act. In the Response it was clearly stated, alternatively and without prejudice to the contentions of GEMCO, assuming that the purported claim of HPPC for the Principal Amount is presumed to be correct, even then no Interest would be payable simply because firstly, it is de hors the PPA and secondly, the onus to raise a dispute regarding the correctness of the invoice raised by GEMCO was on HPPC and the same has to be done in the facts of the present case within a period of 30 days as per the PPA.

- h) That pursuant to email dated 30.06.2020, HPPC has started making payments for GEMCO invoices of June 2020 at the reduced rate in clear violation of the terms of the PPA. The payment of June generation which is released on 1st August 2020 is the first invoice where they have cleared at reduced rates.
- i) That in reply to the Response, i.e. letter dated 28.07.2020 issued by GEMCO to HPPC, HPPC by its letter dated 11.08.2020 (hereinafter "2nd Notice") again reiterated its demand for recovery for an amount which already had been paid by it to GEMCO without any demurer in the past.
- j) That HPPC by its email dated 04.09.2020 wrote to GEMCO and stated that it was deducting an amount of Rs. 2,72,07,360/- (Rupees two crores seventy-two lakhs seven thousand three hundred and sixty) from the June, 2020 bill of GEMCO which bill is already being paid at the reduced tariff of Rs.8.00/kwh.
- k) That GEMCO by its communication dated 07.09.2020 wrote to HPPC against the illegal deduction by HPPC from its June, 2020 bill.
- l) That a bare perusal of the 1st Notice and 2nd Notice makes it clear that HPPC is taking the cost of fuel as per Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 (hereinafter "HERC RE Regulations, 2017") and not order dated 09.10.2015 passed by this Commission. The Petitioner has charged the fuel cost as per order dated 09.10.2015 passed by this Commission. HPPC is wrongly taking the cost of fuel as per HERC RE Regulations, 2017, which is clearly not applicable in the instant case.
- m) That a bare perusal of the HERC RE Regulations, 2017 notified by this Commission on 24.07.2018 make it clear that their scope is limited and are not applicable to the fuel cost of the Petitioner due to the application of Regulation 5 and 38 of the HERC RE Regulations, 2017. Firstly, the ibid Regulations are applicable to projects commissioned/to be commissioned in/during FY 2017-18 to FY 2020-21 and are not applicable to the project of the Petitioner for the purposes of fuel cost of bio-mass. Regulation 38 of the ibid Regulations clearly provides that the rates specified for bio-mass would be applicable to existing projects only upon application of two-part tariff wherein the fixed cost shall be levellised tariff already determined on a year to year basis so that the issue of fuel cost and escalation thereto is addressed. Admittedly, this has not been done by the Commission and therefore, the rate for bio-mass under the HERC RE Regulations, 2017 is not applicable to the Petitioner and the rate specified under the tariff order dated 09.10.2015 is applicable. The Petitioner has been charging as per the 2015 tariff order dated 09.10.2015 and HPPC was paying without any demurer until the issuance of the 1st Notice and 2nd Notice.

- n) That a bare perusal of the ibid Regulations and tariff order dated 09.10.2015 makes it clear that the said Regulations are not applicable for the purposes of fuel rate, as has been claimed by HPPC and therefore, there is no wrong charging of tariff by GEMCO. The bills raised by GEMCO have been raised in accordance with law and are valid as per the tariff orders and regulations issued by Commission. Therefore, the Principal Amount along with the Interest have been wrongly claimed by HPPC and are without jurisdiction.
- o) That the illegal acts and deductions done by HPPC adversely affect the financial position of the Petitioner and such a deduction is clearly in the teeth of the terms of the PPA and cannot be done unilaterally by HPPC. HPPC has unilaterally altered the tariff payable to GEMCO and as such is in gross violation of its obligations under the PPA.
- p) That the cause of action arose in favour of the Petitioner when the deduction of Rs. 2,72,07,360/- (Rupees two crores seventy-two lakhs seven thousand three hundred and sixty) was unilaterally done from the June, 2020 bill of the Petitioner when the communication channels for resolution of the dispute were open between the parties and the process of resolution of the dispute was being resorted in terms of the PPA. As HPPC has unilaterally altered the terms of the PPA and the tariff payable to the Petitioner without the prior permission of this Commission, as mandated in law and the PPA, the Petitioner left with no choice is approaching this Commission.
- q) That the cause of action in favour of the Petitioner is subsisting as HPPC has threatened further deduction without the prior approval of this Commission and as such the cause of action is continuing in favour of the Petitioner. The Petitioner apprehends that HPPC will make further deductions from the bills of the Petitioner for the purported recovery towards claims raised by HPPC in the 1st Notice and 2nd Notice.
- r) That in terms of the PPA unless bills have been disputed, the amounts payable to the Petitioner cannot be deducted or withheld therefore, the present recovery and deduction sought to be done by HPPC is completely illegal and without any sanction of this Commission in terms of the PPA.
- s) That due to the Covid-19 pandemic and the illegal deduction of amounts from the bills of the Petitioner by HPPC unilaterally without prior approval of this Commission, the ability of the Petitioner to pay the farmers for the bio-mass fuel is adversely affected and also affects the cash flows of the Petitioner. The unilateral deductions by HPPC are without the sanction of the Commission and therefore, ought to be stayed and reversed till the dispute regarding the fuel cost is finally decided by this Commission.
- t) That the following prayers have been made:-
- i) Adjudicate the instant dispute regarding the application of the HERC RE Regulations, 2017 for the purposes of calculation of the biomass fuel cost and hold that the

- Petitioner was correct in raising its bills as per tariff order dated 09.10.2015 for the Period, i.e. April, 2017 to March, 2020; and
- ii) Hold that the demand raised by HPPC for the Principal Amount and Interest, i.e. Rs. 6,10,82,803/- (Rupees six crores ten lakhs eighty two thousand eight hundred and three only) as principal along with Rs. 1,29,54,808/- (Rupees one crore twenty nine lakhs fifty four thousand eight hundred and eight only) as interest as per the 1st Notice, i.e. communication dated 06.07.2020, and subsequent further demands, if any, as illegal and contrary to the terms of the PPA, i.e. power purchase agreement dated 12.07.2012, orders and Regulations of this Commission and applicable law; and
 - iii) Direct HPPC to compensate the Petitioner by refunding the entire amount illegally deducted by HPPC from the bills of the Petitioner; and
 - iv) Alternatively and without prejudice to the above, if the Commission decides the instant dispute against the Petitioner then evolve a suitable mechanism for adjusting the dues keeping in mind the cashflow of the Petitioner as any adverse cashflow will have an impact on the payment of the farmers from whom the biomass fuel is being bought; and
 - v) Grant interim relief during the pendency of the instant petition by directing HPPC to refund the amounts deducted from the bills of HPPC without prior permission of the Commission and restrain HPPC from making further deductions during the pendency of the instant petition; and
 - vi) Pass any other or such further order(s), which this Commission may deem fit and proper in favour of the Petitioner and against the Respondents in the interest of justice.

Reply filed by the Respondent (HPPC)

3. HPPC filed its detailed reply on an affidavit dated 05.12.2020, justifying, suo-moto, revision in fuel cost, w.e.f. FY 2017-18 (fuel cost decided in the Order of the Commission dated 30.06.2018 for the FY 2017-18), as per Regulation clause no. 43 of Commission's Order dated 09.10.2015, which specifies that *"fuel cost re-determined by the Commission for the first year of next control period shall also be applicable prospectively to the projects commissioned during current control period"*.
4. The HPPC has replied as under:-
 - a) That a Power Purchase Agreement (PPA) dated 12.07.2012 was executed between Petitioner and the Respondent for procurement of electric energy generated in Biomass based Power Project to be set up at Village Dinod, Tehsil and District Bhiwani in the state of Haryana with an aggregate capacity of 15 MW.
 - b) That Article 1, Clause 39 of the PPA defined 'Tariff' as under –

*“39) **“Tariff”** means the rate payable by the Nigam as approved by HERC from time to time for every kWh of delivered energy at the metering point.”*

(Emphasis Supplied)

Further, Clause 2.1.1 and 2.1.2 of Article-2 pertaining to ‘Energy Purchase and Sale’ provided following provision for applicability of tariff –

*“2.1.1 The HPPC shall purchase and accept entire energy generated by the Company’s facility (new plant and Machinery) up to the contracted capacity 15 MW (8MW + 7MW) delivered at the interconnection point pursuant to the terms and Conditions of this agreement **at the rate decided/notified by the commission and amended from time to time**. The fuel cost (biomass mix) decided by the Commission shall be subject to a cap of twice (2 times) the fuel cost (Rs/kWh) approved by the Commission for thermal power generation of HPGCL in Haryana. Beyond which the HPPC/Discoms shall be under no obligation to purchase power from the company. In such an event the Company shall have the right to sell the entire power generated by them to a third party including offering power to the Discoms at the average pool power cost (APPC) as determined by the Commission, selling power through the power exchange etc.*

*2.1.2 The current applicable Tariff would be as per order dated 27.05.2011 and clarification order dated 17th August, 2011 issued by the HERC. **However, the rates as decided/notified and amended/modified/clarified by HERC from time to time will be applicable**. The cap on fuel cost (biomass mix) as decided by the Commission & detailed in clause 2.1.1 shall be applicable to the parties. No additional payment whatsoever may be on any account shall be payable by the HPPC/DISCOM except those approved by HERC.”*

(Emphasis Supplied)

- c) That a conjoint reading of above-stated provisions of PPA clearly stipulates that the tariff as decided/notified and as amended /modified/clarified by this Commission from time to time will be applicable to the Petitioner. The applicable tariff at the time of signing of PPA was mentioned as the tariff determined by this Commission vide order dated 27.05.2011 and clarification order dated 17.08.2011 subject to rates as decided/notified and as amended/modified/clarified by Commission from time to time.
- d) That the power plant of the Petitioner was commissioned on 24.08.2013. Pursuant to commissioning of the Plant, the Commission amended the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010. The 4th Amendment of said Regulations were notified in the Haryana

Government Gazette (Extraordinary) dated 12.08.2015. After notifying the said 4th amendment, the Hon'ble Commission passed consequential Order dated 09.10.2015 arising from said amendment for the projects commissioned/ to be commissioned in FY 2013-14, FY 2014-15 and FY 2015-16. The Commission, in the Order dated 09.10.2015, listed out salient features of the 4th Amendment having impact on the tariff for the renewable energy power projects commissioned in the FY 2013-14.

- e) That after passing of Order dated 09.10.2015, the Petitioner continued to claim tariff as per the terms and conditions of the said Order. The Project was commissioned on 24.08.2013 (CoD) and tariff thereafter had been paid in terms of order passed by this Commission from time to time. The Petitioner up till now had been claiming tariff as per order dated 09.10.2015 despite specific mention of the then applicable tariff in the PPA, which is as per the order dated 27.05.2011 read with clarification thereof. The operative part of the Order dated 09.10.2015 provided as under –

“The revised tariff sheets for Biomass based Projects for FY 2013-14, FY 2014-15 & FY 2015-16 and Solar PV based projects (crystalline, thin film, rooftop and canal top projects) for FY 2014-15 & FY 2015-16 shall be as per Annexure – A of this Order.

For the Biomass projects commissioned in FY 2013-14, the yearly tariff as already determined shall be applicable for FY 2013-14 and FY 2014-15. For FY 2015-16, the tariff as already notified shall be applicable up to the date of notification of the 4th amendment dated 12.08.2015 and for the remaining part of FY 2015-16 the revised tariff as now determined shall be applicable. For FY 2016-17 and thereafter revised tariff as now determined shall be applicable.”

- f) That it is further pertinent here to reproduce the observation of the Commission in the Order dated 09.10.2015 as regards the impact of amended Regulation 43 on the power projects set up in FY 2013-14:-

“9. Amendment of Regulation 43 of the Principal Regulations:-

The Regulation 43 of the Principal Regulations shall be substituted by the following Regulation:-

“43. Fuel Cost – (1) Biomass fuel price during the control period shall be Rs. 3055 / MT (Base Year FY 2014-15) subject to an escalation of 5% per annum for the projects commissioned/to be commissioned in the FY 2014-15 onwards.

Provided that the revised fuel price shall be applicable to the projects commissioned in FY 2013-14 prospectively from the date of notification of these Regulations.

Provided further that the fuel cost re-determined by the Commission for the first year of next control period shall also be applicable prospectively to the projects commissioned during current control period.

The fuel price Indexation Mechanism given in Regulation 44 shall not apply for Biomass based projects. ”

(Emphasis Supplied)

- g) That the Commission vide order dated 09.10.2015 pegged fuel cost at Rs. 3055/MT for FY 2014-15 with an escalation of 5% each year and tariff was determined accordingly. The aforesaid regulation clearly stipulated that the fuel cost re-determined by the Commission for the first year of next control period shall also be applicable prospectively to the projects commissioned during current control period. The intent and objective of the said regulation was to reflect the changing market condition and increased/ decreased cost of fuel on the cost of electricity.
- h) That this Commission subsequently on 24.07.2018 notified RE Regulations, 2017 and *inter alia* decided the operational and financial parameters for biomass based power projects besides tariff for biomass based power plants commissioned during FY 2017-18. The next control period was also notified as starting from FY 2017-18. The Commission in RE Regulations, 2017 has pegged the fuel cost of biomass at Rs. 3270/MT for FY 2017-18 with an escalation of 5% each year.
- i) That a comparative statement of cost of biomass fuel as per RE Regulations, 2017 (in Rs./MT) and Order of the Commission dated 09.10.2015 (in Rs./MT) is given hereunder for the reference of this Hon'ble Commission -

FY	Biomass fuel cost as per HERC RE Regulations, 2017 (in Rs./MT)	Biomass fuel cost as per HERC order dated 09.10.2015 (in Rs./MT)
FY 2017-18	3270	3537
FY 2018-19	3434	3713
FY 2019-20	3605	3899
FY 2020-21	3785	4094

- j) That on notification of RE Regulations, 2017, it was incumbent upon the Petitioner to revise the tariff in line with the Order dated 09.10.2015 in the bills submitted by them for the supply of electricity. However, the Petitioner, knowing well that the fuel cost has been varied to their disadvantage chose to keep mum and kept sending inflated bills in contravention to the terms of the PPA and Order of this Commission dated 09.10.2015.
- k) That considering the fixed cost component of tariff as specified in the generic tariff sheet dated 09.10.2015 and the variable cost (fuel cost) component of tariff from generic tariff

sheets notified by this Commission from time to time, the yearly applicable tariff for the energy supplied from the Project during respective financial years is worked out as under:-

FY	Applicable Tariff (in Rs. /kWh)		
	Fixed Cost	Variable Cost	Total
FY 2017-18	2.46	4.87	7.33
FY 2018-19	2.44	5.11	7.55
FY 2019-20	2.42	5.33	7.75
FY 2020-21	2.40	5.60	8.00

- l) That the provisions of the PPA, interpreted under the legal framework of the Electricity Act, 2003 and the rules/regulations framed thereunder restrict compensation for what is unreasonable, imprudent or beyond the scope of the PPA executed between the parties. The key, therefore, is to balance the interest of the generators and the consumers. In that view, any variable cost above the normative value could not be allowed and the normative fuel cost assessed by this Commission for the Control period FY 2017-18 to FY 2020-21 had to be applied for revision of tariff of the Petitioner.
- m) That the Commission may kindly appreciate that in the RE Regulations, 2017, the fuel cost has been fixed after considering the data indicating availability and current prices for the biomass fuel in the State of Haryana. Thus, the revision in the tariff of the Petitioner is essential to ensure that no unjust enrichment is made by them at the cost of the consumers of the State. HERC in its RE Regulations has clearly stipulated that the tariff for projects based on renewable energy technology having fuel cost component like biomass power projects and non-fossil fuel based co-generation, shall be single part tariff however with two components i.e. fixed cost component and fuel cost component. Even the Hon'ble CERC had time and again emphasised on determination on two part tariff, i.e. fixed cost and the fuel cost component. The objective behind the same is to not let the volatility of the fuel market affect the generator or the consumer adversely. The said segregation is pertinent to ensure that the actual fuel cost determined is passed on in tariff. Regulation 10 of Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 ('CERC RE Regulations 2020' in short) provides as under -

"10. The generic tariff shall be determined, on levelized basis, considering the year of commissioning of the project, for the tariff period of the project:

Provided that for renewable energy projects having single part tariff with two components, fixed cost component shall be determined on levelized basis considering the year of commissioning of the project while fuel cost component shall be determined on year of operation basis in the Tariff Order to be issued by the Commission."

(Emphasis Supplied)

- n) That after the commissioning of the Petitioner's power plant on 24.08.2013, the tariff rate applicable to the Petitioner was as per the Generic tariff order dated 20.11.2013, wherein the fuel cost for FY 2013-14 was pegged at Rs. 2789/- per MT. Thereafter, the Generic tariff order dated 13.05.2014 was passed by this Commission, wherein the fuel cost for the FY 2014-15 was pegged at Rs. 3055/- per MT. The fuel cost was kept constant in order passed by this Commission dated 09.10.2015, meaning thereby the fuel cost for FY 2015-16 was considered at Rs. 3208/- per MT after applying 5% escalation to the fuel cost assessed for base year, i.e. FY 2014-15. The Petitioner continued to take benefit of the revised variable cost of tariff as long as the fuel cost was varied to their advantage. Nonetheless, the other operative parameters for biomass based projects were revised/amended by the Commission to the advantage of the Petitioner and the tariff for biomass based (water cooled) projects for FY 2013-14 was revised from Rs. 5.98/- per unit to Rs. 7.34/- per unit.

However, in RE Regulations, 2017, the said fuel cost was considered as Rs. 3270/- per MT for the base year, i.e. 2017-18. The tariff payable to the Petitioner has to be revised in the same manner, the said tariff was escalated earlier on consideration of higher fuel cost. It is a matter of record that the fuel cost is ascertained on the basis of the prevailing market conditions. Had the fuel cost further increased under RE Regulations, 2017, the Petitioner would have claimed tariff as per the revised increased fuel cost. On the contrary when the fuel cost has decreased, the Petitioner is backing away from their own obligation laid down by the Commission in order dated 09.10.2015 read with conditions of the PPA.

- o) That it has been upheld in a catena of cases by the Hon'ble APTEL that the variable charge component of tariff may be determined periodically on the basis of the prevailing fuel price which may be fixed after carrying out a state specific study. Thus, the Order of the Commission dated 09.10.2015 is just and appropriate in the larger interest of the State and therefore, the recovery claimed by the Answering Respondent is perfectly legal and valid.
- p) That it came to the notice of the Answering Respondent that the invoices sent by the Petitioner were inflated, inasmuch as the applicable tariff as summarised above, had not been taken into consideration for obvious reasons. The payments against the energy supplied to the Answering Respondent were, therefore, found to have been made in excess owing to the default of the Petitioner. Accordingly, the Answering Respondent rightly and justly, in consonance with the Order of this Commission issued notice dated 06.07.2020 for recovery of excess tariff paid to the Petitioner along with normative interest @1.25% per month. The Petitioner was, therefore, requested to deposit a total amount of

Rs. 7,40,37,611/- (i.e. Rs. 6,10,82,803/- as principal amount and Rs. 1,29,54,808/- as interest, till 31.03.2020) within 15 days of the issue of the notice. However, the Petitioner, vide their reply dated 28.07.2020, despite being in default refused to reimburse the Respondent for the excess payment made to them on frivolous grounds. The Answering Respondent vide their letter dated 11.08.2020 refuted the frivolous and illegal contentions raised by the Petitioner and reiterated the request for deposit of recoverable amount as intimated in notice dated 06.07.2020. The Petitioner, however, continued to indulge in writing frivolous letters to refute their liability. The Respondent having left with no choice, owing to wrongful refusal of the Petitioner to honour their liability, was forced to adjust the recoverable amount for the subsequent bills of the Petitioner. The amount along with interest (Rs. 7,65,51,360/-) has been adjusted from the invoices raised by the Petitioner, for the electricity supplied to Discoms/HPPC, for the month of June, July and August, 2020.

- q) That from the foregoing, it is evident that the demand of the Respondent for recovery of excess amount paid to them without considering revised variable cost component of the tariff, determined by this Commission, w.e.f. FY 2017-18 was just, legal and in consonance with the Order of this Commission dated 09.10.2015 read with conditions of the PPA and the Regulations notified from time to time. Thus, the prayer of the Petitioner seeking declaration of the demand raised by the Respondent and the subsequent adjustment/ recovery of amount as illegal is unsustainable in the eyes of law. It is humbly submitted that such adjustment/ recovery made by the Respondent is liable to be upheld.
- r) That in so far as the contention of the Petitioner that the dispute was to be raised within a period of 30 days is devoid of merit, it is submitted that time limit stipulated under Article 3.7 is not applicable in the present circumstances. It was, in fact, the duty of the Petitioner to have claimed revised tariff after the notification of RE Regulations, 2017 wherein new control period was specified. The dispute in the instant case is not as regards an error in a specific bill and thus, reliance on Article 3 is incorrect. Even otherwise, that the recovery has been duly made in terms of Section 62(6) of the Electricity Act, 2003 and the Respondent has issued notice for recovery within the limitation. The cause of action at best can be said to have arisen pursuant to notification of RE Regulations, 2017 and the claim for recovery has been raised within 3 years. Be that as it may, the Petitioner cannot take benefit of its own wrong of raising inflated bills and seeking tariff higher than the actually applicable tariff.
- s) That it is further denied that even if the principal amount is correct, no interest would be payable simply because it is dehors of the PPA or because the dispute was to be raised within 30 days. In this regard, it is submitted that interest at a nominal rate of 1.25% has been charged. The interest has been charged in view of the well-settled principle- 'interest

follows principal'. It is the basic proposition of law that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called viz. interest, compensation or damages and this proposition is unmistakable and valid. Further, even if the interest is not provided for in the PPA between the parties, the same will still be payable. Reliance in this regard is placed on judgment of the Hon'ble APTEL in PTC India Limited v. Gujrat Electricity Regulatory [Appeal Nos. 47 & 62 of 2013 (decision dated 30.06.2016)].

5. The Petitioner, filed its rejoinder, on affidavit dated 05.12.2020, submitting as under:-
- a) That the Petitioner Company at the very outset denies and disputes in toto all the averments made by the Respondent in its reply in the manner alleged. The denial may be treated as specific and in seriatim, save and except what has been specifically admitted to in the Petition or in the present Rejoinder, as the case may be.
 - b) That the contents of the present Rejoinder may please be read as part and parcel of the original Petition and the same are not being reproduced herein for the sake of brevity and to avoid prolixity.
 - c) That the Project of the Petitioner Company was commissioned in August 2013, the applicable Regulations were HERC/23/2010 notified on 03.02.2011 and Generic Tariff determined/notified through order dated 09.10.2015.
 - d) That some of the relevant portions of HERC RE Regulations, 2010 notified on 03.02.2011, needs to be referred to, as under:-
"2(1)(32) 'Tariff period' means the period for which tariff / price for sale of power is determined by the Commission on the basis of norms specified in these Regulations;
5. *Tariff Period.* - (1) *The Tariff Period for Renewable Energy power projects shall generally correspond to their respective project life or reckoned with the period provided in the PPA as the case may be.*
(2) Tariff period under these Regulations shall be considered from the date of commercial operation of the renewable energy generating stations.
(3) Tariff determined as per these Regulations shall be applicable for Renewable Energy power projects, only for the duration of the Tariff Period as stipulated under Regulation 5(1).
7. *Petition and proceedings for determination of tariff.* - (1) *The Commission shall determine the generic tariff on the basis of suo-motu petition at least six months in advance at the beginning of each year of the Control period for renewable energy technologies for which norms have been specified under the Regulations.*

8. Tariff Structure- (1) The tariff for renewable energy technologies shall be single part tariff consisting of the following fixed cost components: (a) Return on equity; (b) Interest on loan capital; (c) Depreciation; (d) Interest on working capital including margin money; (e) Operation and maintenance expenses;

Provided that for renewable energy technologies having fuel cost component, like biomass power projects and non-fossil fuel based cogeneration, single part tariff with two components, fixed cost component and fuel cost component, shall be determined. The fuel cost component may be subjected to escalation factor.

9. Tariff Design. - (1) The generic tariff shall be determined on levellised basis for the Tariff Period.

Provided that for renewable energy technologies having single part tariff with two components, tariff shall be determined on levellised basis considering the year of commissioning of the project for fixed cost component while the fuel cost component shall be specified on year of operation basis.

(2) For the purpose of levellised tariff computation, the discount factor equivalent to weighted average cost of capital or by other appropriate discounting factor shall be considered.

(3) Levellised tariff shall be specified for the period equivalent to the 'Tariff Period'."

- e) As the project of the Petitioner was commissioned in FY 2013-14, the tariff applicable was the generic tariff determined for projects commissioned in the year 2013-14 and this tariff would continue for the Tariff Period or the life of the project.
- f) The 4th Amendment to these Regulations dated 12.08.2015 were applicable to all the RE Projects commissioned / to be commissioned in FY 2013-14, 2014-15, 2015-16 and 2016-17 in the State of Haryana. Accordingly, the generic tariff determined/ notified on 09.10.2015 was applicable to all such projects including that of the Petitioner.
- g) That the generic tariff applicable to the project of the Petitioner was to be valid for the entire life of the project. Hence no subsequent amendment/revision in RE Regulations are applicable to the project of the Petitioner.
- h) Corresponding provisions under HERC/40/2017 RE Regulations notified on 24.07.2018 and the subsequent amendments made thereof, are reproduced hereunder: -
"2(1) (34) 'Tariff period' means the period for which tariff/price for sale of power is determined by the Commission on the basis of norms specified in these Regulations;

5. Tariff Period. – (1) The Tariff Period for Renewable Energy power projects shall generally correspond to their respective project life or reckoned with the period provided in the PPA as the case may be.

(2) Tariff period under these Regulations is for Renewable Energy Power Plants with entirely new plant and machinery. The first year tariff shall be applicable from the CoD of the project and shall continue for 12 months from the CoD and thereafter the tariff for the second year shall be applicable on year to year basis i.e. for first 12 months from CoD, first year tariff shall be applicable, then for next twelve months second year tariff shall be applicable and so on and each period of such 12 months shall be termed as the tariff year.

(3) Tariff determined as per these Regulations shall be applicable for Renewable Energy power projects, only for the duration of the Tariff Period as stipulated under Regulation 5(1).

(4) The PPA (s) signed by the distribution licensee (s) on the basis of tariff determined by the Commission in its orders prior to the notification of these Regulations on renewable energy shall remain valid for the tariff period as per the PPA. Such cases shall not be reopened in view of the norms provided in these regulations.

38. Fuel Cost. – Biomass fuel price during first year of the Control Period shall be Rs. 3270 /MT and shall be escalated at the rate of 5% per annum for arriving at the levelised tariff for the entire useful life of the project.

Further, the Commission, for biomass / bagasse based power project, both existing and to be set up, may consider two part tariff wherein the fixed cost shall be the levelised tariff already determined for the existing projects and the fuel cost shall be as determined on a year to year basis so that the issue of fuel cost and escalation there to is addressed.

7. Petition and proceedings for determination of tariff. –

(1) The Commission shall determine the generic tariff on the basis of suo-motu petition at least six months in advance at the beginning of each year of the Control period for renewable energy technologies for which norms have been specified under the Regulations.

8. Tariff Structure. –

(1) The tariff for renewable energy technologies shall be single part tariff consisting of the following fixed cost components:- (a) Return on equity capital; (b) Interest on loan capital; (c) Depreciation; (d) Interest on working capital including margin money; (e) Operation and maintenance expenses;

Provided that for renewable energy technologies having fuel cost component, like biomass power projects and non-fossil fuel based cogeneration, single part tariff with two components, fixed cost component and fuel cost component, shall be determined. The

fuel cost component may be subjected to escalation for computing levellised generic tariff for entire useful life of the project as provided in these Regulations.

9. Tariff Design. – (1) *The generic tariff shall be determined on levellised basis for the entire Tariff Period.*

Provided that for renewable energy technologies having single part tariff with two components, tariff shall be determined on levellised basis considering the year of commissioning of the project for fixed cost component while the fuel cost component shall be specified on year of operation basis.”

- i) Thus, the tariff applicable to the project of the Petitioner was the Generic Tariff determined/notified vide order dated 09.10.2015, which was applicable to the projects commissioned during FY 2013-14 to 2016-17. The Respondents have tried to state that the applicable tariff would be as per the subsequent HERC RE Regulations, 2017 notified on 24.07.2018. Although these Regulations clearly provide under Clause 5(4) that the PPAs signed prior to the notification of these Regulations shall remain valid for the tariff period as per PPA and it will not be reopened in view of the revised norms of these Regulations.
- j) Although Clause 3.7 of the PPA clearly provided for raising of dispute by HPPC within 30 days of receipt of bill, but HPPC didn't dispute any of the bills right from the COD of the power project till the issue of 1st Notice in July 2020. There is no provision under the PPA to dispute any bill, which have already been accepted/paid. The very action of HPPC to dispute bills of 2017-18 to 2019-20 was illegal and in violation of the PPA.
- k) Even otherwise the tariff determined under Reg. 5(2) of HERC RE Regulations, 2017 mentions first year tariff from the CoD of the project i.e. projects commissioned during 2017-18. This is not applicable to the Project of the Petitioner as it was commissioned long back in August 2013.
- l) In the absence of any dispute having been raised by HPPC on any of the previous bills, there was no reason for raising demand for so called excess payment or/and interest thereof. The right course available to HPPC was to dispute the bill within 30 days of receipt and in case of failure of amicable settlement of dispute, seek adjudication of the Commission. Unilateral action by the Respondents is a pure misuse of authority and causing financial loss to the Petitioner.
- m) In fact the Respondents are liable to pay a late payment surcharge @ 1.25% per month for the actual period of delay on the undisputed payable amount as per Clause 3.6(b) of the PPA.
- n) That once the Commission revised the generic tariff for projects commissioned in FY 2013-14, there was no reason why not to raise the bills accordingly. The argument that the Petitioner should have claimed as per the interpretation of the Respondents is nothing but

a wishful thinking and reflects hollowness on their part. In contractual matters the parties have to follow the dictates of the legally signed contract.

- o) That the Respondents' reliance to Section 62(6) of the EA-2003 is totally irrelevant as the generic tariffs notified by Commission (including that of 09.10.2015) are not as per Section 62 of the EA-2003 but in exercise of the powers conferred on the Commission by Section 61 read with Section 181 of the Electricity Act, 2003. Repeated denial of the wrong acts of the Respondent will not make these actions legal. Any reference to HERC RE Regulations, 2017 has to be in consonance to the contents of the Regulations and not contrary to the same.
- p) That payment of interest is incumbent on the Respondents as Clause 3.6 (b) of the PPA is very clear on the issue of delayed payments. In so far as the judgment of the Hon'ble APTEL is concerned, it has to be appreciated that any reference to a judgment without reference to the controversy involved and the context in which an observation is made/recorded cannot be ratio of judgment or binding in any other case. The reference to Hon'ble APTEL judgment has no bearing to the controversy involved in the present petition and the issues highlighted for adjudication. Each and every controversy has to be seen and examined by the Commission in light of the issues raised thereunder.

Proceedings in the Case

6. The case was heard on 08.12.2020, through Video conferencing, as scheduled, in view of COVID-19 pandemic. The Commission vide its ibid dated Interim Order directed the parties to file summary of their submissions made during the hearing within 2 days.
7. In response to the Interim Order of the Commission, the Petitioner as well as the Respondent filed their written submissions mainly reiterating the facts already submitted, which have not been reproduced here for the sake of brevity.

Commission's Analysis and Order

8. The Commission, after hearing the rival contentions and documents placed on record by the parties, has framed the following issues for consideration and Order:-
 - a) Whether HPPC was right in revising the tariff on its own and making the same applicable to the Petitioner?
 - b) Whether HPPC is right in issuing demand notice dated 06.07.2020 and claiming recovery w.r.t. Section 62(6) of the Electricity Act, 2003?
 - c) What tariff should be charged for the energy supplied by the Petitioner?

The Commission has carefully perused the demand notice dated 06.07.2020 issued by HPPC in terms of the facts & circumstances of the case and Regulations occupying the field. The findings of the Commission on the issues framed above are as follows: -

Issue (a):

Whether HPPC was right in revising the tariff on its own and making the same applicable to the Petitioner?

The Commission has examined the demand notice dated 06.07.2020 issued by HPPC to the Petitioner. The relevant part is extracted below:-

“The PPA, for sale of power to HPPC, provides that the tariff to be decided/notified and as amended / modified/ clarified by HERC from time to time. The same understanding is clearly reflected from the provisions of the PPA wherein the definition at Article 1 (39) read with Article 2 make it amply clear that the tariff payable shall be as decided/notified and amended / modified/ clarified from time to time by HERC. The applicable tariff at the time of signing of PPA was mentioned as the tariff determined by the HERC vide its order dated 27.05.2011 and clarification order dated 17.08.2011 subject to rates decided/ notified and amended/ modified/ clarified by HERC from time to time. Relevant clauses of PPA are as under:-

Sub clause 39 of Article 1

“Tariff” shall means the rate payable by the Nigam as approved by HERC from time to time for every kWh of delivered energy at the metering point.

Sub Clause 2.1 of Article-2

“2.1.1 The HPPC shall purchase and accept entire energy generated by the Company’s facility (new plant and Machinery) up to the contracted capacity 15 MW (8MW + 7MW) delivered at the interconnection point pursuant to the terms and Conditions of this agreement at the rate decided/notified by the commission and amended from time to time. The fuel cost (biomass mix) decided by the Commission shall be subject to a cap of twice (2 times) the fuel cost (Rs/kWh) approved by the Commission for thermal power generation of HPGCL in Haryana. Beyond which the HPPC/Discoms shall be under no obligation to purchase power from the company. In such an event the Company shall have the right to sell the entire power generated by them to a third party including offering power to the Discoms at the average pool power cost (APPC) as determined by the Commission, selling power through the power exchange etc.

2.1.2 The current applicable Tariff would be as per order dated 27.05.2011 and clarification order dated 17th August, 2011 issued by the HERC. However, the rates as decided/notified and amended/modified/clarified by HERC from time to time will be applicable. The cap on fuel cost (biomass mix) as decided by the Commission & detailed in clause 2.1.1 shall be applicable to the parties. No additional payment whatsoever may be on any account shall be payable by the HPPC/DISCOM except those approved by HERC.”

That a conjoint reading of above-stated provisions of PPA makes it amply clear that the applicable tariff, as per provisions of PPA, shall be the tariff notified/decided/determined by HERC from time to time. The project was commissioned on 24.08.2013 (CoD) and tariff thereafter is being paid as determined by HERC vide Order dated 09.10.2015 despite specific mention of the then applicable tariff in the PPA, which is as per the HERC order dated 27.05.2011 read with clarification thereof.

The HERC subsequently on 24.07.2018 notified Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 (RE Regulations, 2017) and inter alia decided the operational and financial parameters for biomass based power projects besides tariff for biomass based power plants commissioned during FY 2017-18. The HERC vide its ibid Regulations has pegged the fuel cost of biomass at Rs. 3270/MT for FY 2017-18 with an escalation of 5% each year.

However, HERC vide its Order dated 09.10.2015 had pegged fuel cost at Rs. 3055/MT for FY 2014-15 with an escalation of 5% each year and tariff was determined accordingly.

Comparison of biomass fuel cost is as under:-

FY	Biomass fuel cost as per HERC RE Regulations, 2017 (in Rs./MT)	Biomass fuel cost as per HERC order dated 09.10.2015 (in Rs./MT)
FY 2017-18	3270	3537
FY 2018-19	3434	3713
FY 2019-20	3605	3899
FY 2020-21	3785	4094

.....Considering the fixed cost component of tariff as specified in the generic tariff sheet dated 09.10.2015 and the variable cost (fuel cost) component of tariff from generic tariff sheets issued by HERC from time to time, the yearly applicable tariff for the energy supplied from the Project during respective financial years is summarised as under:-

FY	Applicable Tariff (in Rs. /kWh)
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	Fixed Cost	Variable Cost	Total
<i>FY 2017-18</i>	<i>2.46</i>	<i>4.87</i>	<i>7.33</i>
<i>FY 2018-19</i>	<i>2.44</i>	<i>5.11</i>	<i>7.55</i>
<i>FY 2019-20</i>	<i>2.42</i>	<i>5.33</i>	<i>7.75</i>
<i>FY 2020-21</i>	<i>2.40</i>	<i>5.60</i>	<i>8.00</i>

”

Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 (hereinafter referred to as “HERC RE Regulations, 2017”), were notified on 24.07.2018. The Commission has observed the following clauses of the ibid Regulations:-

2. Definitions.:-

(9) Control Period or Review Period’ means the period during which the norms for determination of tariff and other provisions specified in these regulations shall remain valid;

.....

4. Control Period or Review Period. – *The Control Period under these Regulations shall be from the FY 2017-18 to the FY 2020-21.*

.....

Provided further that the tariff determined / discovered and approved by the Commission for the RE projects commissioned / to be commissioned during the Control Period, shall continue to be applicable for the entire duration of the Tariff Period as specified in Regulation 5 below.

.....”

Chapter 6 “*Technology specific parameters for Biomass based power projects*” of the ibid Regulations has specified as under:-

38. Fuel Cost. – *Biomass fuel price during first year of the Control Period shall be Rs. 3270 /MT and shall be escalated at the rate of 5% per annum for arriving at the levelised tariff for the entire useful life of the project.*

Further, the Commission, for biomass / bagasse based power project, both existing and to be set up, may consider two part tariff wherein the fixed cost shall be the levelised tariff already determined for the existing projects and the fuel cost shall be as determined on a year to year basis so that the issue of fuel cost and escalation there to is addressed.”

The Commission has carefully examined Clause 39 (Article 1) & Clause 2.1 (Article-2) of the PPA dated 12.07.2012, on the basis of which HPPC has issued demand notice to the Petitioner. From examination of the PPA, it is apparent that it was not open for HPPC to

determine applicable tariff to be payable to the Petitioner for energy supplied, on its own. Rather, the applicable tariff rates should be *“the rates as decided/notified and amended/modified/clarified by HERC from time to time.....”*

Contrary to the averments of the HPPC that the tariff applied in the demand notice dated 06.07.2020, is as per operational and financial parameters for biomass based power projects, determined by the Commission in its RE Regulations, 2017 notified on 24.07.2018, the Commission observes that it was not open for HPPC to redetermine the tariff on its own. The operation and financial parameters determined in HERC RE Regulations, 2017 were applicable for the project commissioned/ to be commissioned during the control period. The project of the petitioner was commissioned on 24.08.2013 and HERC RE Regulations, 2017 specifies that fuel cost determined in these Regulations shall be applicable to the existing projects, only, when two part tariff has been decided by the Commission, which was not determined by the Commission in its Order dated 30.06.2018, wherein levelized tariff for biomass based projects was determined. The Commission has examined the order of Hon'ble Appellate Tribunal for Electricity dated 23.03.2015 (Appeal No. 3/2013) cited by HPPC, considered by the Commission while issuing the elaborate Order dated 04.08.2015, consequent to which HERC RE Regulations, 2010 (4th Amendment) Regulations, 2015, was notified on 12.08.2015. The Commission in its ibid Order, while amending Regulation clause 43 of the ibid Regulations, has specified as under:-

“The revised fuel cost with escalation shall also be applicable prospectively to the projects commissioned in the FY 2013-14 i.e. from the date of notification of these revised Regulations. Further, in line with APTEL order dated 23.03.2015 in Original Petition No. 03/2013, at the end of the Control Period, the fuel price shall be re-determined for the first year of the next Control Period and the same shall also be applicable for the subsequent years for the projects commissioned in the previous Control Periods.”

Thus, the Commission in its ibid Regulations, has specifically mentioned that the fuel cost determined for current year, shall be made applicable even to the projects commissioning in the FY 2013-14, prospectively i.e. from the date of notification of these revised Regulations. However, the similar clause was not inserted in HERC RE Regulations, 2017. It is added that the tariff determined by the Commission and payable by the HPPC/ DISCOMs, so far, under RE Regulations is a single part tariff despite the fact that the tariff calculation sheet provides fixed cost and fuel cost components separately. One should not lose sight of the fact that some element of fixed cost i.e. receivables and interest on working capital thereto is dependent on fuel cost. Hence, segregating the same, as done by HPPC, is flawed. The case laws cited by HPPC in support of doctrine of “Promissory

Estoppel” are also not applicable in the present context. The tariff rate made applicable by HPPC, suo-moto, by issuing demand notice dated 06.07.2020 was not determined by the Commission, but was arrived by HPPC on its own, which is against the relevant clauses of the PPA dated 12.07.2012 i.e. tariff rate should have been decided/notified by the Commission. We may also gainfully extract from the judgement of the Apex Court cited in the matter viz. BSES v. Tata Power Co. Ltd. (2004) 1 SCC 195 i.e. the Utilities have to first approach the Commission for approval of the tariff and it is not permissible for the Licensee / Utility to charge a different tariff which is the present case. It is further observed that in case the Utility / HPPC had some doubts regarding the applicable fuel cost they could have sought clarification from the Commission instead of proceeding on its own.

In view of the above discussions and on consideration of the material on record and the applicable regulatory and legal provisions, the inevitable conclusion which is liable to be drawn against the HPPC is that it acted beyond the jurisdiction and powers conferred on it by the governing regulations and the PPA. Having usurped the jurisdiction vested in this Commission, the HPPC went on to issue the impugned orders whereby the demand has been raised against the petitioner. Owing to the inherent illegality in the exercise of power which forms the cradle of the impugned demand notices, the tariff determined by the HPPC is liable to be declared as null and void ab initio.

Accordingly, the Commission answers the issue framed above in negative i.e. HPPC was not right in deciding the tariff on its own and making the same applicable to the Petitioner.

Issue (b):

Whether HPPC is right in issuing demand notice dated 06.07.2020 and claiming recovery w.r.t. Section 62(6) of the Electricity Act, 2003?

The Commission has examined the submissions of HPPC that demand notice dated 06.07.2020 has been raised as when the defaults of the Petitioner came to the notice of the Respondent, by working out the excess tariff paid to the Petitioner over the years. The said differential tariff was calculated considering the fixed cost component of tariff as specified in the generic tariff sheet dated 09.10.2015 and the variable cost (fuel cost) component of tariff from generic tariff sheet issued by this Commission from time to time for biomass based generation plants. The applicable tariff was thus, worked out as under:-

FY	Applicable Tariff (in Rs. /kWh)		
	Fixed Cost	Variable Cost	Total
FY 2017-18	2.46	4.87	7.33
FY 2018-19	2.44	5.11	7.55
FY 2019-20	2.42	5.33	7.75
FY 2020-21	2.40	5.60	8.00

HPPC has further justified the demand notice for excess tariff charged by the Petitioner since FY 2014-15, in view of the provisions of Section 62(6) of the Electricity Act, 2003 which is reproduced as under:-

“If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”

Per contra, the Petitioner has argued that reference to Section 62 (6) of Electricity Act, 2003 made by the Respondents in their reply to the Petition is not relevant as the RE Regulations framed/notified by HERC are under the enabling powers of Section 181(2) and tariff determined by the Commission are under Section 61 of Electricity Act, 2003 and not under Section 62. Further, Section 171 in The Indian Contract Act, 1872, provides as under:-

“171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.— Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.”

HPPC has countered the above argument of the Petitioner was submitting that Section 174 of the Electricity Act, 2003, overrides anything inconsistent contained in any other law for the time being in force. The relevant provision of Section 174 of the Electricity Act, 2003, is reproduced hereunder:-

“Section 174. Act to have overriding effect: Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force **or in any instrument** having effect by virtue of any law other than this Act.”

(Emphasis Supplied)

The Commission has also examined the relevant provision of the HERC RE Regulations notified on 24.07.2018 reproduced hereunder:-

“2(1)(34) ‘Tariff period’ means the period for which tariff / price for sale of power is determined by the Commission on the basis of norms specified in these Regulations;

5. Tariff Period. – (1) *The Tariff Period for Renewable Energy power projects shall generally correspond to their respective project life or reckoned with the period provided in the PPA as the case may be.*

(2) Tariff period under these Regulations is for Renewable Energy Power Plants with entirely new plant and machinery. The first year tariff shall be applicable from the CoD of the project and shall continue for 12 months from the CoD and thereafter the tariff for the second year shall be applicable on year to year basis i.e. for first 12 months from CoD, first year tariff shall be applicable, then for next twelve months second year tariff shall be applicable and so on and each period of such 12 months shall be termed as the tariff year.

(3) Tariff determined as per these Regulations shall be applicable for Renewable Energy power projects, only for the duration of the Tariff Period as stipulated under Regulation 5(1).

(4) The PPA (s) signed by the distribution licensee (s) on the basis of tariff determined by the Commission in its orders prior to the notification of these Regulations on renewable energy shall remain valid for the tariff period as per the PPA. Such cases shall not be reopened in view of the norms provided in these regulations.

7. Petition and proceedings for determination of tariff. –

(1) The Commission shall determine the generic tariff on the basis of suo-motu petition at least six months in advance at the beginning of each year of the Control period for renewable energy technologies for which norms have been specified under the Regulations.

8. Tariff Structure. –

(1) The tariff for renewable energy technologies shall be single part tariff consisting of the following fixed cost components:- (a) Return on equity capital; (b) Interest on loan capital; (c) Depreciation; (d) Interest on working capital including margin money; (e) Operation and maintenance expenses;

Provided that for renewable energy technologies having fuel cost component, like biomass power projects and non-fossil fuel based cogeneration, single part tariff with two components, fixed cost component and fuel cost component, shall be determined. The

fuel cost component may be subjected to escalation for computing levelled generic tariff for entire useful life of the project as provided in these Regulations.

9. Tariff Design. – (1) *The generic tariff shall be determined on levelled basis for the entire Tariff Period.*

Provided that for renewable energy technologies having single part tariff with two components, tariff shall be determined on levelled basis considering the year of commissioning of the project for fixed cost component while the fuel cost component shall be specified on year of operation basis.

38. Fuel Cost. – *Biomass fuel price during first year of the Control Period shall be Rs. 3270 /MT and shall be escalated at the rate of 5% per annum for arriving at the levelled tariff for the entire useful life of the project.*

Further, the Commission, for biomass / bagasse based power project, both existing and to be set up, may consider two part tariff wherein the fixed cost shall be the levelled tariff already determined for the existing projects and the fuel cost shall be as determined on a year to year basis so that the issue of fuel cost and escalation there to is addressed.”

The Commission observes that demand notice dated 06.07.2020 has been wrongly issued by HPPC to the Petitioner, after determining the applicable tariff rates on its own, without the approval of the Commission. Further, the amount recoverable as per demand notice has not arisen out of express contract to that effect, HPPC was not right in deducting the same from the Energy Sale bills of the Petitioner. Rather, Regulation clause 5(4) of HERC RE Regulations, 2017 has specifically mentioned that “tariff determined by the Commission in its orders prior to the notification of these Regulations on renewable energy shall remain valid for the tariff period as per the PPA”.

As a natural consequence of the above consideration of the issue at hand, since it did not lie in the hands of HPPC to undertake or arrive any determination of the tariff, the same being a prerogative of this Commission, the consequential orders of demand as well as recovery also suffer from the same defect as the said tariff determination by HPPC. The demand notices therefore deserve to be declared as null and void.

Accordingly, the Commission answers the issue framed above in negative i.e. HPPC was not right in issuing demand notice dated 06.07.2020 and recovering the purported differential amount from the energy bills of the petitioner. Appropriate directions liable to be issued shall follow in the subsequent paragraphs.

Issue (c):

What tariff should be charged for the energy supplied by the Petitioner?

The Commission has already examined the issues and decided that HPPC was not right in suo-moto determination of tariff rate and making the same applicable on the Petitioner by issuing demand notice dated 06.07.2020 under Section 62(6) of the Electricity Act, 2003, in view of the fact that there is absence of enabling provision in the HERC RE Regulations, 2017. At the same time, the Commission is also not inclined to accept the arguments of the Petitioner that PPA is reopened, when tariff rate is re-determined by the Commission, prospectively, aligned with the current market price of fuel, in accordance with the prevalent Regulations.

The Order of the Commission dated 30.06.2018 read with the HERC RE Regulations, 2017, notified on 24.07.2018, was made applicable for the projects commissioned/ to be commissioned during the control period i.e. from the FY 2017-18 to FY 2020-21. Hence, the same cannot be not be made applicable to the Petitioner. It needs to be noted that 'Fuel Cost' cannot be considered in isolation, unless specifically ordered by the Commission, as certain components of it e.g. Working Capital and interest thereto is also dependent on computation of Fixed Cost.

The Commission observes further that Provisio 3 of Regulation 4 of Order dated 04.08.2015 provided as under:

“Provided also that the revision in Regulations for next Control Period shall be undertaken at least six months prior to the end of the this second Control Period and in case the Regulations for the next Control Period are not notified, until commencement of next Control Period, the tariff norms as per these Regulations shall continue to remain applicable until notification of the revised Regulations, and the second control period shall be deemed to have been extended up to the date of notification of Regulations for the next control period.”

The Control Period under the 2015 Regulations stood extended upto 24th July 2018 which was the date of the notification of 2017 Regulations. Hence the claim of HPPC that the fuel cost was revised from 1st April 2017 is also flawed.

Year	Fuel cost as per 2015	Fuel cost as per 2018
2018-19	3713	3434
2019-20	3899	3605
2020-21	4094	3785

Regulation 5(4) of 2017 Regulations also provide as under:-

The PPA (s) signed by the distribution licensee (s) on the basis of tariff determined by the Commission in its orders prior to the notification of these Regulations on renewable energy shall remain valid for the tariff period as per the PPA. Such cases shall not be reopened in view of the norms provided in these regulations (emphasis added).

The projects commissioned in FY 2013-14, as in the present case, got the benefit of enhanced fuel cost from Rs. 2789 / MT to Rs 3055/- per MT for the FY 2014-15 as per the Order dated 9.10.2015 prospectively i.e. from 04.08.2015 (which is in FY 2015-16 as against Rs. 3208/MT allowed by the Commission for the plants commissioned in the FY 2015-16).

Hence, even if the fuel cost is to be revised as per the latest Regulations under consideration, the same can be done so prospectively to maintain equity i.e. when the fuel cost was revised upwards the benefit was extended to the Petitioner herein prospectively. Hence, in case the fuel cost is revised downward the same also has to be made applicable prospectively i.e. from the date of revision of RE Regulations and tariff (fuel cost) determination thereto. Needless to add, that a Regulation can override any PPA or contract for that matter.

The Commission is in the process of issuing RE Regulations, for the control period from FY 2021-22 to FY 2024-25. Accordingly, the tariff shall be charged by the Petitioner, for the energy supplied, during the control period from FY 2021-22 to FY 2024-25, in accordance with the provisions contained in these Regulations including dispensation on 'fuel cost' for the projects already commissioned prior to the FY 2021-22. **Till then the fuel cost shall be frozen at the FY 2020-21 levels as per HERC Order dated 9.10.2015 for the projects commissioned in the FY 2013-14. It is added that, hence forth, the Commission shall determine 'fuel cost' on an annual basis for the RE Projects set up / to be set up in Haryana so as to ensure that fuel cost remains aligned to the prevailing market conditions.**

Having arrived at the conclusions drawn and expressed in the preceding paragraphs in the form of the findings of this Commission on the issues framed for its consideration and Order and to take the findings to its logical conclusion to do complete justice and to bring about harmonious confluence of interests in the present case, it is deemed appropriate to set aside the impugned demand notice.

As a corollary of the above findings and directions, the amount already deducted by HPPC from the Energy bills of Petitioner, is liable to be refunded. The needful be done within one month from the date of this Order, failing which HPPC shall be liable to pay interest @ 1.25% p.m. from the date of such default till the date of actual payment.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 27.01.2021.

Date: 27.01.2021
Place: Panchkula

(Naresh Sardana)
Member

(Pravindra Singh Chauhan)
Member

HEERC