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

Case No. HERC/PRO – 56 of 2020

Date of Hearing	:	**08.12.2020**
Date of Order	:	**18.01.2021**

IN THE MATTER OF:

Application seeking directions under Regulation 66 & 68 of the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff for Renewable Energy Sources, Renewable Purchase Obligations and Renewable Energy Certificates) Regulations read with the PPA dated 25.10.2012 between the petitioner and the respondent.

Petitioner
M/s. Oasis Commercial Pvt. Ltd.

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 Member (in chair)
Shri Naresh Sardana Member

ORDER

Brief Background of the case

1. The petitioner has invoked the jurisdiction of this Commission under Regulation 66 & 68 of the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff for Renewable Energy Sources, Renewable Purchase Obligations and Renewable Energy Certificates) Regulations, 2017 (hereinafter referred to as "HERC RE Regulations, 2017") read with PPA executed on 25.10.2012 between the petitioner and the respondent. The petitioner has prayed to direct the Respondent to withdraw illegal notice dated 29.06.2020, amounting to Rs.29,31,19,044/-, to release the payment of invoice raised (Rs.1,04,04,852/-) on 01.07.2020 for the energy supplied for the month of June, 2020 and to decide about the tariff to be charged hereafter for the energy to be supplied by the Petitioner from its Biomass based Cogeneration Power Plant.
2. The Petitioner has submitted as under:-

a) That the Petitioner has entered into a Memorandum of Understanding on 05.07.2013 with M/s A. B. Grain Spirits Pvt. Ltd., whereby the distillery unit set up by M/s A. B. Grain Spirits situated at Village Jatwar, Tehsil Naraingarh in Distt. Ambala, Haryana were purchased/ taken over by the Petitioner along with other assets as on 31.03.2013. Accordingly, all the Liabilities (present & future) relating to the assets acquired by the unit of M/s A. B. Grain Spirits Pvt. Ltd. situated at Village Jatwar, Tehsil Naraingarh, Distt. Ambala, Haryana were transferred to the Petitioner on 'as is where is' basis.

b) That M/s A. B. Grain Spirits Pvt. Ltd. had set up 8.93 MW Biomass based Power Plant at Village Jatwar in Tehsil Naraingarh, as captive power plant of the distillery unit to the extent of 3.93 MW, it had entered into a long term Power Purchase Agreement (PPA) with the Haryana Power Purchase Centre (HPPC) on 25.10.2012, whereby the Respondent agreed for purchase up to 5 MW of all such energy offered for sale, upon the terms and conditions set forth in the PPA.

c) That the Petitioner approached the Respondent for making necessary change in name in the PPA in January 2017. After considering the request and examining all the connected documents, the Respondent conveyed 'No Objection' through office Memo. No. Ch.67/CR/HPPC/SEC&R-1/PPA-128 dated 20.03.2017, as reproduced hereunder:-

"It is intimated that HPPC has no objection for change of name from M/s AB Grain Spirits Pvt. Ltd. to M/s Oasis Commercial Pvt. Ltd. and accordingly you may approach HERC alongwith the requisite fees for approval."

d) That in view of the above 'No Objection' given by the Respondent, the Petitioner approached the Commission vide Petition No. HERC/PRO-33 of 2017 seeking necessary clarification/direction under Regulation 72 & 73 of RE Regulations, 2012. The Commission, vide its order dated 16.03.2018, made the following observations:-

"8. The Commission further observed that the conduct of the parties to an Agreement has to be in accordance with the clause of the Agreement. The Commission had approved the procurement of power through the PPA executed on 25.10.2012. Subsequently, the parties to the Agreement have to follow the same and their right to approach the Commission arises only when there is some dispute on the same."

e) That the Power Plant of the Petitioner has been in operation since 17.10.2014 and supplying power to the Respondent. The PPA, under Clause 2.1 (Article-2 dealing with Energy Purchase and Sale) provided as under:-

"2.1 Sale of Energy by Company:

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 (5 MW)

delivered at the interconnection point pursuant to the terms and conditions of this agreement at the tariff decided/notified by the commission and amended from time to time. The fuel (biomass mix) cost (Rs./kWh) 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 Commission's order dated 03.09.2012. 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."

f) That as the project of the Petitioner was commissioned in October 2014, the tariff, as approved by the Commission vide order dated 03.08.2014 (to be read as 13.08.2014) (read with consequential order dated 09.10.2015) for the projects to be commissioned during the year FY 2014-15 became applicable to the project of the Petitioner. All generic tariff orders commencing 15.05.2007 and subsequent orders dated 27.05.2011, 25.01.2012, 03.09.2012, 20.11.2013 and 13.08.2014 (read with order of 09.10.2015) classified RE Biomass projects as Biomass (Water Cooled), Biomass (Air cooled) and Cogeneration (Bagasse). It was in the Generic Tariff order dated 20.11.2013 (for projects to be commissioned in FY 2013-14), the Commission mentioned about use of 'Multiple Fuel' for biomass based generation projects. Relevant extract from this order is reproduced hereunder:-

"10.4 Multiple Fuel Generation Projects:

The Commission has considered the submission of HPPC that they are receiving offers from the power project developers whose projects would be using in – house available bagasse during the cane - crushing season and for the remaining days (off season) the same would be using biomass purchased from outside. Since the tariff approved by the Commission has no provision for renewable energy power projects using multiple fuels, the same may be included in the Generic Tariff order for FY 2013-14.

On the above submission, the Commission is of the view that project cost of biomass based projects and co-generation projects are not significantly different. However, fuel cost, GCV, SHR is considerably different in two cases thus the tariff in the case of co-

generation projects vis – a – vis biomass project is considerably lower. Consequently, subject to regulation 41 of RE regulations, 2010, beyond the sugarcane crushing period, HPPC at their own discretion and in order to meet their RPO obligation, may procure power from co-generation projects at the tariff determined for biomass fuel based generation projects in Haryana. In such cases the generating company shall certify and HPPC / Discoms shall verify that the generation is from biomass and not bagasse. However, it is made clear that procuring such power shall not be binding on HPPC / Discoms."

g) That while dealing with the use of Mixed Fuel, the Commission made very important observations i.e.
   i) Project cost of biomass based projects and cogeneration projects are not significantly different;
   ii) However, fuel cost, GCV, SHR is considerably different in biomass based projects and cogeneration projects;
   iii) The tariff in the case of co-generation projects vis – a – vis biomass project is considerably lower;
   iv) Subject to regulation 41 of RE regulations, 2010, beyond the sugarcane crushing period, HPPC at their own discretion and in order to meet their RPO obligation, may procure power from co-generation projects at the tariff determined for biomass fuel based generation projects in Haryana.

h) That Regulations 39 to 41 of RE Regulation No. HERC/23/2010, deal with use of Mix Fuel for Biomass based Projects and recognizes use of fossil fuel to the extent of 15% of the total fuel consumption on annual basis. These Regulations read as under,

***"39. Fuel Mix**. - (1) The biomass power plant shall be designed in such a way that it uses different types of non-fossil fuels available within the vicinity of biomass power project such as crop residues, agro-industrial residues, forest residues etc. and other biomass fuels as may be approved by MNRE.*

(2) The Biomass Power Generating Companies shall ensure fuel management plan to ensure adequate availability of fuel to meet the respective project requirements.

*40. **Use of Fossil Fuel**. - The use of fossil fuels shall be limited to the extent of 15% of total fuel consumption on annual basis.*

*41. **Monitoring Mechanism for the use of fossil fuel**. - (1) The Project developer shall furnish a monthly fuel usage statement and monthly fuel procurement statement duly certified by Chartered Accountant to the beneficiary (with a copy to appropriate agency appointed by the Commission for the purpose of monitoring the fossil and non-fossil fuel consumption) for each month, along with the monthly energy bill."*

i) That the project of the Petitioner being a pure biomass based cogeneration project and not a bagasse based cogeneration project, the tariff applicable was rightly as determined by the Commission for biomass fuel based generation projects in Haryana**.** The guidelines given under Reg. 39 to 41 were rigidly followed by the Petitioner all through and there has never been any dispute in this regard since the commissioning of the project in October 2014, almost 6 years now.

j) That the Respondent unilaterally issued a '*Notice for default and recovery of differential tariff excessively paid for power scheduled under Power Purchase Agreement (PPA) dated 25.10.2012 executed between Haryana Power Purchase Centre (HPPC) and M/s A B Grain Spirits Pvt. Ltd.*' dated 29.06.2020 and directed Petitioner to deposit Rs. 29,31,19,044/- (i.e. Rs. 19,69,87,503 as principal amount and Rs. 9,61,31,541/- as interest) within a period of 15 days and if the said amount was not deposited within 15 days, it would be adjusted from the subsequent electricity bills.

k) That main grounds for the above notice were conveyed as under:-

   i) On perusal of records it came to the notice of the Respondent that Petitioner acted in contravention to the terms of the PPA by constructing and operating a co-generation plant. The generic tariff for non-fossil fuel based cogeneration plants was applicable. (Para 4 of the aforesaid Notice).

   ii) The Petitioner acted in breach of terms of PPA, misrepresentation and wrongful practice in setting up of a co-generation plant and wrongly paid a higher tariff. (Para 5 of the aforesaid Notice).

   iii) Tariff applicable to the Petitioner should have been as per generic tariff orders notified by the Commission for co-generation projects for the relevant years from 2014-15 onwards. ((Para 6 of the aforesaid Notice).

   iv) The tariff to be paid to the Petitioner over the years was tabulated considering the project as bagasse based co-generation project. (Para 7 of the aforesaid Notice).

   v) The Respondent worked out the consequent recovery of Rs. 29,31,19,044/- for the years from FY 2014-15 to FY 201-20. (Para 8 of the aforesaid Notice).

   vi) The Petitioner failed to perform its material obligations under the PPA by setting up and operating a co-generation plant in contravention to the terms of the PPA. Respondents gave notice for default in terms of Article 15 of the PPA with a threat to terminate the PPA.

l) That the Petitioner sent a detailed reply to the above illegal and baseless notice of the Respondent through letter dated 10.07.2020 refuting each and every point raised by the Respondent. The Petitioner emphasized through this letter that the power plant had been in operation since the year 2014 and there had never been any dispute about the power

plant and/or the tariff for the power supplied to the Respondent. In case after 6 years, the Respondent was aggrieved on some of the application of the PPA, it should have referred the matter to the Commission for seeking legal order to proceed with unilateral recovery.

m) That the Respondent refused to accept any of the arguments of the Petitioner vide letter dated 05.08.2020 and even did not agree to refer the matter to the Commission. On the contrary, the Respondent stopped the payment of the Petitioner against the Invoice raised on 01.07.2020 (for an amount of Rs.1,04,04,852/-) for the energy supplied during the month of June 2020. The due date for payment of this Invoice was 29.08.2020. On enquiry from the Accounts Wing of the Respondent it was learnt that the payment has been unilaterally withheld in view of the notice served on 29.06.2020.

n) That the Petitioner has conveyed to the Respondent about the illegal action taken by withholding contractual payment of the latest Invoice vide e-mail dated 04.09.2020 addressed to CMD, UHBVN/HPPC with copy to the Chief Engineer of the Respondent. Relevant extracts from this letter are reproduced for ready reference:-

"We understand that any unilateral action taken by HPPC is totally in violation of the terms of the PPA. There is a well addressed procedure for settlement of dispute, if any, under the PPA. Article 12 of the PPA deals with the 'Settlement of Disputes and Arbitration'. If HPPC had any difference in opinion on the provisions of PPA, the matter should have been referred to the State Commission for dispute resolution instead of initiating a unilateral action and withholding the rightful payments.

You would kindly appreciate that withholding due payments would amount to preventing the generator from operating the power plant and resultant huge financial loss.

We would seek your kind intervention in this case and request for issuing suitable directions not to unilaterally withhold payments and continue making payments of monthly Invoices as heretofore. The matter would be referred for adjudication of the Hon'ble State Electricity Regulatory Commission on urgent basis and decision taken by the Commission would in any case be binding on both the parties."

o) That the intervention of the Commission has been sought, as per Clause 12.02 of Article-12 of PPA, which reads as under:-

"Article-12 – Settlement of Disputes and Arbitration:

12.2 In the event of such differences or disputes, between the parties, either party may by written notice of 30 days to the other party, request the other party for resolution of dispute through HERC as per Electricity Act, 2003"

p) That some of the main issues for consideration of the Commission are discussed hereunder: -

A) Has there been any misrepresentation of facts by the Petitioner regarding the type of RE Project?

There has not been any misrepresentation of facts by the Petitioner at any stage. The fact is just contrary to the allegation by the Respondent. In support of this following facts/documents are placed for consideration of the Commission: -

i) The Petitioner had submitted a proposal to HAREDA in April 2011 to set up 8 MW Co-gen Power Plant (Biomass based) under self-identified category. HAREDA organized 'Interaction Meet on Biomass Industrial Co-Generation (Rice Husk based) and REC Framework at Kurukshetra/Kaithal on 04.08.2011 to sensitize on Cogeneration technology.

ii) HAREDA approved the Biomass Co-Gen Power Project of Petitioner. This approval letter clearly mentioned the project of Petitioner Company as '**Biomass Cogeneration Plant**.

iii) The Petitioner, vide letter dated 29.02.12 addressed to MD, UHBVN had offered to sell 5 MW power from its **8.93 MW Bio-mass based Co-Gen. Plant**.

iv) The Petitioner had offered to sell up to 5 MW power from its **8.93 MW Biomass Co-Gen Power Project** vide letter dated 21.03.2012 addressed to Chief Engineer/HPPC.

v) A copy of the Detailed Project Report (DPR) of Power Project and NOCs obtained from various departments and photographs were sent to Chief Engineer/HPPC vide letter dated 23.03.2012.

vi) The Chief Engineer/HPPC vide letter dated 24.04.2012 conveyed in principle consent of Respondent to purchase power upto 5 MW from **8.93 MW Biomass Co-Gen Power Project** at rates decided by HERC.

vii) The Petitioner acknowledged the receipt of above consent of the Respondent vide letter dated 26.04.2012 with a request to execute an early PPA.

viii) The in-Principle consent of the Respondent Feasibility Report was the basis of execution of PPA dated 25.10.2012. In the Preamble of the Project its was rightly mentioned as under: -

"*Whereas, the Company proposes to design, construct, own, operate & maintain a Biomass based Power Project (hereinafter called 'Project') at Village JATWAR Tehsil Naraingarh & Distt. Ambala in the state of Haryana with an aggregate capacity of 8.93 MW. The Company is desirous to sell generated energy upto 5 MW to HPPC*."

ix) On 17.10.2014, a joint team of senior officers from the Respondent visited Power Plant of the Petitioner and Minutes of Meeting (MOM) was signed. The MOM reads as under,

"*MOM date 17.10.2014 for the visit to 5 MW* ***Biomass based Co-generation Plant*** *at M/s AB Grains Spirits Pvt. Ltd., Vill. Jatwar, Naraingarh"*

- *The Company is engaged in the business of manufacturing of ENA (Ethanol Alcohol) and has* ***installed a Bio-Mass (Rice Husk) Based Co-Generation Power Plant*** *at its Works Vill. Jatwar, Naraingarh.*

x) As the Petitioner has an Ethanol Spirit manufacturing Plant, it uses Low Pressure Steam from the exhaust of Turbine for manufacturing process. An indicative Heat Mass Balance Diagram of the Turbine is attached.

xi) The PPA also mentions about the fuel to be used at the power plant of the Petitioner. This is in line with the provision under Reg. 35 & 36 of RE Regulations HERC/40/2017. Article-13, Clause 13.1 (i), mentions as under: -

'The biomass power plant shall be designed in such a way that it uses different types of non-fossil fuels available within the vicinity of biomass power project such as husk crop residue, agro industrial residue, forest residue etc. and other biomass fuels as may be approved by MNRE.'

B) Can the Respondent treat the project of the Petitioner as bagasse based co-generation project?

The Petitioner has all along maintained that it is a biomass based cogeneration project and not bagasse based cogeneration plant. The assumption about the power plant of the Petitioner being a bagasse-cogeneration plant is totally vague and baseless.

C) Whether the tariff claimed by the Petitioner was in order?

The mindset of Regulatory Commissions (both at the CERC level as well as HERC) has always been to associate co-generation with Sugar Mills using bagasse as fuel for co-generation and accordingly the generic tariff determined from 2007 to 2019 had been under 3 broad categories i.e. Biomass (Water Cooled), Biomass (Air Cooled) and Bagasse based Cogeneration Projects. Some of the relevant observations made by CERC and HERC in this regard are very important to substantiate this point.

HERC order dated 20.11.2013 (for projects commissioned in 2013-14): -

The Commission had accepted the following facts about cogeneration projects using Bagasse as fuel and others using biomass (non-bagasse),

i) Project cost of biomass based projects and co-generation projects are not significantly different;

ii) Fuel cost, GCV, SHR is considerably different in two cases;

iii) The tariff in case of co-generation projects vis–a–vis biomass project is considerably lower;

iv) HPPC may procure power from co-generation projects at the tariff determined for biomass fuel based generation projects in Haryana. In such cases the generating company shall certify and HPPC/Discoms shall verify that the generation is from biomass and not bagasse.

HERC order dated 13.08.2014 (for projects commissioned during FY 2014-15 & 2015-16):

While dealing with the cost of fuel for cogeneration projects, the Commission observed as under,

"As far as cost of bagasse is concerned no data was submitted by the nodal agency i.e. HAREDA. ***The Commission reiterates that bagasse is available on site for generation. Hence no additional expenses are incurred in collection, storing, handling etc.***

Hence the fuel cost for Bagasse was retained almost 25% of Biomass cost or Rs. 695/MT against Rs. 3055/MT for Biomass and all other parameters like O&M Cost, Aux. Consumption, GCV, Heat Rate etc. were taken same as for Bagasse as fuel.

CERC order dated 19.03.2019: -

The Central Commission while determining generic tariff for FY 2019-20, made following important observations: -

"The Commission notes that bagasse produced from sugar cane crushing is a waste material. Bagasse as fuel which is generally used by co-gen plants and it is available within the premises of a sugar mill and thus, there is no transportation cost incurred on the procurement of bagasse.

It was only in the latest generic tariff order of the HERC dated 20.12.19, that generic tariff for Cogeneration (non-bagasse) and Cogeneration (Bagasse) projects were determined for FY 2019-20 and 2020-21 but here also except the cost of fuel, all other norms of bagasse based cogeneration projects i.e. Project Cost, O&M Cost, Auxiliary Consumption, Heat Rate were retained without taking into account the actual functioning of non-bagasse based cogeneration projects and other ground realities.

In the above background, it is very clear that upto the year 2019-20, cogeneration project was associated with Bagasse as fuel and for non-bagasse based projects, tariff as determined for biomass based projects was adopted.

There was no hiding the fact, as Respondents were fully aware about the project of the Petitioner being a non-bagasse based cogeneration project and accordingly the tariff as determined by Hon'ble Commission for biomass based projects was made applicable. In case the Respondent had any difference in opinion, it should have referred the matter to the Hon'ble Commission as per the provisions of the PPA and sought clarification/approval.

D) Can the Respondent raise a dispute retrospectively as the claim raised by Respondent is badly time barred?

The project of the Petitioner has been in operation since the year 2014 and regular payments have been made for the last 6 years based on the tariff determined by the Commission for Biomass based projects. At no stage any difference in opinion or dispute was ever raised by the Respondent, hence there is no ground for revising the tariff retrospectively.

There has been no new development since the year 2014 and the circumstances continue to be the same, hence the Respondent, if it had any doubt or difference in opinion on applicable tariff, should have revoked provision under Clause 12.2 of the PPA and referred the matter to the Commission for prospective consideration.

The Respondent is not a novice in the power sector and deals with numerous Generators, Transmission Licensees and scores of electricity consumers. The provisions of the PPA have to be honored and implemented in true contractual spirit.

As the Respondent has raised the billing dispute for the first time through its notice dated 29.06.2020, the decision taken by the Commission on this dispute would be applicable prospectively from the date of notification of decision on the present Petition. The Respondent has no right to revise the bills issued/paid in the past before the date of order of the Commission.

E) Can the Respondent withhold payment of current Invoices of the Petitioner without seeking intervention of the Hon'ble Commission?

There is no provision in the PPA whereby the Respondent could raise unilateral claim and withhold payment of the Petitioner, without appropriate order from the State Commission. Clause 12.2 of the PPA provides for reference by any party seeking resolution of any difference or dispute between the parties through HERC as per the Electricity Act, 2003.

F) Is there any provision for termination of agreement by any of the party and what are the events of default?

Article 15 of the PPA deals with the 'Events of Default and Termination'. Some of the important/relevant provisions under the PPA are reproduced hereunder,

Clause 15.1 -Events of Default of Company:

The occurrence of any or combination of the following events at any time during the term of this agreement shall constitute as event of default by the company,

a) Failure to pay to the HPPC any amount payable and due under this Agreement within sixty (60) calendar days after receipt of Invoice/bill/claim:

e) Abandonment of its generation facilities by the Company or the discontinuance of the Company of services under this Agreement without any reasonable cause;

Clause 15.2 Events of Default by HPPC:

a) Failure or refusal by HPPC to perform its material obligations under this Agreement;

b) ……

c) Failure to pay the company any amount payable and due under the agreement within Ninety (90) calendar days after receipt of invoice;

Clause 15.3 *- If any Event of Default by either party shall extend for a period of Sixty (60) Calendar days after receipt of written notice of such event of Default from the non-defaulting party, then the non-defaulting party may, at its option, terminate this agreement by delivering 15 days written notice of such termination to the party in default.*

Clause 15.6 *- Either the HPPC or the Company may terminate this Agreement upon notice to the other party, if the Company fails to begin producing electric energy within Three (3) years from the planned commercial operational date;*

In the present case there is clear 'Event of Default' on the part of the Respondent as it has failed to pay the Petitioner the amount of Invoice raised for supply of energy for the month of June 2020.

There is no default on the part of the Petitioner under the present agreement and as such Respondent has no reason/ground to issue threat of termination of agreement.

G) Role of the Commission under the PPA:

Clause 12.2 of the PPA provides procedure for settlement of disputes and requires that in the event of any differences or disputes, between the parties, either party may

request the other party for resolution of dispute through HERC as per the Electricity Act, 2003.

Accordingly, the Petitioner had requested the Respondent to refer the matter to the Commission instead of taking any unilateral action by stopping the rightful payments to the Invoices raised by the Petitioner. Due to failure of the Respondent to refer the dispute to the Commission, the Respondent has filed the present Petition seeking resolution of the dispute raised by the Respondent.

H) Consequences of non-payment of Invoice/Bill raised by Petitioner under the PPA by the Respondent:

In case of continued default by the Respondent, the Petitioner will have the right to take contractual actions provided under the PPA. Moreover, if the Petitioner is forced to stop generation of power from its facility, the Respondent will be solely responsible for the financial loss caused to the Petitioner.

q) That in view of all the facts on record and as explained above, the notice served by the Respondent vide letter dated 29.06.2020 is totally unlawful and nothing but an attempt to cause harassment and financial loss to the Petitioner. The Respondent instead of following the 'Settlement of Disputes and Arbitration' covered under Article 12 of the PPA, has unilaterally taken action to stop rightful payments of the Petitioner causing financial loss.

r) In view of the above, the following prayers have been made: -

a) To accept the above Petition in the present form;

b) To direct the Respondent to withdraw illegal notice served upon the Petitioner vide letter dated 29.06.2020;

c) To direct the Respondent to immediately release payment of the Invoice raised on 1st July, 2020 for supply of energy during month of June 2020 and thereafter;

d) To decide about the tariff to be charged hereafter for the energy to be supplied by the Petitioner from its Biomass based Cogeneration Power Plant as provided under the PPA;

e) To allow any other relief deemed proper.

Reply filed by the Respondent (HPPC)

3. HPPC filed its detailed reply on an affidavit dated 23.11.2020, emphasizing that the plant of the Petitioner is non fossil fuel based co-generation as defined under Regulation 2(19) of HERC RE Regulations, 2010 and accordingly the parameters as per chapter 7 of HERC RE Regulations, 2010 are applicable to it. The tariff applicable to the Petitioner for sale of energy for FY 2014-15 to FY 2016-17 was the generic tariff for Co-generation Plant notified by this Commission vide Order dated 13.08.2014 in case no. PRO-13 of 2014. Thereafter,

the Commission vide Order dated 03.10.2017 issued generic tariff sheet for Non-fossil fuel based Co-generation Plant. However, the Commission recently vide order dated 20.12.2019, passed in PRO-53 of 2019 issued generic tariff sheet for Non-fossil fuel based Co-generation plant (other than bagasse). Petitioner was entitled to tariff as per the parameters/considered taken by this Commission for Co-generation plants in the said Order. Whereas, the Petitioner has claimed and was being paid the generic tariff determined for biomass based power projects (water cooled), by the Commission in Order dated 09.10.2015 in case no. PRO-15 of 2013. Section 62(6) of the Electricity Act, 2003 permits Respondent to recover excess amount paid to the generator in claiming price or charge exceeding the tariff determined.

4. The HPPC has replied as under:-

a) That the PPA provided for tariff to be decided/ notified and as amended /modified/clarified by this Commission from time to time. The same understanding is clearly reflected from the provisions of the PPA wherein the definition of Article 1 (39) read with Article 2 makes it clear that the tariff payable shall be as may be decided/notified and amended /modified/clarified from time to time by this Commission which clearly points to the applicability of generic tariff. The Plant was commissioned on 17.10.2014 and the power was supplied to the Respondent thereafter.

b) That the applicable tariff at the time of signing of PPA was mentioned as the tariff determined by this Commission vide order dated 03.09.2012. The Commission vide order dated 13.08.2014 and 09.10.2015, subsequently, inter alia determined the tariff for the biomass projects commissioned during for FY 2014-15 and up till now, Oasis Commercial is being paid generic tariff determined by this Commission vide order dated 09.10.2015 for biomass based project commissioned during FY 2014-15.

c) That while it has admitted by the Petitioner that their project is a 'Co-generation Power Plant (Biomass based)' (Para 17 A (i) of the Petition), it is now contended that that Co-generation project of the petition cannot be treated at par with non-fossil fuel based co-generation project specified by this Commission in Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 ('HERC RE Regulations, 2010' in brief). The said contention of the Petitioner is not only an afterthought but a frivolous basis to cover up their misrepresentation and unjust enrichment by claiming higher tariff for nearly 6 years.

d) That it is worthwhile to notice that the Petitioner in reply to the show cause notice of the Respondent had contended that the power plant of the Petitioner is a pure Biomass based Power Plant and not a Co-generation Plant. It was also the incomprehensible case of the

Petitioner that since the steam generated by using biomass fuel is utilized in the power turbine, their plant is a pure biomass based project. It was further admitted that they had been representing their project as Biomass based Project, which according to them is a correct representation. The relevant extract of the reply of the Petitioner is reproduced hereunder –

"…… At the outset we would like to mention that these issues are not based on facts and contractual terms but on simple assumptions/conjectures. We would address all these issues based on facts as follows: -

a) The power plant set up by AB Grain/Oasis is a biomass based power plant and not a co-generation plant as stated by you. We reiterate that our power plant is a non-fossil fuel biomass based power plant. The biomass, which is used in the power plant is totally procured by us from market and no part of this fuel comes by – product form our operations. This is not like a conventional cogeneration plant which uses bagasse or straw produced during operation of the main manufacturing plant.

b) The biomass used in power generation, produces high pressure steam which in entirety is fed to the power turbine without any heat/steam extraction. As such the power plant is purely biomass based power plant and not a cogeneration power plant.

……

f) In our power plant the entire useful energy from steam generated by using biomass fuel is utilized in the power turbine. The steam parameters at the exit point of Boiler and inlet of Turbine are (Pressure – 85 ATA, Temperature 515°C) and at the exit of Turbine are (Pressure – 5.5 ATA, Temperature 196.2 /- 15 °C). The exhaust low pressure steam, instead of being taken through water condensers is cooled in our process. Thus we are utilizing this exhaust low pressure steam instead of letting it off through the cooling towers. Hence our power plant is a conventional biomass fuel based power plant and not a cogeneration power plant and no misstatement or wrong claim has been lodged by us at any time."

However, in the present Petition, the Petitioner has contended otherwise and in contradiction to the reply given by them in response to the show-cause notice of the Respondent. It is now the case of the Petitioner that their Plant is a Biomass based Co-generation Plant and has always been represented as such. The Petitioner has while filing the instant Petition has coined another frivolous ground to cover up their defaults by

contending that tariff for Biomass based Co-generation plant cannot be paid as per Order passed by this Commission for Co-generation Plants. The grounds of the instant Petitioner are liable to be dismissed being an afterthought.

e) That a conjoint reading of HERC RE Regulations, 2010, shall evince that the Petitioner had been claiming incorrect tariff in contravention to the Regulations as well as the terms of the PPA. Reference is made to Regulation 2(19) of the then applicable HERC RE Regulations, 2010, wherein the definition of non-fossil fuel based Co-generation plant is provided as under:-

"*Non fossil fuel based co-generation' means the process in which more than one form of energy (such as steam and electricity) are produced in a sequential manner by use of biomass including Bagasse provided the project may qualify to be a co-generation project if it fulfills the eligibility criteria as specified in clause (d) of Regulation 3."*

Further, Regulation 3(d) defines qualifying criteria for 'Non-fossil fuel based co-generation project' as under –

"(d) Non-fossil fuel based co-generation project: The project shall qualify to be termed as a non-fossil fuel based co-generation project, if it is using new plant and machinery and is in accordance with the definition and also meets the qualifying requirement outlined below: Topping cycle mode of co-generation – Any facility that uses non-fossil fuel input for the power generation and also utilizes the thermal energy generated for useful heat applications in other industrial activities simultaneously. Provided that for the co-generation facility to qualify under topping cycle mode, the sum of useful power output and one half the useful thermal output be greater than 45% of the facility's energy consumption, during season."

f) That Chapter-7 of RE Regulations, 2010 clearly specified Technology Specific Parameters for Non-fossil fuel based Co-generation Projects. It was on the basis of said parameters that the generic tariff was determined by this Commission from time to time. The intent and object of the Regulations is clearly to identify all kinds of non-fossil fuel co-generation projects as distinct from other renewable energy projects. The rationale behind such segregation is also well recognized and well settled by this Commission in various orders passed by this Commission.

Also, Section 2(12) of the Electricity Act, 2003 defines 'Co-generation' as under: -

"Cogeneration" means a process which simultaneously produces two or more forms of useful energy (including electricity).

From the foregoing, it stands established that the use of a particular kind of fuel has no impact on the co-generation process of the Plant. Thus, no presumption ulterior to the statutory provision or regulation can be made to hold that the use of biomass fuel by the Petitioner in a Co-generation plant will entitle him to the parameters considered by this Commission for a pure Biomass based Project.

g) That the Plant set up by AB Grain (now under the ownership of the Petitioner) squarely falls under the category of a Co-generation plant and not a Biomass based Power Plant in terms of HERC Regulations. Whereas as per the PPA, A.B. Grain had to design, construct, own, operate and maintain a 'Biomass based Power Project', the AB Grain/Petitioner has therefore, misrepresented in the PPA. Not only this, Petitioner has been wrongly selling power at generic tariff notified for Biomass based projects, which is higher than what would have been paid to Co-generation Plant. Petitioner has therefore, been unjustly enriched at the cost of the consumers of the State which is against the basic tenets of the Electricity Act, 2013. Petitioner is therefore, guilty of breach of terms of PPA, misrepresentation and adopting wrongful practice.

h) That considering the above stated factual position, it is evident that the tariff applicable to the Petitioner for sale of energy for FY 2014-15 to FY 2016-17 was the generic tariff for Co-generation Plant notified by this Commission vide Order dated 13.08.2014 passed in PRO-13 of 2014. Thereafter, the Commission vide Order dated 03.10.2017 issued generic tariff sheet for Non-fossil fuel based Co-generation Plant. However, the Commission has recently vide order dated 20.12.2019 passed in PRO-53 of 2019 issued generic tariff sheet for Non-fossil fuel based Co-generation plant (other than bagasse). Petitioner was entitled to tariff as per the parameters taken by this Commission for Co-generation plants in the above mentioned orders.

i) That as when the apparent defaults of the Petitioner came to the notice of the Respondent, the Respondent worked out excess tariff bagged by 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 13.08.2014 and the variable cost (fuel cost) component of tariff from generic tariff sheet issued by this Commission from time to time for Non-fossil based co-generation generation plants. The differential tariff was thus, worked out as under:-

Year	Tariff paid (in Rs. /kWh)				Diff. (in Rs./unit)
		FC	VC	Total	
FY 2014-15	7.58	2.99	1.28	4.27	3.31
FY 2015-16	7.49	2.79	1.34	4.13	3.36
FY 2016-17	7.70	2.71	1.41	4.12	3.58
FY 2017-18	7.92	2.63	4.03	6.66	1.26
FY 2018-19	8.16	2.55	4.24	6.79	1.37
FY 2019-20	8.41	2.47	4.58	7.05	1.36
FY 2020-21	8.68	2.40	4.80	7.20	1.48

Based on differential tariff computed above, the recovery for excess tariff (principal amount) paid to the Petitioner upto 31.03.2010 was worked out as Rs.19,69,87,503. The Respondent therefore, validly and justly issued notices for recovery of an amount of Rs.19,69,87,503, which forms the subject matter of the instant dispute. Apart from the same, show cause notice for termination was also issued to the Petitioner for committing default in terms of Article 15 of the PPA.

j) 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 29.06.2020 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.29,31,19,044/- (i.e. Rs.19,69,87,503/- as principal amount and Rs.9,61,31,541/- as interest) within a period of 15 days of the issue of the notice. However, the Petitioner, vide their reply dated 10.07.2020, 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 05.08.2020 refuted the frivolous and illegal contentions raised by the Petitioner and reiterated request for deposit of recoverable amount as intimated in notice dated 29.06.2020.

k) That from the foregoing, it is evident that the demand of the Respondent for recovery of excess amount 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 is liable to be rejected.

l) That the generation of electricity is a regulated business, where norms of operation as ceiling norms are set up to preclude the generating companies from claiming unreasonable tariff against the interest of the consumers of the State. The provision 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. Under the Electricity Act, 2003, it is settled law that the Commission has to balance the equities between the Generator, Distribution licensees and Consumer and neither one of the parties should be made to unduly benefit to suffer because of the other. However, in the instant case Petitioner on

misrepresentation has pocketed extra benefit over and above the other Non-fossil based co-generation power projects in the State.

m) That the Commission may kindly appreciate that the parameters of a Biomass based Project are different from a Co-generation Project and therefore, the tariff assessed for a Biomass Project is higher than the tariff of a Co-generation Project owing to better efficiency. The Commission had duly recognised co-generation and conventional generation from Non-fossil fuel separately in their Regulations notified from time to time and accordingly determined distinct operation norms for both cases. 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.

n) That it is imperative to state here that a comparative reading of the Reply of the Petitioner to the show cause notice sent by the Respondent and the instant Petition establishes that the Petitioner knowing well that their Plant is a Co-generation Plant has acted *malafide* in raising invoices for generic tariff of pure Biomass based Projects. The Petitioner is clearly in breach of terms under the PPA and is therefore, liable for action in terms in Article 15 of the PPA. The Respondent seeks liberty of the Commission to elaborate on the above mentioned position of law with reference to relevant judgments of the various Courts/ Tribunals at the time of the arguments.

o) That the Order of the Commission was a general order which was made applicable for all Renewable energy projects commissioned in FY 2014-15. The Commission had not identified the project of the Petitioner as pure Biomass based Project. Further, reliance of the Petitioner on order of the Commission dated 20.11.2013 is highly misconceived and misleading. The said Order was only specific for the operation of bagasse based power projects during off-crushing season. There is a specific rationale in support of the same. It is worthwhile to note that in absence of any crushing process the Baggage based Sugar Mill Plants would not be a Co-generation Plant during the off-crushing season. It is in fact specified by the Commission in the said order that the tariff for Co-generation plants is considerably lower than the biomass plants. However, the plant of the Petitioner has been designed as a Biomass Co-generation Plant and thus, Petitioner cannot justify claiming generic tariff for Pure Biomass based project by relying on Order of this Commission dated 20.11.2013.

p) That the Petitioner has wrongly sought to interpret the concluding lines of Para 10.4 of the Commission's Order dated 20.11.2013 to mean that power from *'any kind of Co-generation project'* could be obtained by HPPC at tariff determined for biomass fuel based generation projects in Haryana. Whereas, a thorough perusal of Para 10.4 of the Order establishes beyond doubt that the expression *'Co-generation Project'* was exclusively referred for

Bagasse based *'Co-generation Project'*. Had the intention of the Commission been to allow biomass based tariff for any kind of Co-generation Project, incorporation of Chapter-7 of the RE Regulations, 2010 would lose all relevance. Thus, the reliance of the Petitioner on Order dated 20.11.2013 to cover up their defaults is misconceived and misleading.

q) The issues raised by the Petitioner are responded point wise hereunder, a perusal of which shall establish that the issues raised by the Petitioner are devoid of any merits.

A) Reply to '*Has there been any misrepresentation of facts by the Petitioner regarding the type of RE Project': -*

Admittedly, the terms of the PPA defined the Plant of the Petitioner as a Biomass based Project. Nowhere in the PPA has the word 'Co-generation' been used despite the fact that the approval was granted to the Petitioner for setting up a Co-generation Power Plant and the Plant has been installed as a Co-generation Power Plant. The relevant terms of the PPA mentions as under:-

"…. WHEREAS, the Company proposes to design, construct, own, operate & maintain a Biomass based Power Project (hereinafter called 'project') at Village JATWAR Tehsil Naraingarh & Distt. Ambala in the state of Haryana with an aggregate capacity of 8.93 MW. The Company is desirous to sell generated energy upto 5 MW to HPPC."

" Article 13

13.1 Fuel usage guidelines shall be as per HERC guidelines and as modified from time to time. The current guidelines are elaborated as under:-

i) The biomass power plant shall be designed in such a way that it uses different types of non-fossil fuels available within the vicinity of biomass power project such as husk crop residues, agro industrial, forest residues etc. and other biomass fuels as may be approved by MNRE.

ii) The Biomass Power Generating Companies shall ensure fuel management plan to ensure adequate availability of fuel to meet the respective project requirements."

It was incumbent upon the petitioner to have specified that the Plant set up by them is a Biomass based Co-generation Power Plant. The invoices of the generator are processed considering the terms of the PPA. Had the PPA correctly mentioned the Plant as Biomass based Co-generation Plant, the Respondent would have, at the outset, raised the objection on the claim for generic tariff determined for a Biomass

based Plant. Therefore, it is evident that the Petitioner has misrepresented themselves as Biomass based Power Project to claim higher tariff.

B) Reply to '*Can the Respondent treat the project of the petitioner as bagasse based co-generation project': -*

The Respondent has correctly specified that the Plant of the petitioner was a Non-fossil fuel based Co-generation Project squarely falling under definition of Non-fossil fuel based Co-generation Project as per RE Regulations, 2010 and is therefore, governed by the parameters specified under Chapter-7 of the said Regulations. Had there been any grievance regarding the parameters taken in the said regulations for Non-fossil fuel based Co-generation Project, the Petitioner ought to have challenged the same at the appropriate time. The Petitioner cannot be allowed to justify claiming tariff determined for Biomass based projects by alleging that the parameters defined for Co-generation Plants for FY 2014-15 by this Commission were not for Biomass based Co-generation Plant.

C) Reply to '*Whether the tariff claimed by the Petitioner was in Order': -*

The averment made by the Petitioner under instant issue is erroneous and misleading. Without prejudice to the foregoing contentions raised by the Respondent, even if it is believed that the generic tariff for Co-generation Projects determined by this Commission for FY 2014-15 and onwards was for Bagasse based Co-generation Plants, it still does not in any manner justify the claim for entitlement of the Petitioner for Pure Biomass based tariff. Petitioner cannot be allowed to blow hot and cold in the same breath. The Petitioner has repeatedly contended that the Respondent ought to have approached this Commission for clarification of the instant dispute. The same yardstick is applicable to the Petitioner as well. They could have also approached this Commission and seek the decision on the tariff applicable to them at the appropriate time instead of deliberating keeping mum over the issue and misrepresenting themselves as Biomass based Projects. Suffice to say that the claim of the Petitioner for Biomass based generic tariff all through is illegal and unjustified.

D) Reply to '*Can the Respondent raise a dispute retrospectively as the claim raised by the Respondent is badly time barred' :-*

E) Reply to '*Can the Respondent withhold payment of current Invoices of the Petitioner without seeking intervention of the Hon'ble Commission' :-*

As detailed above, the instant dispute cannot be strictly compartmentalized as dispute under 'Article 12' of the PPA. This is the case of the fraud and misrepresentation whereby the petitioner had been claiming excessive tariff over the years. The PPA was governed by and construed in accordance with the provisions of Electricity Act, 2003. Section 62(6) of the Electricity Act, 2003 permits Respondent to recover excess amount paid to the generator in claiming price or charge exceeding the determined tariff. The notices for recovery were therefore, in consonance with the provisions of the Electricity Act, 2003. No conditions of the PPA can be read over and above the statutory provisions provided under the Act governing the said PPA. There is no question of the prospective adjudication of the dispute. As per the Electricity Act, 2003, the Petitioner cannot be permitted to unjustly enrich them with excess charge of tariff and allege that the recovery cannot be made retrospectively in terms of the PPA. Such an interpretation of the terms of the PPA executed and governed under Electricity Act, 2003 is illegal and untenable. The issue no. D& E raised by the Petitioner are thus, liable to be decided in negative in view of the submission made above.

F) Reply to '*Is there any provision for termination of agreement by any of the party and what are the events of default' :-*

The Petitioner has selectively reproduced provisions of Article 15 of the PPA to raise another frivolous issue. The Petitioner has omitted to refer to Clause 15.1 c) which provides as under –

'c) Failure or refusal by the Company to perform its material obligation under this Agreement;'

There is a clear default of the said condition by the Petitioner wherein they have been claiming incorrect tariff under the PPA and have set up a Co-generation Power Project whereas the PPA obligates Petitioner to install and operate a Biomass based Power Project.

Thus, looked at any which way, there is clear 'Event of default' committed by the Petitioner in the in the instant case and thus, the show cause notice issued by the Respondent for termination of PPA is legal and valid.

G) Reply to '*Role of the Hon'ble Commission under the PPA' :-*

The role of the Commission under the PPA is not denied. The Respondent is duty bound to follow the orders of the Commission. However, as detailed above, the notices

for recovery has been issued by the Respondent was in accordance with the orders of the Commission and as per the provisions of the Electricity Act, 2003.

H) Reply to '*Consequences of non-payment of Invoice/ Bill raised by the Petitioner under the PPA by the Respondent' :-*

The Petitioner has committed defaults and cannot be permitted to raise claims for action taken by the Respondent against such defaults. It is the Respondent which has suffered losses owing to the default of the Petitioner and is liable to be compensated with interest for the same in the interest of the justice.

Proceedings in the Case

5. The case was first heard on 24.11.2020. The Commission vide its ibid dated Interim Order directed the Petitioner to file its rejoinder, if any, to the reply filed by HPPC.
6. In response to the Interim Order of the Commission, the Petitioner filed its rejoinder on an affidavit dated 01.12.2020, submitting as under:-
   a) 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.
   b) That the Respondent No. 1 has tried to confuse the issues raised by the Petitioner in the present Petition and attempted to totally distort the facts to sidetrack the main issues.
   c) That the Petitioner has unambiguously declared its Power Plant as a "Biomass Co-Gen Power Project" since the date of inception. There has never been any iota of doubt or misconception on this issue either with the Petitioner or the Respondent. The in-principle consent conveyed by the Respondent dated 24.04.2012, which culminated into the signing of the PPA clearly mentioned the nature of the power plant. Even the 'Minutes of Meeting' signed by the team of senior officers of Petitioner after visiting the power plant on 17.10.2014 specifically mentioned this fact.
   d) Although the PPA in Clause 2.1.2 mentioned the applicable tariff for the power plant of the Petitioner Company as per Commission order dated 03.09.2012 but as the project was actually commissioned in Oct. 2014, the tariff applicable was the Generic Tariff determined vide order dated 13.08.2014 (as amended vide order dated 09.10.2015) for projects commissioned in FY 2014-15. This is the tariff rightly charged by the Petitioner Company/paid for by the Respondent for the power injected/supplied to the Respondent from the date of commissioning onwards.
   e) This is a fact established on record that the understanding of the Hon'ble CERC and HERC for a co-generation power plant had all along been of a bagasse based co-

generation which was associated with the sugar industries. This was the reason why the Hon'ble Central/State Commissions while determining generic tariff for co-generation power plants considered bagasse as the fuel and not the conventional bio-mass. In this regard kind attention is drawn to the Generic Tariff Orders passed by Hon'ble CERC and/or HERC through the following orders:-

Order dated	Description
15.05.2007	HERC notified generic tariff for RE projects and co-generation power plants were based on bagasse as fuel for FY 2007-08
25.01.2012	HERC notified generic tariff for biomass based power projects commissioned during FY 2011-12 but co-generation power plants were not segregated.
03.09.2012	HERC again notified generic tariff for projects commissioned during FY 2012-13 for biomass based power plants but for co-generation power plants fuel considered was bagasse only
20.11.2013	HERC notified generic tariff for RE projects commissioned during FY 2013-14 but the co-generation power plants were still associated with bagasse as fuel. This was the first time that Hon'ble Commission clarified that cogeneration power plants when these are not using bagasse and rather using non-fossil fuel (other than bagasse) be given the same tariff as determined for biomass based power plants during the period these operate on biomass instead of bagasse.
13.08.2014	HERC notified generic tariff for RE Projects commissioned during FY 2014-15 & 2015-16 but no separate tariff given for cogeneration projects using biomass. This was assuming the clarification given in the earlier order of 20.11.2013
09.10.2015	HERC notified consequential generic tariff for RE Projects commissioned during FY 2014-15 to 2015-16 using biomass as fuel but no revision was done for bagasse based co-generation power plants
30.06.2018	HERC notified generic tariff for RE projects commissioned in FY 2017-18 but still bagasse was considered the basic fuel for co-generation power plants
19.03.2019	CERC notified generic tariff for RE projects commissioned during FY 2019-20 including biomass based power projects for but for the co-generation power plants, basic fuel was considered as bagasse only and no tariff was determined for non-bagasse based cogeneration projects.
20.12.2019	HERC notified generic tariff for RE projects commissioned in FY 2019-20 & 2020-21 and through this order for the first time a separate tariffs were determined for co-generation power plants using bagasse as fuel and others using non-fossil fuel (biomass – other than bagasse)

f) From the above sequence of developments it is clear that either the Hon'ble CERC or HERC didn't determine separate tariff for cogeneration power plants (using fuel other than bagasse) as these were equated with other biomass based power projects. This was the reason why biomass fuel based generic tariff was rightly taken as the base tariff by the Petitioner and paid for by the Respondents all through FY 2014-15 right upto June 2020.

g) If the Respondents had ever any doubt about the applicable tariff right from Oct. 2014 to June 2020, they were fully competent and free to approach the Commission to clarify the issue relating to the tariff permissible to the power purchased from the cogeneration power plant of the Petitioner Company. Clause 3.7 of the PPA dealing with 'Billing Procedure and Payments' very clearly mentioned about the action to be taken by the Respondents in case of dispute on any of the bills, which reads as under:-

"3.7 In case of dispute on any of the bills, the HPPC shall notify the company of any disputed amount within 30 days of receipt of bills and the Company shall rectify the

error/shortcomings or otherwise intimate in writing its rejection of the disputed amount with reasons thereto within 5 days of the reference of HPPC. The HPPC shall however on demand will make the payment of undisputed part of the bill and for the disputed part; the parties shall try to settle amicably. If the dispute is not settled during such discussion; then either party may refer the same for adjudication as per Article 12."

h) The PPA, once signed, becomes a binding contract between the parties and has to be honored by the parties. No part of the Electricity Act, 2003 or Regulations framed under the enabling powers give any power to any of the parties to act unilaterally against the provisions of the signed PPA. The Respondents were free to raise dispute on any of the bills raised by the Petitioner by following the dispute resolution procedure enshrined in the PPA.

i) The payments of the Petitioner are linked with the consequential rebate and penalties under Article 3 of the PPA. The Clause 3.6(b) of PPA reads as under,

"3.6 (b) In case the payments of bills of the Company are made through LC or RTGS on presentation, rebate of 2% shall be allowed. Where payments are made other than through letter of credit within a period of one month of presentation of bills by the company a rebate of 1% shall be allowed. In case the payment of any bill is delayed beyond 60 days from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be payable to the Company by HPPC/Discoms for the actual period of delay on the undisputed payable amount."

j) There is no authority with the Respondents to either withhold or deny the legitimate payments to the Petitioner Company. In case the Respondents dispute any bill, they are at liberty to follow the procedure as provided for under Article 3 (Clause 3.7) and Article 12 of the PPA. The Petitioner has no authority to unilaterally stop any payments of the Petitioner Company or make deductions. They have to follow the procedure laid down in the PPA.

k) Even when the dispute was raised by the Respondents through letter dated 29.06.20 and as replied by the Petitioner vide letter dated 10.07.20, the Respondents did not seek intervention of the Commission and instead acted of their own resulting in recurring financial loss to the Petitioner.

l) The Respondents were free to raise the issues, referred to in reply to the present Petition, at the time of signing of the PPA or making payment to the Invoices. Instead of calling the arguments of the Petitioner as 'after thoughts' this charge squarely applies to the Respondents who kept sleeping for 6 years and suddenly cause financial loss to the Petitioner for the reasons best known to the Respondents.

m) That in all the thermal based power plants, fuel is burnt in the Boilers to generate high pressure/high temperature steam and used for power generation by routing it through turbine-generators. The exhaust steam is either condensed through water/air cooled condensers or gets condensed when it is used in the process. In the power plant of the Petitioner, the steam is generated at a high pressure of 85 ATA and 515^0C. This steam is used for running the turbo-generator and generate electricity. When it has delivered the inherent heat energy into electrical energy, the exhaust steam is at a low pressure of 5.5 ATA and 196.2 +/- 15^0C. The same process is followed in all thermal power plants. The Heat Mass Balance Diagram of turbine was given to the officers of the Respondents when they visited power plant on 17.10.2014. However, the Petitioner from the very initiation of the Project had maintained that it is a cogeneration power project based on biomass (other than bagasse).

n) That the Respondents are trying to reverse the time line to pre-PPA stage. The PPA clearly mentioned the tariff to be applicable on the power transactions from the cogeneration power plant of the Petitioner. The Petitioner had rightly applied tariff as determined by the Commission for the projects commissioned during 2014-15 read with the clarification given by the Commission through order dated 20.11.2013.

o) That there is no denying the fact that the Commission, for the first time, determined separate tariff for cogeneration projects based on bagasse and non-bagasse as fuel. But the tariff determined is to be applicable on the projects commissioned in FY 2019-20 and thereafter.

p) That the Respondents have mentioned that bills of the Petitioner were revised by the Respondents from the date of commissioning based on the bagasse based cogeneration tariff. This action of the Respondents was in violations of the terms of the PPA, applicable Regulations and Generic Tariff orders of the Commission.

q) That the bills raised were as per the PPA and the generic tariff orders issued by the Commission from time to time. If the Respondents had any doubt or objection to any of the bills, they should have followed the provisions contained in the PPA and disputed the concerned bill within 30 days of receipt of the bill. Any reference to Section 62(6) of Electricity Act, 2003, is totally irrelevant.

Commission's Analysis and Order

7. The final hearing in the matter was held on 08.12.2020. The parties were directed to file summary of their submissions made during the hearing within 2 days. In the final submissions filed by the Petitioner under affidavit dated 10.12.2020 and by HPPC dated

11.12.2020, the parties have mainly reiterated their submissions already made, which for the sake of brevity is not reproduced.

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 the Status of the Petitioner w.r.t. biomass based co-generation power project was known to the Respondent, since inception?
   b) Whether the Commission has determined tariff for non-bagasse based co-generation power projects commissioned during the FY 2014-15?
   c) Whether HPPC was right in deciding the tariff on its own and making the same applicable to the Petitioner?
   d) Whether HPPC is right in issuing demand notice dated 29.06.2020 and claiming recovery w.r.t. Section 62(6) of the Electricity Act, 2003?
   e) What tariff should be charged for the energy supplied by the Petitioner from its Biomass based Cogeneration Power Plant?

The Commission has carefully perused the demand notice dated 29.06.2020 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 the Status of the Petitioner w.r.t. biomass based co-generation power project was known to the Respondent, since inception?

HPPC, in its demand notice dated 29.06.2020 pointed out that as per the PPA, the Petitioner had to design, construct, own, operate and maintain a “Biomass based Power Project”. However, from perusal of records, it came to the notice that the plant set up by the Petitioner is a non-fossil fuel based cogeneration plants and accordingly alleged that the Petitioner has acted in contravention to the terms of the PPA by constructing and operating a co-generation power plant. Therefore, the generic tariff for non-fossil fuel based cogeneration plants is applicable to the Petitioner, for the relevant years from 2014-15 onwards. HPPC tabulated the tariff to be paid to the Petitioner over the years considering the project as bagasse based co-generation project for the FY 2014-15 to 2018-19 & non-fossil co-generation plant (other than bagasse) for FY 2019-20 & FY 2020-21.

The Petitioner has vehemently argued that allegation, that the Petitioner has concealed the fact of its power plant being a Biomass based Co-generation power plant, is unfounded

and averred that, it has, from the very beginning clearly stated that it was installing a Biomass based Co-gen Power Plant since the year 2011. Letter from Petitioner to HAREDA dated 05.04.2011, Proposal of the Petitioner dated 29.02.2012 & 21.03.2012 for PPA, approval accorded by HPPC on 24.04.2012 and MoM signed by senior officers of UHBVN and HPPC dated 17.10.2014 after visiting the Power Plant of the Petitioner unambiguously confirmed it to be a Biomass based Cogeneration Power Project.

The Commission has carefully examined the citation of both the parties and observes that although there was no specific mention of the power plant of the Petitioner as *"Biomass based co-generation power plant"* in the PPA, but, Proposal of the Petitioner dated 29.02.2012 addressed to MD/UHBVNL requesting to issue consent to purchase power from it, Letter of the Petitioner dated 21.03.2012 addressed to CE/HPPC requesting to issue consent to purchase power from it, In-principle approval accorded by HPPC on 24.04.2012 and MoM signed by senior officers of UHBVN and HPPC dated 17.10.2014 after visiting the Power Plant of the Petitioner, clearly establishes the fact that the power plant of the Petitioner is *"Biomass based co-generation power plant"*.

In view of the above factual matrix, the Commission answers the issue in affirmative i.e. the status of the Petitioner w.r.t. biomass based co-generation power project was known or should have been in the knowledge of the Respondent, since the very beginning when the proposal for purchase of power was considered by HPPC. However, same was not correctly reflected in PPA.

Issue (b):

Whether the Commission has determined tariff for non-bagasse based co-generation power projects commissioned during the FY 2014-15?

The Commission observes that the power plant of the Petitioner achieved CoD on 17.10.2014. Accordingly, the generic tariff for the project commissioned during the FY 2014-15 should have been applicable for the power supplied by the Petitioner.

The Commission has further examined the relevant provisions of the HERC RE Regulations, 2010, in vogue at that time, applicable for the control period from 03.02.2011 to 31.03.2013 (control period extended, vide notification dated 12.08.2015 for RE projects commissioned / to be commissioned in the FY 2013-14, FY 2014-15, FY 2015-16 & FY 2016-17), as under: -

Regulation 2(19) read with Regulation 3(d) of HERC RE Regulations, 2010, contains following provisions regarding "Non Fossil fuel based co-generation":-

"2(19) 'Non fossil fuel based co-generation' means the process in which more than one form of energy (such as steam and electricity) are produced in a sequential manner by use of biomass including Bagasse provided the project may qualify to be a co-generation project if it fulfills the eligibility criteria as specified in clause (d) of Regulation 3"

"3(d) Non-fossil fuel based co-generation project: The project shall qualify to be termed as a non-fossil fuel based co-generation project, if it is using new plant and machinery and is in accordance with the definition and also meets the qualifying requirement outlined below: Topping cycle mode of co-generation – Any facility that uses non-fossil fuel input for the power generation and also utilizes the thermal energy generated for useful heat applications in other industrial activities simultaneously. Provided that for the co-generation facility to qualify under topping cycle mode, the sum of useful power output and one half the useful thermal output be greater than 45% of the facility's energy consumption, during season."

Chapter 7 of the ibid Regulations, lays down the *"Technology specific parameters for Non-fossil fuel based Cogeneration Projects".* Regulation clause 51& 52 of the ibid Regulations, specifies the Calorific value & fuel cost of such projects as given under:-

"51. Calorific Value. -The Gross Calorific Value for Bagasse shall be considered as 2250 kCal/kg. For the use of biomass fuels other than bagasse , calorific value as specified under regulation 42 shall be applicable.

52 Fuel Cost. – (1) The price of Bagasse shall be 600(Rs/MT) and shall be linked to indexation formulae as outlined under Regulation 53. Alternatively, for each subsequent year of the Control Period, the normative escalation factor of 5% per annum shall be applicable at the option of the project developer.

(2) For use of biomass other than bagasse in co-generation projects, the biomass prices as specified under Regulation 44 shall be applicable."

Whereas, Regulation clause 42 of the ibid Regulations is reproduced hereunder:-

"42 Calorific Value. -The Calorific Value of the biomass fuel used for the purpose of determination of tariff shall be 3458(kCal/kg)."

The Commission, vide its Order dated 13.08.2014, determined generic tariff, for projects commissioned during FY 2014-15 & 2015-16, in accordance with the HERC RE Regulations, 2010, including co-generation (bagasse) based power projects. However, generic tariff for Non-Fossil fuel based cogeneration (other than bagasse) based power projects, was not determined by the Commission in the said Order. Admittedly, the tariff so determined was for bagasse based co-generation power project.

Further, the Commission, notified 4th Amendment to HERC RE Regulations, 2010, vide notification dated 12.08.2015, called *"Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) (4th Amendment) Regulations, 2015"*. The said Regulations, was applicable for *"RE Projects commissioned / to be commissioned in FY 2013-14, 2014-15, 2015-16 and 2016-17 in the State of Haryana."* Regulation clause no. 43 of the ibid Regulations, provides as under:-

"*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."

Consequent to the HERC RE Regulations 2010 (4th amendment), the Commission, vide its Order dated 09.10.2015, determined generic tariff, for projects commissioned / to be commissioned in the FY 2013-14, 2014-15 & 2015-16, in accordance with the HERC RE Regulations, 2010. The operational norms mentioned in the ibid Order were made applicable prospectively from the date of notification of 4th amendment Regulations i.e. 12.08.2015, even for the projects commissioned in the FY 2013-14 & FY 2014-15. However, generic tariff for Non-Fossil fuel based cogeneration (other than bagasse) based power projects, was not determined by the Commission in the ibid Order also.

"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.

For the projects commissioned in FY 2014-15, the tariff as already determined for 1st year i.e. FY 2014-15 shall be applicable for 12 months from the date of commissioning. The revised tariff as now determined for the 2nd year i.e. FY 2015-16 shall be applicable from the date of notification of 4th amendment i.e. 12.08.2015 or the date of commencement of

2nd year of tariff whichever is later. For earlier part of 2nd year, if, any, the tariff as already determined shall be applicable. For 3rd year onwards revised tariff as now determined shall be applicable."

The Commission, notified on 24.07.2018, 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"). 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.

With an objective to utilize and thereby prevent burning of paddy straw / stubble in the farms, the Commission would like to promote use of the same in the power projects. Hence, while determining fuel cost / GCV on a year to year basis applicable for the existing as well as to be commissioned biomass / bagasse power projects, appropriate price weightage could be considered. HAREDA may provide the relevant data collected from the field for consideration of the Commission. However, the details of usage of paddy straw / stubble shall be certified by the IPPs and verified by HPPC based on the data emanating from the local authorities concerned."

Chapter 7 "*Technology specific parameters for Non-fossil fuel based Cogeneration Projects*" of the ibid Regulations has specified fuel cost and calorific value for bagasse only, as is evident from Regulation Clause nos. 44 & 45, reproduced as under:-

*"44. **Calorific Value**. – The Gross Calorific Value for Bagasse shall be considered as 2250 kCal/kg.*

*45. **Fuel Cost**. –*

(1) The price of Bagasse shall be Rs. 2307/ MT and shall be escalated at the rate of 5% per annum for determination of levellised tariff for the entire useful life of the project."

Consequently, the Commission determined generic tariff of biomass and bagasse based projects. However, generic tariff for Non-Fossil fuel based cogeneration (other than bagasse) based power projects, was not determined by the Commission in the ibid Order also.

The Commission determined levelized tariff for Non-Fossil fuel (cogeneration) other than bagasse i.e. biomass etc., in its Order dated 20.12.2019, applicable for projects commissioned during the FY 2019-20 & FY 2020-21 on the basis of the parameters provided in the HERC RE Regulations, 2017.

The examination of various RE Regulations and resultant Orders of the Commission, as mentioned hereinabove, provides enough grounds for the Commission to hold that although it comes out that the underlying parameters for determining tariff of co-generation projects based on bagasse vis-à-vis biomass shall be different only so far as fuel cost and calorific value thereof is concerned, the Commission never determined tariff for non-bagasse based co-generation power projects commissioned during the FY 2014-15. The Commission for the first time determined levelized tariff for Non-Fossil fuel (cogeneration) Other than bagasse i.e. biomass etc., in its Order dated 20.12.2019. However, the same was applicable for projects commissioned during the FY 2019-20 & FY 2020-21 on the basis of the parameters provided in the HERC RE Regulations, 2017.

In view of the above, the Commission answers the issue framed above in negative i.e. the Commission has not determined tariff for non-bagasse based co-generation power projects commissioned during the FY 2014-15.

<u>Issue (c):</u>

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

The Commission has examined the demand notice dated 29.06.2020 issued by HPPC to the Petitioner. The relevant part is reproduced as below:-

"6. The tariff applicable to AB Grain/Oasis for sale of energy since FY 2014-15 should have been the generic tariff for co-generation plant notified by Commission from time to time.

Tariff for the period from FY 2014-15 to FY 2016-17 should be tariff determined by the Commission for co-generation based plants vide Order dated 13.08.2014 passed in PRO-50 of 2014. Thereafter, for 2017-18 and FY 2018-19, generic tariff determined by the Commission vide Order dated 03.10.2017 passed in HERC/PRO-67 of 2017 for co-generation based plant and for FY 2019-20 & FY 2020-21 in accordance with the generic tariff determined by the Commission for non-fossil co-generation plant (other than bagasse) vide order dated 20.12.2019 passed in PRO-53 of 2019.

7. Considering the fixed cost component of tariff as specified in the generic tariff sheet dated 13.08.2014 and the variable cost (fuel cost) component of tariff from generic tariff sheets issued by the Commission from time to time, the yearly applicable tariff for the energy supplied during respective financial year is summarized as under:-

Year	*Applicable tariff (in Rs./kWh)*		
	Fixed Cost	*Variable Cost*	*Total*
FY 2014-15	*2.99*	*1.28*	*4.27*
FY 2015-16	*2.79*	*1.34*	*4.13*
FY 2016-17	*2.71*	*1.41*	*4.12*
FY 2017-18	*2.63*	*4.03*	*6.66*
FY 2018-19	*2.55*	*4.24*	*6.79*
FY 2019-20	*2.47*	*4.58*	*7.05*
FY 2020-21	*2.40*	*4.80*	*7.20*

The Commission has also examined Clause 2.1 (Article-2) of the PPA dated 25.10.2012, reproduced hereunder:-

"2.1 Sale of Energy by Company:

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 (5 MW) delivered at the interconnection point pursuant to the terms and conditions of this agreement at the tariff decided/notified by the commission and amended from time to time. The fuel (biomass mix) cost (Rs./kWh) 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 Commission's order dated 03.09.2012. 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."

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 29.06.2020, are the rates determined by the Commission in its Orders dated 13.08.2014, 03.10.2017 and 20.12.2019, it has already been examined and decided above that the Commission has not determined tariff for non-bagasse based co-generation power projects commissioned during the FY 2014-15. Therefore, tariff rates mentioned in the ibid demand notice are determined by HPPC on its own. Additionally, reference made by the HPPC to Section 62(6) of the Electricity Act, 2003 is misplaced, as the said Section of the Act refers to "tariff determined" under Section 62 of the Act and as already held no tariff for the non-bagasse based co-generation power plant was determined by the Commission for such projects commissioned during the FY 2014-15.

In view of the above, 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 (d):

Whether HPPC is right in issuing demand notice dated 29.06.2020 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 29.06.2020 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 13.08.2014 and the variable cost (fuel cost) component of tariff from generic tariff sheet issued by this Commission from time to time for Non-fossil based co-generation generation plants. The differential tariff was thus, worked out as under:-

Year	Tariff paid (in Rs. /kWh)				Diff. (in Rs./unit)
		FC	VC	Total	
FY 2014-15	7.58	2.99	1.28	4.27	3.31
FY 2015-16	7.49	2.79	1.34	4.13	3.36
FY 2016-17	7.70	2.71	1.41	4.12	3.58
FY 2017-18	7.92	2.63	4.03	6.66	1.26
FY 2018-19	8.16	2.55	4.24	6.79	1.37

FY 2019-20	8.41	2.47	4.58	7.05	1.36
FY 2020-21	8.68	2.40	4.80	7.20	1.48

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."*

The Commission observes that demand notice dated 29.06.2020 issued by HPPC to the Petitioner suffers from procedural infirmity to the extent that HPPC mis-interpreted the Commission's dispensation on 'fuel cost" and proceeded to apply the same on its own in the present case. Further, no recourse was taken to clause 3.7 of the PPA which expressly deals with billing procedure and payments including disputes in any bill raised by the generator supplying power to HPPC/DISCOMs.

In view of the above, the Commission decides that although there was a procedural lapse in issuing the demand notice, however, the fact remains that the tariff claimed by the generator and paid by HPPC, giving rise to the impugned demand notice, was wrong. Hence, prima-facie, the excess amount paid can not be negated as such, though the quantum of excess amount, can only be determined once the generator herein gets the tariff determined by the Commission.

Issue (e):

What tariff should be charged for the energy supplied by the Petitioner from its Biomass based Cogeneration Power Plant?

The power plant of the Petitioner achieved CoD on 17.10.2014 and started supplying power to HPPC, in terms of PPA executed on 25.10.2012. The power plant was set up by the Petitioner as "non-fossil fuel based cogeneration plants". The Commission has not determined generic tariff for "non-fossil fuel based cogeneration plants" and in absence of the same generator has charged the tariff rate in its energy sale bill raised on HPPC, at the generic tariff determined by the Commission from time to time, for biomass based projects. Whereas, the applicable tariff for such projects should have been determined, as per the parameters specified in Chapter 7 of the HERC RE Regulations, 2010 *"Technology specific parameters for Non-fossil fuel based Cogeneration Projects",* as amended from time to time, but it is not open for HPPC to redetermine the tariff on its own. 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 arguments of the Ld. Counsel Sh. R.K. Jain, appearing for the petitioner herein, that a biomass based power project remains a biomass project whether it is co-generation or not, is far fetched as far as tariff determination is concerned, for simple reason that a part of the process heat (in form of steam) can be passed through turbine to generate electricity and the steam leaving the turbine can also be used for Industrial processes. This is not the case in a pure coal/gas/biomass based power plant as such. Even if thermal power plants with waste heat recovery mechanism, the same is used for generation of electricity alone and there is no extraction of steam for Industrial processes as in the case of co-generation.

In view of the above, the Commission decides that tariff should be charged on energy supplied by the Petitioner from its Biomass based Cogeneration Power Plant at the rates to be decided by the Commission since CoD, on a separate petition to be filed by the Petitioner for the same under Section 62 of the Electricity Act, 2003, as per the parameters specified under HERC RE Regulations, 2010 for *"Non-fossil fuel based Cogeneration Projects",* as amended from time to time, substantiated by the actual data of generation/cost/technical parameters etc. The tariff determined by the Commission shall be reckoned with for estimating the differential amount to be recovered / paid to the petitioner.

Since, the tariff determination under Section 62 of the Electricity Act, 2003 is a long process, HPPC is directed to apply, w.e.f. the date of this Order, the levelized tariff determined by the Commission in its Order dated 20.12.2019 for *"Non-fossil fuel based Cogeneration Projects".*

9. In view of the determination as arrived above on the issues framed in the preceding paragraphs of this order, this Commission has no hesitation in holding that both the petitioner as well as the HPPC have been in default as both has omitted to perform their legally binding duties, the foremost of which was to approach this Commission for tariff determination as was not in terms of the PPA as well as prescribed by the regulatory framework within which all the stakeholders including the petitioner, the respondents operate, under this Commission's vigil.
10. A consequential observation which is inevitable to be drawn in the present circumstances is that the procedure adopted by the HPPC in undertaking the determination of tariff on its own is reflective of the usurping tendencies in HPPC, possibly to provide cover for its own default in not taking cognizance of the anomaly which has been noticed by it only recently after enormous and inexcusable delay. The procedure followed by the DISCOM in consequentially withholding the clearance of the invoices raised by the petitioner is equally wrong and in violation of the applicable provisions of law, and no succor to the present irregular situation can be deemed to have resulted from the said act of the HPPC, despite the fact that origin of the act is the genuine intention of recovering the alleged dues.

    Resultantly, the action of the HPPC is hereby declared to be bad in law as the same cannot be considered to have emanated from a lawful application of the provisions.

    However, it is not out of place here to mention that the recovery of due money, expected to precipitate subsequent to tariff determination exercise to be taken by this Commission, will not be hit by the principles of limitation for the reason that the cause of action in this case will be deemed to be recurring in nature and therefore, the cause of action shall have retained the life force attributable to aforesaid recurrence. Needless to say that upon petition which is due to be filed by the petitioner, this Commission shall undertake the process of tariff determination with the assistance of the HPPC as well as other stakeholders like HAREDA and the due recovery amount shall be determined accordingly.
11. Having observed as above, this Commission must now proceed to deal with the demand notices issued by the HPPC to the petitioner and to which notices the present petition owes

its origin. Having given due consideration to the conduct of the parties in the present petition, this Commission is of the view that the demand notices are not liable to be set aside and accordingly, the prayer for the same is declined. The demanded recovery from the petitioner is therefore declared to be correct in principle; however, the quantum of the recovery of the differential amount, is an issue which must necessarily succeed tariff determination which is yet to be undertaken in due course.

12. In view of the above, the generator is directed to file tariff petition in 15 days from the date of this Order but not later than 30 days in any case.
13. The present petition is accordingly disposed of in above terms.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 18.01.2021.

Date: 18.01.2021 Place: Panchkula	(Naresh Sardana) Member	(Pravindra Singh Chauhan) Member