

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

**Case No. HERC/PRO – 51 of 2020**

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

**IN THE MATTER OF:**

**Petition for adjudication of dispute(s) between generating company and distribution licensee under Section 86 (1) (f) of the Electricity Act, 2003.**

**Petitioner**

M/s. Star Wire (India) Vidyut Pvt. Ltd.

**Respondent**

Haryana Power Purchase Centre, Panchkula (HPPC)

**Present On behalf of the Petitioner, through Video Conferencing**

Shri Buddy Ranganadhan, Advocate

**Present On behalf of the Respondent, through Video Conferencing**

Smt. Sonia Madan, Advocate

**Quorum**

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

**Member(in chair)  
Member**

**ORDER**

**Brief Background of the case**

1. The petitioner has invoked the jurisdiction of this Commission under Section 86 (1)(f) of the Electricity Act, 2003 read with PPA executed on 22.06.2012 between the petitioner and the respondent. The petitioner has prayed to restrain the respondent from making deductions/withholding as payments for the power supplied by them on the basis of the demand notice dated 06.07.2020, 11.08.2020 and email dated 07.09.2020, for the period from April, 2017 to March, 2020, for the Principal Amount and Interest (Rs. 10,34,00,210/- as principal and Rs. 2,30,45,573/- as interest), on account of reduced fuel cost in the HERC RE Regulations, 2017, as compared to the fuel cost in the Order dated 09.10.2015. The Petitioner is further aggrieved on account of interest charged by HPPC on excess

payment on reimbursement of invoices towards MAT/ Corporate Tax and adjustment of the same from the power sale invoice of the Petitioner for the month of April, 2020.

2. The Petitioner has submitted as under:-

- a) On 03.02.2011, the Commission notified the HERC (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 {"HERC RE Regulations, 2010"}. The said Regulations were to be in effect for 3 years from the date of notification thereof up to 31<sup>st</sup> March 2013.
- b) On 22.06.2012, PPA was executed between the Respondent HPPC and the Petitioner for purchase of power for a period of 20 (twenty) years as per tariff determined by the Commission.
- c) The Petitioner's power plant achieved commercial operation on 03.05.2013, i.e. in the FY 2013-14.
- d) The Commission passed a Generic Tariff Order dated 20.11.2013 for biomass plants commissioned in FY 2013-14, *inter alia*, determining the generic tariff for plants commissioned in FY 2013-14.
- e) On 04.08.2015, the Commission passed an order, HERC (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate Regulation, 2010 (4th Amendment, 2014) {"HERC RE 4<sup>th</sup> Amendment Regulations, 2014"} which was subsequently notified on 12.08.2015, pertaining to the second Control Period or Review Period for four years beginning from FY 2013-14 up to FY 2016-17. It is evident from the amendment that all the projects commissioned / to be commissioned from the FY 2013-14 to the FY 2016-17 have been brought under the ambit of the said HERC RE 4<sup>th</sup> Amendment Regulations, 2014. The relevant extracts are as under: -

***"1. Short Title and Commencement. –***

(1) ....

(2) *These Regulations shall extend to all the RE Projects commissioned / to be commissioned in FY 2013-14, 2014-15, 2015-16 and 2016-17 in the State of Haryana.*

(3) .....

(4) *These regulations shall come into force from the date of their notification in the Official Gazette.*

***2. Amendment of Regulation 4 of the Principal Regulations: - The existing Regulation 4 of the Principal Regulations shall be substituted as under: -***

***"4. Control Period or Review Period – The second Control Period or Review Period under these Regulations shall be of four years, of which the first year shall be the FY 2013-14.***

*Provided ....*

*Provided further that the tariff determined as per these Regulations for the RE projects commissioned during the Control Period, shall continue to be applicable for the entire duration of the Tariff Period as specified in Regulation 5 of the Principal Regulations.*

*.....” {Emphasis supplied by underling}*

- f) On 09.10.2015, the Commission further issued the consequential Order under the HERC RE 4th Amendment Regulations, 2014 for the projects commissioned / to be commissioned in the FY 2013-14, FY 2014-15 and FY 2015-16. The Commission has, *inter alia*, held in the said order as under: -

*“...*

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

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

- g) Under Annexure - A of the said order, the cost of biomass fuel has been specified as Rs. 3208/MT for FY 2015-16 and the tariff for plants commissioned / to be commissioned in FY 2013-14, has been determined for the useful life of the project i.e. 20 years (the same Tariff Period prescribed under the PPA of the Petitioner).
- h) As a result of the above Order dated 09.10.2015 passed by this Commission, the Petitioner, from FY 2015-16 onwards, has been continuing to raise the bills on the Respondent HPPC for the power purchased by HPPC. The Respondent HPPC has also made the payment of tariff to the Petitioner without any dispute or demur.
- i) On 24.07.2018, this Commission notified the HERC (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 {“HERC RE Regulations, 2017”}, which were applicable for the Control Period of FY 2017-18 to the FY 2020-21.

**“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.

.....

**5. Tariff Period. –**

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

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

(3) ....

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

- j) It is clear from the above that the HERC RE Regulations, 2017 are applicable only to RE power plants with entirely new plant and machinery, which are commissioned / to be commissioned “during the Control Period”. The “Control Period” under the said regulations is from the FY 2017-18 to the FY 2020-21. Hence, those RE power plants, which are newly set up with entirely new plant and machinery during Control Period of FY 2017-18 to FY 2020-21, alone are governed by the HERC RE Regulations, 2017 in respect of tariff determination. The tariff for these RE power plants commissioned during Control Period of FY 2017-18 to FY 2020-21 is determined under the said regulations and the tariff determined is applicable for the respective project life or reckoned with the period provided in the PPA for the said RE projects. The Petitioner’s RE power plant was commissioned on 03.05.2013, i.e. in FY 2013-14 and its tariff has been determined previously by the HERC under its Order dated 09.10.2015, hence is excluded from the applicability of the HERC RE Regulations, 2017, specifically in view of Regulation 5(4), and the tariff/PPA of the Petitioner cannot be reopened as per the norms provided in the HERC RE Regulations, 2017.
- k) Under the HERC RE Regulations, 2017, this Commission passed a Suo-motu Order dated 20.12.2019 in Case No. HERC/PRO – 53 of 2019, whereby the HERC determined the “levelized tariff for Waste to Energy (WtE) projects as well as other RE projects viz.

*Biomass, Biogas & Bagasse etc. commissioned during the FY 2019-20 & FY 2020-21 on the basis of the parameters provided in the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017...*

The scope and applicability of the said order is discussed here under: -

*“4. The Commission, in accordance with the provision of Regulation 7(1) of the HERC RE Regulations in vogue, considered it appropriate to suo motu initiate the process of determination of generic tariff of certain RE projects for the third & fourth year of control period i.e. FY 2019-20 & FY 2020-21.*

*5. Accordingly, the Commission issued Public Notice proposing determination of levelized tariff rates for Waste to Energy (WtE) projects as well as other RE projects viz. Biomass, Biogas & Bagasse etc. commissioned / to be commissioned during the FY 2019-20 & FY 2020-21 on the basis of the parameters provided in the HERC RE Regulations, 2017 and invited comments/suggestions/objections from the stakeholders. ...” {Emphasis supplied by underling}*

Facts pertaining to Claim 1: Illegal and unilateral change in tariff by HPPC and unlawful adjustments/ deductions: -

- l) On 01.05.2020, Petitioner submitted its power sale invoice for the month of April, 2020 amounting to Rs. 5,12,44,954/- (Rupees Five Crore Twelve Lakh Forty-Four Thousand Nine Hundred Fifty-Four) in accordance with the Order dated 09.10.2015 of HERC, through e-mail dated 01.05.2020 and the hard copy of the invoice was submitted to HPPC on 03.06.2020.
- m) On 01.07.2020, Petitioner received payment from the Respondent HPPC in respect of power supply invoice for the month of April, 2020, with a short-payment of Rs. 42,31,257/- (Rupees Forty-Two Lacs Thirty-One Thousand Two Hundred Fifty-Seven Only). No reason was given by the Respondent HPPC for making such illegal, arbitrary and unilateral deduction.
- n) Petitioner wrote a Letter dated 02.07.2020 to HPPC, requesting it to release the balance withheld payment along with interest as per PPA, since the same would result in delayed payments to suppliers and vendors further compounding the negative effects of the COVID-19 Pandemic and the resultant lockdown.
- o) Vide its e-mail dated 02.07.2020, Respondent HPPC informed the Petitioner that the tariff of Rs. 8.00/kWh was applicable to the Petitioners plant for FY 2020-21 as per HERC Regulations (instead of Rs. 8.56/kWh as determined by HERC vide its Order dated 09.10.2015 used in the invoice submitted by the Petitioner) has been made applicable in the case of the Petitioner as under:

- Fixed Cost – Rs. 2.40 per kWh (Fixed cost corresponding as per initial order of the commission dated 09.10.15)
  - Variable Cost - Rs. 5.60 per kwh (Generic variable cost determined by the Commission for particular year in the recently determined tariff)
- p) It can be seen from the calculation provided by HPPC that Rs. 33,52,466/- (Rupees Thirty-Three Lacs Fifty-Two Thousand Four Hundred Sixty-Six Only) has been deducted from the power sale invoice for the month of April, 2020 of the Petitioner on account of unilateral and illegal change in applicable tariff by HPPC.
- q) Further, Respondent HPPC informed the Petitioner that Rs 8,78,791/- (Rupees Eight Lacs Seventy-Eight Thousand Seven Hundred & Ninety-One) had been deducted towards interest payable to HPPC as per Article 3.6(b) of the PPA (which forms part of the second Claim of the Petitioner in the present petition).
- r) On the same day i.e. 02.07.2020, Petitioner vide its Letter, protested against the illegal adjustment and deduction on account of change in alleged tariff unilaterally by HPPC and requested HPPC to refund the illegally deducted amount with 1.25% interest as per Article 3.6(b) of the PPA.
- s) On 06.07.2020, the Respondent HPPC, in fact, credited back the amount of Rs. 33,52,466/- (Rupees Thirty-Three Lacs Fifty-Two Thousand Four Hundred Sixty-Six Only) which had been illegally deducted from the power sale invoice for the month of April, 2020 of the Petitioner. HPPC. However, no interest was paid by HPPC on the amount which was illegally withheld and subsequently refunded. This clearly shows that the Respondent HPPC had agreed with the Petitioner that there was no tariff change applicable upon the Petitioner and the unilateral tariff change applied by them stood resolved.
- t) On 01.07.2020, Petitioner submitted its power sale invoice for the month of June, 2020 amounting to Rs. 5,26,58,381/- (Rupees Five Crore Twenty-Six Lakh Fifty-Eight Thousand Three Hundred Eighty-One). Said invoice was raised as per applicable tariff of Rs. 8.56/- in accordance with Order dated 09.10.2015 passed by the HERC.
- u) That the Respondent HPPC thereafter sent a notice dated 06.07.2020 (vide its email dated 07.07.2020) to the Petitioner regarding applicable tariff in the case of the Petitioner and recovery of differential tariff allegedly excessively paid by HPPC under the PPA dated 22.06.2012 executed with the Petitioner. Respondent HPPC has stated that the HERC has pegged the Fuel Cost of biomass at Rs. 3270/MT for FY 2017-18 with an escalation of 5% each year as per the HERC RE Regulations, 2017, whereas, the biomass fuel cost as per Order dated 09.10.2015 for FY 2017-18 works out to be Rs. 3537/MT for FY 2017-18. The comparison of Fuel Cost for various years from FY 2017-18 to FY 2020-21 has sought to be done on similar footing by HPPC and thereafter a demand of Rs. 12,64,45,783/- (Rupees Twelve crores sixty-four lacs forty-five thousand seven hundred

and eighty-three only) (i.e. Rs. 10,34,00,210/- as principal amount and Rs. 2,30,45,573/- as interest) has been raised on the Petitioner, payable within 15 days, failing which the amount will be adjusted along with interest from the subsequent electricity bills. The Respondent has raised claims pertaining to FY 2017-18 to FY 2019-20 and no claim has been raised by Respondent HPPC for FY 2020-21, which clearly is an admission of the fact that there is no tariff change applicable on the Petitioner.

- v) Petitioner vide its Letter dated 21.07.2020 has repeated and reiterated its submissions that the HERC RE Regulations, 2017 are not applicable in the case of projects which are commissioned in FY 2013-14 such as the Petitioner.
- w) On 11.08.2020, in response to the Petitioner's Letter dated 21.07.2020, Respondent HPPC has once again repeated its stand.
- x) On 07.09.2020, Respondent HPPC sent the impugned e-mail wherein it has informed the Petitioner that tariff @ Rs. 8/kWh has been applied for the month of June, 2020 against the Petitioner's power sale invoice for the month of June, 2020 which has been raised as per tariff of Rs 8.56/kWh as per HERC Order dated 09.10.2015. Accordingly, it can be seen that HPPC has illegally and unilaterally deducted an amount of Rs. 5,26,58,380/- (Rupees Five Crore Twenty-Six Lac Fifty-Eight Thousand Three Hundred & Eighty Only) against Petitioner's power sale invoice for the month of June, 2020.
- y) Petitioner vide its Letter dated 19.09.2020 has submitted its protest against the said illegal change in applicable tariff and unlawful deductions made by HPPC from the power sale invoices of the Petitioner and has requested the Respondent to make payment of the invoice along with interest due as per clause 3.6(b) of the PPA dated 22.06.2012. The same is contrary to the Regulations and orders applicable in the case of the Petitioner as well as provisions of the PPA executed between the parties.

Facts pertaining to Claim 2: Illegal interest charged by HPPC on excess payment on reimbursement of invoices towards MAT/ Corporate Tax and unlawful adjust adjustments/ deductions: -

- z) On 09.12.2019, Respondent HPPC while relying on the Order dated 09.10.2015, requested Petitioner to refund an amount of Rs. 3,54,015/- (Rupees Three Lacs Fifty-Four Thousand & Fifteen) towards the interest component claimed by the Petitioner for Assessment Year 2019-20, while claiming reimbursement from HPPC, towards MAT/Corporate Tax paid to the Income Tax authorities. HPPC claimed that since Rs. 98,270/- is refundable to the Petitioner by the Income Tax authorities, the same shall be also passed to HPPC immediately on receipt of the same from the Income Tax authorities.
- aa) In response to the above Letter dated 09.12.2019 of HPPC, Petitioner vide its Letter dated 10.12.2019 furnished the details of amounts claimed from HPPC as MAT/ Corporate Tax reimbursement and actual amounts received by Petitioner against the said reimbursement

claimed. Petitioner stated that it had claimed an amount of Rs. 1,79,40,000/- from which, they received only Rs. 1,23,15,000/- and an amount of Rs. 56,25,000/- is still pending from HPPC. It was stated that as per the ITR filed by the Petitioner for AY 2019-20, the Net tax payable is Rs. 1,76,64,763/- which shows there is difference of Rs. 2,75,237/- (1,79,40,000- 1,76,64,763), which HPPC may adjust with the balance outstanding amount of Rs. 56,25,000/- lying with HPPC towards the reimbursement of MAT/Corporate Tax yet to be paid by HPPC to the Petitioner. Petitioner further clarified that the income tax refund of Rs. 98,270/- as shown in ITR is related to the Petitioner as it has paid Rs. 4,52,285/- for Interest & fees (including TDS/TCS) and interest liability is Rs. 3,54,015/-. The detail of the same were also provided by the Petitioner.

- bb) On 06.03.2020, Respondent HPPC wrote an e-mail to the Petitioner wherein they have claimed reimbursement of excess amount allegedly paid by HPPC to the Petitioner towards refund of MAT/Corporate Tax along with interest as per HERC Suo-moto Order dated 09.10.2015 which was issued on the basis of the 4th Amendment Regulations.
- cc) Further, Respondent vide its e-mail dated 16.03.2020, requested the Petitioner to provide the ITR acknowledgement copy of all years since inception on urgent basis.
- dd) In response to the above e-mails dated 06.03.2020 and 16.03.2020 sent by HPPC, Petitioner vide its e-mail dated 16.03.2020, duly provided the ITR acknowledgement copies of all years since inception, and further requested HPPC to provide the working of the claim towards excess amount allegedly paid by HPPC to the Petitioner towards refund of MAT/Corporate Tax.
- ee) On 29.03.2020, HPPC once again wrote an e-mail to the Petitioner claiming reimbursement of excess amount allegedly paid by HPPC to the Petitioner towards refund of MAT/Corporate Tax along with interest as per HERC Suo-moto Order dated 09.10.2015. HPPC requested Petitioner to raise the credit note against the excess reimbursement of MAT/Corporate tax immediately otherwise it will be deducted from the upcoming payments. However, no working was provided by HPPC.
- ff) In response to the above e-mail dated 29.03.2020 of HPPC, Petitioner vide its e-mail dated 29.03.2020, once again requested HPPC to provide the working of the same so Petitioner could check the same and raise the credit note if required as already requested on 16.03.2020.
- gg) On 01.05.2020, Petitioner submitted its power sale invoice for the month of April, 2020 amounting to Rs. 5,12,44,954/- (Rupees Five Crore Twelve Lakh Forty-Four Thousand Nine Hundred Fifty-Four).
- hh) In further response to HPPC's e-mail dated 06.03.2020, Petitioner vide its Letter dated 04.06.2020, submitted that a credit note of Rs. 2,55,93,343/- (Rs. 1,12,38,895/- refund of excess amount & Rs. 1,43,54,448/- excess unpaid amount) has been already provided to



HPPC on 03.04.2020 vide credit note no. SWIVPL/HPPC/20-21/CN01. However, with regard to recovery of interest amount, the same will be provided only after reconciliation of instalments of MAT/Corporate Tax reimbursement with HPPC. The interest amount if any paid will be paid under protest as the HERC Regulation/HERC orders existing as on date, do not provide for any interest to be paid on MAT claim/refund or on any excess payment claimed/refunded by any party.

- ii) On 23.06.2020, the Petitioner received an e-mail from Respondent HPPC referring to Petitioner's Letter dated 04.06.2020 regarding refund of the excess amount claimed along with interest on the reimbursement of MAT/Corporate tax invoices. It was stated by HPPC that the payment of instalments has been discussed and reconciled telephonically and requested to provide further credit note of Rs. 8,78,791/- on account of interest on excess payment on reimbursement invoices.
- jj) Petitioner vide its e-mail dated 24.06.2020 requested Respondent HPPC to provide the working for the alleged claim of interest on the reimbursement of MAT/Corporate tax invoices.
- kk) In response to the above e-mail of the Petitioner, the Respondent HPPC vide its e-mail dated 24.06.2020 provided an excel sheet claiming an alleged amount of Rs. 8,78,791/- for the period of FY 2018-19 & FY 2019-20 on account of interest on the excess amount paid by HPPC to the Petitioner as reimbursement of MAT/Corporate tax invoices.
- ll) In response to the above, Petitioner vide its Letter dated 29.06.2020, informed the Respondent HPPC that a credit note of Rs. 8,78,791/- had already been provided on 24.06.2020 vide credit note no. SWIVPL/HPPC/20-21/CN02. However, with respect to the claim of HPPC towards interest, the HERC Regulations/HERC orders existing as on date, do not provide for any interest to be paid on MAT claim/refund or on any excess payment claimed/refunded by any party. Further, it was informed that interest rate charged by HPPC is 15% per annum which is not acceptable. As per HERC order HERC/PRO-21 of 2020 dated 17.06.2020, the working capital interest rate allowed is 8.65%. Accordingly, the credit note no. SWIVPL/HPPC/ZO-21/CN02 dated 24.06.2020 stood cancelled and a new credit note will be issued under protest after the revised calculation is received.
- mm) On 01.07.2020, the Petitioner received payment from the Respondent HPPC in respect of power supply invoice for the month of April, 2020, with a short-payment of Rs. 42,31,257/- (Rupees Forty-Two Lacs Thirty-One Thousand Two Hundred Fifty-Seven Only).
- nn) Vide the impugned e-mail dated 02.07.2020, Respondent HPPC informed the Petitioner that Rs 8,78,791/- (Rupees Eight Lacs Seventy-Eight Thousand Seven Hundred & Ninety-One) had been deducted towards interest payable to HPPC as per Article 3.6(b) of the PPA.

Grounds in support of Claim 1:

- oo) That the Respondent HPPC has no authority in law or otherwise, to unilaterally change/modify/revise/amend the tariff payable to the Petitioner.
- pp) No prior sanction has been sought from this Commission to change/modify/revise/amend the applicable tariff in the case of the Petitioner.
- qq) Respondent's action of illegally and unilaterally revising the tariff of the Petitioner, besides lacking the sanction of this Commission, is further marred by its abuse of dominant position by adjusting/ deducting the alleged tariff differential amount from the power purchase bill of the Petitioner for the month of June, 2020.
- rr) The Respondent has acted in blatant violation of the contract executed between the parties i.e. PPA dated 22.06.2012. As per Article 3.7 of the PPA, in case of any dispute on any of the bills, HPPC has an obligation to notify the Petitioner of such disputed amount **"...within 30 days of receipt of the bills..."**. Petitioner thereafter may rectify the errors /shortcomings or otherwise intimate in writing its rejection of the disputed amount with reasons within 5 days of the reference by HPPC, and then the parties may try to settle the matter amicably as per discussions. However, as specifically provided in Article 3.7, **"If the dispute amount is not settled during such discussion, then either party may refer the same for adjudication as per Article 12."** It is submitted that no disputes whatsoever have been raised by HPPC within 30 days from the receipt of the energy supply invoices for FY 2017-18 to FY 2019-20, which have been illegally and partly adjusted against the power sale invoice of the Petitioner for the month of June, 2020.
- ss) There is no provision under the PPA which permits the Respondent HPPC to adjust/ deduct any disputed amount and interest thereon. The Respondent HPPC, therefore, has acted in breach of the provisions of the PPA, and if at all, it ought to have approached this Commission for adjudication of dispute under Article 12, however, certainly it has no authority under the PPA to make unilateral adjustments and deductions in the power supply invoices of the Petitioner.
- tt) The Respondent HPPC has not raised any disputes whatsoever since the notification of the RE Regulation 2017 dated 24<sup>th</sup> July 2018 until their first notice dated 2<sup>nd</sup> July 2020 which was in response to the Petitioner's letter of the same date regarding delay in payment and shortfall in payment received. The release of payment to the Petitioner vide payment made on 6<sup>th</sup> June 2020 is an admission of HPPC that the dispute raised by them with regard to tariff change is not applicable and the dispute stands resolved.
- uu) Petitioner's tariff is strictly governed under the earlier tariff Order dated 09.10.2015 passed by the Hon'ble HERC in respect of plants commissioned / to be commissioned in FY 2013-

14 under the HERC RE 4th Amendment Regulations, 2014. It is abundantly clear from Regulation 5 of the HERC RE Regulations, 2017 that the same are applicable only to RE power plants with entirely new plant and machinery, who are commissioned / to be commissioned "during the Control Period". The "Control Period" under the said regulations is from the FY 2017-18 to the FY 2020-21 (Regulation 4). Hence, those RE power plants, which are newly set up with entirely new plant and machinery during Control Period of FY 2017-18 to FY 2020-21, alone are governed by the HERC RE Regulations, 2017 in respect of tariff determination. The tariff for these RE power plants commissioned during Control Period of FY 2017-18 to FY 2020-21 is determined under the said regulations and the tariff determined is applicable for the respective project life or reckoned with the period provided in the PPA for the said RE projects. The Petitioner's RE power plant was commissioned on 03.05.2013, i.e. in FY 2013-14 and its tariff has been determined previously by the HERC under its Order dated 20.11.2013 and Order dated 09.10.2015, hence is excluded from the applicability of the HERC RE Regulations, 2017, specifically in view of Regulation 5(4), and the tariff/PPA of the Petitioner cannot be reopened as per the norms provided in the HERC RE Regulations, 2017. Regulation 5(4) of the HERC RE Regulations, 2017 is once again extracted for convenience as under:

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

Hence, in terms of Regulation 5(4) above, the tariff of the Petitioner continues to be governed only by the assessments made by the Commission for projects commissioned in FY 2013-14 vide Order dated 09.10.2015, and by no stretch of imagination can the assessments and/or regulations and/or tariff orders determined and/or passed by the Commission for projects commissioned in financial years prior to FY 2017-18 or post FY 2013-14 be applied to the Petitioner, as is unilaterally, arbitrarily and wrongfully sought to be done by HPPC.

The Second Proviso to Regulation 4 of the HERC RE 4<sup>th</sup> Amendment Regulations, 2014 provides that, *"...the tariff determined as per these Regulations for the RE projects commissioned during the Control Period, shall continue to be applicable for the entire duration of the Tariff Period as specified in Regulation 5 below."* Hence, it is clear that the tariff determined by the Hon'ble Commission for 20 years vide its Order dated 09.10.2015 (including cost of biomass fuel as Rs. 3208/MT for FY 2015-16 for plants commissioned / to be commissioned in FY 2013-14), is applicable for the entire duration of the "*Tariff*

*Period*". It is relevant to note that "*Tariff Period*" under Regulation 5(1) of the HERC RE Regulations, 2010 means, "*The Tariff Period for Renewable Energy power projects shall generally correspond to their respective project life or reckoned with the period provided in the PPA as the case may be.*" Therefore, there can be no doubt in the matter that the tariff determined by the Commission for plants commissioned during FY 2013-14 vide Order dated 09.10.2015, would continue to apply for the entire "*Tariff Period*" i.e. entire project life as recognised in the PPA for 20 years.

- vv) For the reason that after expiry of FY 2016-17, the tariff determined in the Order dated 09.10.2015 for projects commissioned in FY 2013-14) applies and continues to apply to Petitioner's project till a different dispensation is notified by the Commission in respect of projects commissioned in FY 2013-14, which till date has not been done.
- ww) For the reason that it is a matter of record that neither the Tariff Order forming a part of the Order passed by the Commission on 30th June, 2018 nor the Tariff Order passed subsequently on 20<sup>th</sup> December, 2019, each passed in pursuance of the RE Regulations of 2017, have any manner of application to/on Petitioner's power plant.
- xx) For the reason that while the 2nd proviso to the amendment of Regulation 43 of Principal Regulations as recorded in the 4th Amendment does appear to provide for prospective application of the fuel cost re-determined by the Commission for the first year of the control period which would commence only after expiry of the control period forming the subject matter of the said 4th Amendment, it is evident that the Commission has already waived the same as evident from a bare perusal of the Tariff Orders respectively dated 30th June, 2018 and 20th December, 2019 and Regulation 5(4) of the HERC RE Regulations, 2017 as neither of the above-mentioned tariff orders nor any other order passed by the Commission seek to amend the tariff for projects commissioned in FY 2013-14 and to the contrary, Regulation 5(4) of the HERC RE Regulations, 2017 limits the application of the norms determined under the RE Regulations, 2017 to be applicable only to projects commissioned in the corresponding control period, which in any event could have been done only after giving all the concerned parties a reasonable opportunity of being heard.
- yy) For the reason it is also a matter of record that in terms of the mandate of the Commission as recorded in the 4<sup>th</sup> Amendment, the Control Period stipulated under the 4th Amendment stood extended up to the date of notification of Regulations for the next Control Period i.e. up to 24th July, 2018, and thus the re-determined fuel cost, if at all any, could be made

applicable only after the relevant applicable tariff order is passed by the Commission on the basis of the RE Regulations of 2017 notified on 24th July, 2018 after granting all the concerned parties a fair and reasonable opportunity of being heard, and that too only if at all, only with effect from the date of such order passed.

zz) For the reason that vide the impugned Notices dated 06.07.2020, 11.08.2020 and e-mail dated 07.09.2020, which are issued contrary to the regulations and orders of this Commission, HPPC has suo-moto determined the tariff (which is clearly beyond the ambit of HPPC's jurisdiction, being a mere agent of the distribution licensees), and by foisting wrongful and unjustified claims and demands on power generators such as the Petitioner, and thus seeking to coerce and threaten the Petitioner into succumbing to their blackmail and extortion/threats.

aaa) There is no provision in the PPA or the law which permits the Respondent to illegally and unauthorizedly deduct and retain amounts from running bills of the Petitioner. In fact, in terms of Section 171 of the Contract Act, 1872, the Respondent is expressly barred from making such adjustments. Hence, any such adjustment as threatened by the Respondent is nothing but a criminal misappropriation of property. If at all the Respondent has a claim against the Petitioner it necessarily has to first approach this Commission by means of a dispute petition, have the same adjudicated and only then recover monies from the Petitioner in accordance with law. Any attempt by the Respondents to adjust or recover monies unilaterally from the Petitioner's running bills, in the absence of any contractual or statutory right to do so, ought to be dealt with this Commission with a heavy hand.

**Grounds in support of Claim 2:**

bbb) It is admitted position that on reconciliation of accounts, the matter was discussed and Petitioner immediately paid back the amount of excess payment on reimbursement of invoices towards MAT/ Corporate Tax i.e. Rs. 1,12,38,895/- which is evident from the credit note of Rs. 2,55,93,343/- (Rs. 1,12,38,895/- refund of excess amount & Rs. 1,43,54,448/- excess unpaid amount) already provided to HPPC on 03.04.2020 vide credit note no.SWIVPL/HPPC/20-21/CN01. This shows the genuine measures taken by the Petitioner.

ccc) For the reason that the limited dispute is for the interest component on the refund of excess reimbursement of MAT/ Corporate Tax already paid to HPPC by the Petitioner, which has been illegally charged at an arbitrary rate and also forcefully recovered/

adjusted/ deducted by HPPC from the power sale invoice of the Petitioner for the month of April, 2020, contrary to the terms of the PPA executed between the parties.

- ddd) It is submitted that vide the impugned e-mail dated 02.07.2020, the Respondent HPPC has on its own, illegally adjusted/ deducted an amount of Rs. Rs 8,78,791/- (Rupees Eight Lacs Seventy Eight Thousand Seven Hundred & Ninety One) which has been deducted towards interest payable to HPPC, allegedly as per Article 3.6(b) of the PPA. However, Article 3.6(b) of the PPA are relating to the payment of bills raised by the Petitioner on HPPC and it is provided that where the bill of the Petitioner is delayed beyond 60 days from the date of billing, by HPPC, a late payment surcharge at the rate of 1.25% per month shall be payable to the Petitioner by HPPC for actual period of delay.
- eee) It is respectfully submitted that Article 3.6(b) of the PPA has no application in the facts and circumstances of the present case since Respondent HPPC has never disputed the amount claimed as reimbursement of MAT/Corporate tax invoices by the Petitioner prior to 06.03.2020, which was done for the first time vide its e-mail of 06.03.2020. It is not the case at hand where Petitioner has refused to make the payment of the excess reimbursement of MAT/Corporate tax invoices to the Respondent. Yet, HPPC has charged arbitrary interest from the date when the amounts were actually paid by HPPC. There is, therefore, no provision in the PPA or otherwise under which HPPC may charge interest for any excess amount paid to Petitioner.
- fff) The Respondent has acted in blatant violation of the contract executed between the parties i.e. PPA dated 22.06.2012, more specifically Article 3.7 and Article 12 of the PPA. The ground submitted in support of Claim 1 in this regard, is equally applicable in support of the present Claim 2, and the Respondent HPPC has no authority to unilaterally adjust/ deduct the disputed interest amount from the power sale invoices of the Petitioner.
- ggg) Without prejudice to the above, it may be noted that the rate of interest charged by HPPC is 15% per annum which is arbitrary and cannot be accepted. In terms of HERC order HERC/PRO-21 of 2020 dated 17.06.2020, the working capital interest rate allowed is 8.65%. If at all the Commission were to hold that the Petitioner is liable to pay the interest on the excess payment towards reimbursement of MAT/Corporate tax invoices of the Petitioner, in that case, the Commission may be pleased to consider the submission of the Petitioner regarding working capital interest rate allowed as 8.65% in terms of HERC order HERC/PRO-21 of 2020 dated 17.06.2020.

hhh) It is relevant to note that while making the unilateral revisions in the case of the Petitioner in respect of Claim 1, Respondent HPPC is wrongly applying the HERC RE Regulations, 2017 and the tariff orders issued under the said Regulations. On the other hand, while claiming the refund of excess amount reimbursed to the Petitioner on account of MAT/Corporate tax in respect of Claim 2, HPPC has correctly applied the Order dated 09.10.2015 issued under the HERC RE 4<sup>th</sup> Amendment Regulations, 2014. This clearly shows the arbitrary and high-handedness of the Respondent HPPC.

iii) Following prayers have been made:-

- (a) Declare the impugned Notices dated 06.07.2020, 11.08.2020 and e-mail dated 07.09.2020 issued by HPPC to the Petitioner as illegal, unwarranted and unlawful and quash/set aside the same;
- (b) Direct the Respondent HPPC to make payment of the amount of Rs. 5,26,58,380/- (Rupees Five Crore TwentySix Lac Fifty Eight Thousand Three Hundred & Eighty Only) wrongly adjusted/ deducted against Petitioner's power sale invoice for the month of June, 2020, alongwith interest as per 3.6(b) of the PPA, till date of actual release of such wrongly adjusted/ deducted amount;
- (c) Direct the Respondent HPPC to forthwith comply and continue to make payment to the Petitioner in accordance with the Order dated 09.10.2015 issued under the HERC RE 4<sup>th</sup> Amendment Regulations, 2014 notified by this Commission for plants commissioned in FY 2013-14, which is applicable in the Petitioner's case for the entire duration of the project under the PPA;
- (d) Direct the Respondent to refund the amount of Rs 8,78,791/- (Rupees Eight Lacs Seventy Eight Thousand Seven Hundred & Ninety One) wrongly adjusted/ deducted against Petitioner's power sale invoice for the month of April, 2020 towards interest on the excess amount paid by HPPC to the Petitioner as reimbursement of MAT/Corporate tax invoices, along with interest as per 3.6(b) of the PPA, till date of actual release of such wrongly adjusted/ deducted amount;
- (e) Direct the Respondent HPPC to abide by the provisions of the PPA and in case of any disputed amounts in future, to strictly comply and act in accordance with Articles 3.7 read with Article 12 of the PPA dated 22.06.2012 executed between the parties; and
- (f) Pass such further order(s) as this Commission may deem fit in the interest of justice, equity and good conscience.

#### **Reply filed by HPPC**

3. HPPC filed its detailed reply on an affidavit dated 26.11.2020, justifying, suo-moto, revision in fuel cost, w.e.f. FY 2017-18 (fuel cost decided in the Order of the Commission

dated 30.06.2018 for the FY 2017-18), as per Regulation clause no. 43 of Commission's Order dated 09.10.2015, which specifies that *"fuel cost re-determined by the Commission for the first year of next control period shall also be applicable prospectively to the projects commissioned during current control period"*.

4. The HPPC has replied as under:-

- a) That a Power Purchase Agreement (PPA) dated 22.06.2012 was executed between Petitioner and the Respondent for procurement of electric energy generated in Biomass based Power Project to be set up at Village Khurawata, District Mohindergarh in the state of Haryana with an aggregate capacity of 9.9 MW.
- b) That Article 1, Clause 39 of the PPA defined 'Tariff' as under –  
*"39) **"Tariff"** means the rate payable by the Nigam as approved by HERC from time to time for every kWh of delivered energy at the metering point."* (Emphasis Supplied)

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

*"2.1.1 The HPPC shall purchase and accept entire energy generated by the Company's facility (new plant and Machinery) up to the contracted capacity (9.9 MW) delivered at the interconnection point pursuant to the terms and Conditions of this agreement **at the rate decided/notified and as amended /modified/clarified by HERC 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 order dated 27.05.2011 and clarification order dated 17<sup>th</sup> August, 2011 issued by the HERC. **However, the rates as decided/notified and amended/modified/clarified by HERC from time to time will be applicable.** The cap on fuel cost (biomass mix) as decided by the Commission & detailed in clause 2.1.1 shall be applicable to the parties. No additional payment whatsoever may be on any account shall be payable by the HPPC/DISCOM except those approved by HERC."* (Emphasis Supplied)

- c) That a conjoint reading of above stated provisions of PPA clearly stipulated that the tariff as decided/notified and as amended /modified/clarified by this Commission from time to time will be applicable to the Petitioner. The applicable tariff at the time of signing of PPA was mentioned as the tariff determined by this Commission vide order dated 27.05.2011



and clarification order dated 17.08.2011 subject to rates as decided/notified and as amended/modified /clarified by the Commission from time to time.

d) That the power plant of the Petitioner was commissioned on 03.05.2013. Pursuant to commissioning of the Plant, the Commission amended the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010. The 4<sup>th</sup> Amendment of said Regulations were notified in the Haryana Government Gazette (Extraordinary) dated 12.08.2015. After notifying the said 4<sup>th</sup> amendment, the Commission passed consequential Order dated 09.10.2015 arising from said amendment for the projects commissioned/ to be commissioned in FY 2013-14, FY 2014-15 and FY 2015-16. The Commission, in the Order dated 09.10.2015, listed out salient features of the 4<sup>th</sup> Amendment having impact on the tariff for the renewable energy power projects commissioned in the FY 2013-14.

e) That after passing of Order dated 09.10.2015, the Petitioner continued to claim tariff as per the terms and conditions of the said Order. The Project was commissioned on 03.05.2013 (CoD) and tariff thereafter had been paid in terms of order passed by this Commission from time to time. The Petitioner up till now had been claiming tariff as per order dated 09.10.2015 despite specific mention of the then applicable tariff in the PPA, which is as per the order dated 27.05.2011 read with clarification thereof. The operative part of the Order dated 09.10.2015 provided as under –

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

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

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

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

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

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

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

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

*The fuel price Indexation Mechanism given in Regulation 44 shall not apply for Biomass based projects.”* (Emphasis Supplied)

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

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

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

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

- l) That the provisions of the PPA, interpreted under the legal framework of the Electricity Act, 2003 and the rules/regulations framed thereunder restrict compensation for what is unreasonable, imprudent or beyond the scope of the PPA executed between the parties. It is relevant here to mention that the generation of electricity is a regulated business, where norms of operation as ceiling norms are set up to preclude the generating companies to claim unreasonable tariff against the interest of the consumers of the State. The key therefore, is to balance the interest of the generators and the consumers. In that view, any variable cost above the normative value could not be allowed and the normative fuel cost assessed by this Commission for the Control period FY 2017-18 to FY 2020-21 had to be applied for revision of tariff of the Petitioner.
- m) That the Commission may kindly appreciate that in the RE Regulations, 2017, the fuel cost has been fixed after considering the data indicating availability and current prices for the biomass fuel in the State of Haryana. Thus, the revision in the tariff of the Petitioner is essential to ensure that no unjust enrichment is made by them at the cost of the consumers of the State. HERC in its RE Regulations has clearly stipulated that the tariff for projects based on renewable energy technology having fuel cost component like biomass power projects and non-fossil fuel-based co-generation, shall be single part tariff however with two components i.e. fixed cost component and fuel cost component. Even the CERC had time and again emphasised on determination on two-part tariff, i.e. fixed cost and the fuel cost component. The objective behind the same is to not let the volatility

of the fuel market affect the generator or the consumer adversely. The said segregation is pertinent to ensure that the actual fuel cost determined is passed on in tariff. Regulation 10 of Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 ('CERC RE Regulations 2020' in short) provides as under :-

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

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

- n) That it is imperative to state here that after the commissioning of the Petitioner's power plant on 03.05.2013, the tariff rate applicable to the Petitioner was as per the Generic tariff order dated 20.11.2013, wherein the fuel cost for FY 2013-14 was pegged at Rs.2789/- per MT. Thereafter, the Generic tariff order dated 13.05.2014 was passed by this Commission, wherein the fuel cost for the FY 2014-15 was pegged at Rs. 3055/- per MT. The fuel cost was kept constant in order passed by this Commission dated 09.10.2015, meaning thereby the fuel cost for FY 2015-16 was considered at Rs. 3208/- per MT after applying 5% escalation to the fuel cost assessed for base year, i.e. FY 2014-15. The Petitioner continued to take benefit of the revised variable cost of tariff as long as the fuel cost was varied to their advantage. Nonetheless, the other operative parameters for biomass-based projects were revised/amended by the Commission to the advantage of the Petitioner and the tariff for biomass based (water cooled) projects for FY 2013-14 was revised from Rs.5.98/- per unit to Rs. 7.34/- per unit.

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

- o) That it has been upheld in a catena of cases by the Hon'ble APTEL that the variable charge component of tariff may be determined periodically on the basis of the prevailing fuel price which may be fixed after carrying out a state specific study. Thus, the Order of

the Commission dated 09.10.2015 is just and appropriate in the larger interest of the State and therefore, the recovery claimed by the Answering Respondent is perfectly legal and valid.

- p) That the Petitioner was under an obligation to raise correct invoices relating to the applicable tariff. The Respondent under the bonafide impression that correct bills are being raised continued to make payments to the Petitioner. However, as and when the default came to the knowledge of the Respondent, immediate steps were taken to adjust/ deduct the amount that was illegally claimed by the Petitioner. Rest of the contents of the para are wrong and denied. It is vehemently denied that there is any admission of HPPC that the dispute raised by the Respondent with respect to the tariff change is not applicable or the dispute stands resolved. **As detailed hereinabove, the amount was returned so as to give an opportunity of hearing to the Petitioner prior to the deduction of any amount due.**
- q) That it came to the notice of the Answering Respondent that the invoices sent by the Petitioner were inflated, in as much as the applicable tariff as summarized above, had not been taken into consideration for obvious reasons. The payments against the energy supplied to the Answering Respondent were therefore, found to have been made in excess owing to the default of the Petitioner. Accordingly, the Answering Respondent rightly and justly, in consonance with the Order of this Commission issued notice dated 06.07.2020 for recovery of excess tariff paid to the Petitioner along with normative interest @ 1.25% per month. The Petitioner was therefore, requested to deposit a total amount of Rs 12,64,45,783/- (i.e. Rs. 10,34,00,210/- as principal amount and Rs 2,30,45,573/- as interest ) within a period of 15 days of the issue of the notice. However, the Petitioner, vide their reply dated 21.07.2020, despite being in default refused to reimburse the Respondent for the excess payment made to them on frivolous grounds. The Answering Respondent vide their letter dated 11.08.2020 refuted the frivolous and illegal contentions raised by the Petitioner and reiterated request for deposit of recoverable amount as intimated in notice dated 06.07.2020. The Petitioner, however, continued to indulge in writing frivolous letters to refute their liability. The Respondent having left with no choice, owing to wrongful refusal of the Petitioner to honour their liability, was forced to adjust the recoverable amount for the subsequent bills of the Petitioner. The amount along with interest (Rs. 137598089/-) has been adjusted from the invoices raised the Petitioner, for the electricity supplied to Discoms/HPPC, for the month of June, July and August, 2020.
- r) That from the foregoing, it is evident that the demand of the Respondent for recovery of excess amount paid to them without considering revised variable cost component of the tariff w.e.f. FY 2017-18 was just, legal and in consonance with the Order of this Commission dated 09.10.2015 read with conditions of the PPA and the Regulations

notified from time to time. Thus, the prayer of the Petitioner seeking declaration of the notices of the Respondent dated 06.07.2020, 11.08.2020 and email dated 07.09.2020 as illegal, unwarranted and unlawful is liable to be rejected.

**INTEREST PAYMENT CHARGED BY THE RESPONDENT ON EXCESS PAYMENT MADE TO THE PETITIONER TOWARDS MAT/ CORPORATE TAX –**

- s) That the claim of the Petitioner is limited to the 'interest' component and the principal amount has been admitted. In this regard, it is submitted that the payment of interest is normal accretion to the capital and therefore the same is a matter of right for the Respondent. Had the PPA not contained any provision with respect to the payment of interest, the same was still payable to the Respondent herein. Reliance in this regard is placed on the judgment of the Hon'ble APTEL in **PTC India Limited v. Gujrat Electricity Regulatory in Appeal Nos. 47 and 62 of 2013 (decision dated 30.06.2016)** - wherein the Hon'ble Tribunal was pleased to hold as under:-

*"58. We agree that there is no provision in PPA with regard to payment of delayed payment charges on 'take or pay' liability. Gujarat Urja has sought interest on the principles of restitution and equity. Let us examine the rulings referred to by the learned counsel for Gujarat Urja.*

*59. In South Eastern Coalfields Ltd. vs. State of M.P. (2003) 8 SCC 648, the Hon'ble Supreme Court has held as under:*

*21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (see Chitty on Contracts, 1999 Edn., Vol. II, Para 38-248 at p. 712). Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.*

*22..... The basis proposition of law that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called viz. interest, compensation or damages and this proposition is unmistakable and valid; the efficacy and binding nature of such law cannot be either diminished or whittled down.....*

*24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest.....*

60. In *Sovintorg (India) Ltd. vs. State Bank of India*: (1999) 6 SCC 406, the Hon'ble Supreme Court has held as under:

6 . ..... We, however, find that the general provision of Section 34 being based upon justice, equity and good conscience would authorize the Redressal Forums and Commissions to also grant interest appropriately under the circumstances of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases. The interest can also be awarded on equitable grounds as was held by this Court in *Satinder Singh v. Umrao Singh* (AIR 1961 SC 908: (1961) 3 SCR 676).....

..... The power to award interest on equitable grounds or under any other provisions of the law is expressly saved by the proviso to Section 1. This question was considered by the Privy Council in *Bengal Nagpur Rly. Co. Ltd. vs. Ruttanji Ramji* (1937-38) 65 IA 66: AIR 1938 PC 67]. Referring to the proviso to Section 1 of the Act the Privy Council observed 'this proviso applies to cases in which the court of equity exercises its jurisdiction to allow interest'. .....

61. In *Mahanadi Multipurpose Industries vs. State of Orissa & Anr.*: AIR 2002 Orissa, 150, it has been held as under:

11. ...., we find that the trial Court can award interest even in the absence of a contract, if the same is equitable..... In such a situation, when the trial Court has awarded interest at the rate of 6% per annum in its discretion, it cannot be said that the Court has acted illegally or has exercised its discretion in an arbitrary or unreasonable manner.”

- t) That, in view of the above, to implement in practical terms the concepts of Time Value of Money, restitution and unjust enrichment of the Petitioner, the interest so deducted was just and fair. It has been time and again held in a catena of judgments that the interest has to be calculated on compound basis and not simple, for the latter leaves much uncalled for benefits in the hands of the wrongdoer. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in the case of **Enviro Legal Action v. UOI & Ors. (2011) 8 SCC 161**. Further reliance is placed on **Alok Shanker Pandey v. Union of India (2007) 3 SCC 545**, wherein the Hon'ble Supreme Court of India was pleased to hold as under:

“7. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead

*of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B.”*

Thus, the deduction of interest was just, fair and legal in the eyes of law.

### **Proceedings in the Case**

5. The case was first heard on 24.11.2020. The Commission vide its Interim Order of even date 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 06.12.2020, submitting as under:-

**Claim 1** - *Illegal and unilateral change in applicable tariff in the case of the Petitioner by HPPC, and unlawful adjustment/ deduction of the alleged differential tariff from the power sale invoice of the Petitioner for the month of June, 2020:-*

- a) HPPC has wrongly applied the HERC RE Regulations, 2017 for unilaterally revising the Fuel Cost payable to the Petitioner, which are inapplicable to the Petitioner.
- b) HERC RE Regulations, 2017 are applicable only to RE power plants with entirely new plant and machinery, which are commissioned / to be commissioned “**during the Control Period**”. The “**Control Period**” under the said regulations is from the FY 2017-18 to the FY 2020-21. Hence, those RE power plants, which are newly set up with entirely new plant and machinery during Control Period of **FY 2017-18 to FY 2020-21**, alone are governed by the HERC RE Regulations, 2017.
- c) The Petitioner’s plant was commissioned on 03.05.2013 i.e. in FY 2013-14 and is governed by the HERC (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate Regulation, 2010 (4th Amendment, 2015) (“**RE 4th Amendment Regulations, 2014**”) and the consequential Tariff Order dated 09.10.2015 passed under the said regulations. The tariff of the Petitioner, including biomass Fuel Cost (variable cost), has been determined under the Tariff Order dated 09.10.2015 for the useful life of the project i.e. 20 years (the same Tariff Period prescribed under the PPA of the Petitioner).
- d) There has been no re-determination or revision of tariff by this Commission to the tariff payable to the Petitioner as per the Tariff Order dated 09.10.2015 till date. The Suo-motu Order dated 20.12.2019 in Case No. HERC/PRO – 53 of 2019 issued by this Commission under the HERC RE Regulations, 2017 has determined the “*levelized tariff for Waste to Energy (WtE) projects as well as other RE projects viz. Biomass, Biogas & Bagasse etc.*”



*commissioned during the FY 2019-20 & FY 2020-21..”. Petitioner has been commissioned during FY 2013-14 and the said order is inapplicable in its case.*

- e) HPPC has failed to point-out a single order of the Commission by which the tariff of the Petitioner (as determined for its entire useful life as per Tariff Order dated 09.10.2015) has been revised or modified by this Commission. It has gone to the extent of recovering an alleged amount of Rs.15.40 Cr. with alleged interest, on 05.11.2020, when the petition was already pending before this Commission, by adjusting it fully against the power sale invoices of the Petitioner for the months of June, 2020 to August, 2020.
- f) Despite there being a specific challenge to the power of the HPPC to revise the tariff unilaterally and without any approval or order from the Commission, the HPPC has singularly failed to plead or prove any order or approval from this Commission to revise the tariff. HPPC’s only reliance is on the HERC RE 2017 Regulations and that too on their own erroneous interpretation of the same. Further, HPPC has not been able to point out a single clause in the PPA or any provision of law which would permit such unilateral deductions to be made. In point of fact, Section 171 of the Contract Act would specifically bar any such deductions by HPPC.
- g) It may also be noted that the Tariff Order dated 09.10.2015 is having force of law under the Electricity Act, 2003. It has neither been challenged, nor set-aside and continues to apply in the case of the Petitioner. At this juncture, it is important to refer to the judgment of the Hon’ble Supreme Court in the case of **BSES v. Tata Power Co. Ltd. (2004) 1 SCC 195** wherein following pertinent observations were made: -

*“16. The word “tariff” has not been defined in the Act. “Tariff” is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. “Utility” has been defined in Section 2(1) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for the intra-State transmission of electricity and tariff for supply of electricity — wholesale, bulk or retail — in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that the terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (a) to (g) thereof. **The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The***

**provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff.**

- h) In view of the above, it is clear that this Commission alone has the power to determine the tariff, including the tariff to be paid by the distribution company to the generators. The distribution company, or in this case – HPPC, has no authority whatsoever to determine or revise the applicable tariff to be paid to the Petitioner, much less re-determine the tariff of the Petitioner with retrospective effect and make illegal adjustments and deductions, contrary to the terms of the PPA.
- i) The above illegal, arbitrary acts and blatant abuse of its authority by HPPC has compelled the Petitioner to approach this Hon'ble Commission.

**Claim 2 -** *Illegal interest charged by HPPC on excess payment on reimbursement of invoices towards MAT/ Corporate Tax and unlawful adjustment of the alleged interest amount from the power sale invoice of the Petitioner for the month of April, 2020: -*

- j) It is admitted position that on reconciliation of accounts, the matter was discussed and Petitioner immediately paid back the amount of excess payment on reimbursement of invoices towards MAT/ Corporate Tax i.e. Rs. 1,12,38,895/- which is evident from the credit note of Rs. 2,55,93,343/- (Rs. 1,12,38,895/- towards refund of excess amount & Rs. 1,43,54,448/- towards excess unpaid amount) already provided to HPPC on 03.04.2020 vide credit note no. SWIVPL/HPPC/2021/CN01. This shows the genuine measures taken by the Petitioner.
  - k) As per HERC Order HERC/PRO-21 of 2020 dated 17.06.2020, the working capital interest rate allowed is 8.65% per annum. Even though the PPA, orders and regulations of the Commission do not provide for payment of interest by the solar plant to HPPC, if at all the Petitioner is to be held liable to pay interest, it should only be @ 8.65% per annum which is the working capital interest rate allowed by this Commission.
  - l) HPPC has illegally, unilaterally and without following the provisions of the PPA, fully adjusted the entire alleged interest amount on 05.11.2020 from the power sale invoices of the Petitioner.
7. The case was heard on 08.12.2020, through Video conferencing, as scheduled, in view of COVID-19 pandemic. The Commission vide its ibid dated Interim Order directed the parties to file summary of their submissions made during the hearing within 2 days.
8. In response to the Interim Order of the Commission, the Petitioner as well as the Respondent filed their written submissions mainly reiterating the facts already submitted, which have not been reproduced here for the sake of brevity.

## Commission's Analysis and Order

9. The Commission, after hearing the rival contentions and documents placed on record by the parties, has framed the following issues for consideration and Order:-

- a) Whether HPPC was right in revising the tariff on its own and making the same applicable to the Petitioner?
- b) Whether HPPC is right in issuing demand notice dated 06.07.2020 and claiming recovery w.r.t. Section 62(6) of the Electricity Act, 2003?
- c) What tariff should be charged for the energy supplied by the Petitioner?
- d) Whether HPPC is right in levying interest amounting to Rs. 8,78,791/- (Rupees Eight Lacs Seventy-Eight Thousand Seven Hundred & Ninety-One) on account of excess amount paid by HPPC to the Petitioner as reimbursement of MAT/Corporate tax invoices, as per 3.6(b) of the PPA?

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

### **Issue (a)**

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

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

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

### **Sub clause 39 of Article 1**

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

### **Sub Clause 2.1 of Article-2**

*“2.1.1 The HPPC shall purchase and accept entire energy generated by the Company’s facility (new plant and Machinery) up to the contracted capacity of 9.9 MW delivered at the interconnection point pursuant to the terms and Conditions of this agreement at the rate decided/notified by the commission and amended from time to time. The fuel cost (biomass mix) decided by the Commission shall be subject to a cap of twice (2 times) the fuel cost (Rs/kWh) approved by the Commission for thermal power generation of HPGCL in Haryana. Beyond which the HPPC/Discoms shall be under no obligation to purchase power from the company. In such an event the Company shall have the right to sell the entire power generated by them to a third-party including offering power to the Discoms at the average pool power cost (APPC) as determined by the Commission, selling power through the power exchange etc.*

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

*That a conjoint reading of above-stated provisions of PPA makes it amply clear that the applicable tariff, as per provisions of PPA, shall be the tariff notified/decided/determined by HERC from time to time. The project was commissioned on 03.05.2013 (CoD) and tariff thereafter is being paid as determined by HERC vide Order dated 09.10.2015 despite specific mention of the then applicable tariff in the PPA, which is as per the HERC order dated 27.05.2011 read with clarification thereof.*

*The HERC subsequently on 24.07.2018 notified Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 (RE Regulations, 2017) and inter alia decided the operational and financial parameters for biomass-based power projects besides tariff for biomass-based power plants commissioned during FY 2017-18. The HERC vide its ibid Regulations has*

pegged the fuel cost of biomass at Rs. 3270/MT for FY 2017-18 with an escalation of 5% each year.

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

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

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

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

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

**‘2. Definitions:-**

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

.....

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

.....

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

*.....”*

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

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

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

The Commission has carefully examined Clause 39 (Article 1) & Clause 2.1 (Article-2) of the PPA dated 22.06.2012, on the basis of which HPPC has issued demand notice to the Petitioner. From examination of the PPA, it is apparent that it was not open for HPPC to determine applicable tariff to be payable to the Petitioner for energy supplied, on its own. Rather, the applicable tariff rates should be *“the rates as decided/notified and amended/modified/clarified by HERC from time to time.....”*

Contrary to the averments of the HPPC that the tariff applied in the demand notice dated 06.07.2020, is as per operational and financial parameters for biomass-based power projects, determined by the Commission in its RE Regulations, 2017 notified on 24.07.2018, the Commission observes that it was not open for HPPC to redetermine the tariff on its own. The operation and financial parameters determined in HERC RE Regulations, 2017 were applicable for the project commissioned/ to be commissioned during the control period. The project of the petitioner was commissioned on 03.05.2013 and HERC RE Regulations, 2017 specifies that fuel cost determined in these Regulations shall be applicable to the existing projects, only, when two-part tariff has been decided by the Commission, which was not determined by the Commission in its Order dated 30.06.2018, wherein levelized tariff for biomass-based projects was determined. The Commission has examined the order of Hon’ble Appellate Tribunal for Electricity dated 23.03.2015 (Appeal No. 3/2013) cited by HPPC, considered by the Commission while issuing the elaborate Order dated 04.08.2015, consequent to which HERC RE Regulations, 2010 (4<sup>th</sup> Amendment) Regulations, 2015, was notified on 12.08.2015. The

Commission in its *ibid* Order, while amending Regulation clause 43 of the *ibid* Regulations, has specified as under:-

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

Thus, the Commission in its *ibid* Regulations, has specifically mentioned that the fuel cost determined for current year, shall be made applicable even to the projects commissioned in the FY 2013-14, prospectively i.e. from the date of notification of these revised Regulations. However, the similar clause was not inserted in HERC RE Regulations, 2017. It is added that the tariff determined by the Commission and payable by the HPPC/ DISCOMs, so far, under RE Regulations is a single part tariff despite the fact that the tariff calculation sheet provides fixed cost and fuel cost components separately. One should not lose sight of the fact that some element of fixed cost i.e. receivables and interest on working capital thereto is dependent on fuel cost as well. Hence, segregating the same, as done by HPPC, is flawed. The case laws cited by HPPC in support of doctrine of “Promissory Estoppel” are also not applicable in the present context. The tariff rate made applicable by HPPC, suo-moto, by issuing demand notice dated 06.07.2020 was not determined by the Commission, but was arrived by HPPC on its own, which is against the relevant clauses of the PPA dated 22.06.2012 i.e. tariff rate should have been decided/notified by the Commission. We may also gainfully extract from the judgement of the Apex Court cited in the matter viz. BSES v. Tata Power Co. Ltd. (2004) 1 SCC 195 i.e. the Utilities have to first approach the Commission for approval of the tariff and it is not permissible for the Licensee / Utility to charge a different tariff which is the present case. It is further observed that in case the Utility / HPPC had some doubts regarding the applicable fuel cost they could have sought clarification from the Commission instead of proceeding on its own.

**In view of the above discussions and on consideration of the material on record and the applicable regulatory and legal provisions, the inevitable conclusion which is liable to be drawn against the HPPC is that it acted beyond the jurisdiction and powers conferred on it by the governing regulations and the PPA. Having usurped the jurisdiction vested in this**

Commission, the HPPC went on to issue the impugned orders whereby the demand has been raised against the petitioner. Owing to the inherent illegality in the exercise of power which forms the cradle of the impugned demand notices, the tariff determined by the HPPC is liable to be declared as null and void ab initio.

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

**Issue (b)**

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

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

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

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, it has been submitted that Section 171 in The Indian Contract Act, 1872, provides as under:-

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

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

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

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

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

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

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

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

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

**7. Petition and proceedings for determination of tariff. –**

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

**8. Tariff Structure. –**

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

Provided that for renewable energy technologies having fuel cost component, like biomass power projects and non-fossil fuel-based cogeneration, single part tariff with two components, fixed cost component and fuel cost component, shall be determined. The fuel cost component may be subjected to escalation for computing levelled generic tariff for entire useful life of the project as provided in these Regulations.

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

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

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

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

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

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

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

**Issue (c):**

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

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

The Order of the Commission dated 30.06.2018 read with the HERC RE Regulations, 2017, notified on 24.07.2018, was made applicable for the projects commissioned/ to be commissioned during the control period i.e. from the FY 2017-18 to FY 2020-21. Hence, the same cannot be not be made applicable to the Petitioner. It needs to be noted that

'Fuel Cost' cannot be considered in isolation, unless specifically ordered by the Commission, as certain components of it e.g. Working Capital and interest thereto is also dependent on computation of Fixed Cost.

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

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

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

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

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

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

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

Hence, even if the fuel cost is to be revised as per the latest Regulations under consideration, the same can be done so prospectively to maintain equity i.e. when the fuel cost was revised upwards the benefit was extended to the Petitioner herein prospectively. Hence, in case the fuel cost is revised downward the same also has to be made applicable prospectively i.e. from

the date of revision of RE Regulations and tariff (fuel cost) determination thereto. Needless to add, that a Regulation can override any PPA or contract for that matter.

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

**Issue (d)**

**Whether HPPC is right in levying interest @ 1.25% per month, amounting to Rs. 8,78,791/- (Rupees Eight Lacs Seventy-Eight Thousand Seven Hundred & Ninety-One) on account of excess amount paid by HPPC to the Petitioner as reimbursement of MAT/Corporate tax invoices, as per 3.6(b) of the PPA?**

The Commission has examined the relevant clause 3.6 (b) of the PPA dated 22.06.2012, on the basis of which HPPC has charged interest on excess amount paid to the Petitioner, as reproduced hereunder:-

*"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."*

The above-mentioned clause of the PPA, provides rebate/surcharge mechanism to ensure timely payment of bills raised by the Generator.

The Commission has observed that Regulation clause no. 15 (b) of HERC RE Regulation, 2010 (4th Amendment, 2014) notified on 12.08.2015, provides as under: -

*"(b) Applicable MAT/Corporate Tax shall be separately invoiced as per the applicable tax rate as declared by the Income Tax Department. The Generator shall raise the bill for*

*reimbursement of MAT/Corporate Tax applicable on Return on Equity in 12 equal installments which shall be payable by HPPC.”*

The Commission has examined the documents on record and observed that MAT/Corporate Tax was reimbursed in excess to the Generator for the FY 2018-19 & FY 2019-20. The amount reimbursed, actual tax amount reimbursable, excess amount so reimbursed and interest levied by HPPC on such excess amount is tabulated below:-

FY	Tax amount reimbursed (Rs.)	Actual tax to be reimbursed (Rs.)	Excess amount reimbursed (Rs.)	Interest levied on excess amount reimbursed (Rs.)
2018-19	1,49,35,315	45,85,710	1,03,49,605	8,59,431
2019-20	54,75,000	45,85,710	8,89,290	19,360
Total	2,04,10,315	91,71,420	1,12,38,895	8,78,791

The Petitioner has provided credit note no. SWIVPL/HPPC/20-21/CN01 dated 03.04.2020 for Rs. 2,55,93,343/-, which includes the excess amount reimbursed, calculated above (Rs. 1,12,38,895/- refund of excess amount & Rs. 1,43,54,448/- excess unpaid amount) and intimated the same to HPPC vide letter dated 04.06.2020.

HPPC has calculated interest amounting to Rs. 8,78,791/- on such excess payment, citing clause 3.6(b) of the PPA and intimated the same to the Petitioner, vide email dated 23.06.2020. The Petitioner issued credit note no. SWIVPL/HPPC/20-21/CN02 dated 24.06.2020, for the said amount, under protest, which was later cancelled by the Petitioner vide letter dated 29.06.2020, on the ground that clause 3.6(b) of the PPA does not provides for levy of such interest on excess amount of tax reimbursed to it and if at all the same is applicable, then the rate of interest should be 8.65% i.e. the working capital interest allowed in the Order dated 17.06.2020 (HERC/PRO-21 of 2020). However, HPPC recovered the same from the power supply invoice for the month of April, 2020, as intimated vide e-mail dated 02.07.2020.

HPPC has argued that interest is the matter of right in view of the concepts of Time Value of Money, restitution and unjust enrichment of the Petitioner. The same is recoverable even in the absence of any such clause in the PPA. Reliance is placed on the judgment of the Hon'ble APTEL in PTC India Limited v. Gujrat Electricity Regulatory in Appeal Nos. 47 and 62 of 2013 (decision dated 30.06.2016) wherein the Hon'ble Tribunal has decided as under:

*"58. We agree that there is no provision in PPA with regard to payment of delayed payment charges on 'take or pay' liability. Gujarat Urja has sought interest on the principles of restitution and equity. Let us examine the rulings referred to by the learned counsel for Gujarat Urja.*

*59. In South Eastern Coalfields Ltd. vs. State of M.P. (2003) 8 SCC 648, the Hon'ble Supreme Court has held as under:*

*21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (see Chitty on Contracts, 1999 Edn., Vol. II, Para 38-248 at p. 712). Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.*

*22..... The basis proposition of law that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called viz. interest, compensation or damages and this proposition is unmistakable and valid; the efficacy and binding nature of such law cannot be either diminished or whittled down.....*

*24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest.....*

*60. In Sovintorg (India) Ltd. vs. State Bank of India: (1999) 6 SCC 406, the Hon'ble Supreme Court has held as under:*

*6 . ..... We, however, find that the general provision of Section 34 being based upon justice, equity and good conscience would authorize the Redressal Forums and Commissions to also grant interest appropriately under the circumstances of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases. The interest can also be awarded on equitable grounds as was held by this Court in Satinder Singh v. Umrao Singh (AIR 1961 SC 908: (1961) 3 SCR 676).....*

*..... The power to award interest on equitable grounds or under any other provisions of the law is expressly saved by the proviso to Section 1. This question was considered by the Privy Council in Bengal Nagpur Rly. Co. Ltd. vs. Ruttanji Ramji (1937-38) 65 IA 66: AIR 1938 PC 67]. Referring to the proviso to Section 1*

*of the Act the Privy Council observed 'this proviso applies to cases in which the court of equity exercises its jurisdiction to allow interest'. .....*

61. *In Mahanadi Multipurpose Industries vs. State of Orissa & Anr.: AIR 2002 Orissa, 150, it has been held as under:*

*11. ...., we find that the trial Court can award interest even in the absence of a contract, if the same is equitable..... In such a situation, when the trial Court has awarded interest at the rate of 6% per annum in its discretion, it cannot be said that the Court has acted illegally or has exercised its discretion in an arbitrary or unreasonable manner."*

HPPC has further advanced the arguments by submitted that the interest has to be calculated on compound basis and not simple, for the latter leaves much uncalled-for benefits in the hands of the wrongdoer. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in the case of *Enviro Legal Action v. UOI & Ors. (2011) 8 SCC 161*. Further reliance is placed on *Alok Shanker Pandey v. Union of India (2007) 3 SCC 545*, wherein it was decided as under:-

*"7. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example, if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B."*

The Commission has examined the facts and circumstances of the case together with the judgements cited by the Petitioner. The Commission observes that although express provision in the PPA does not exist for levy of interest on excess payments, but, principle of natural justice demands that HPPC should be restituted to the position at which it would have been in case excess payment was not reimbursed. The interest is not in the nature of penalty but it is the carrying cost of money utilized by the generator by claiming excess amount of tax for reimbursement. As regards the submission of the Petitioner that the rate of interest should be as allowed in the Order dated 17.06.2020 (HERC/PRO-21 of 2020) i.e. 8.65% per annum, it is observed that the same was applicable only for the period from March, 2020 to June, 2020 that too in view of COVID-19 pandemic, whereas



the Petitioner has been utilizing the excess money so reimbursed by HPPC, since the FY 2018-19.

**In view of the above, the Commission answers the issue framed above in affirmative i.e. HPPC was right in levying interest @ 1.25% per month, amounting to Rs. 8,78,791/- (Rupees Eight Lacs Seventy-Eight Thousand Seven Hundred & Ninety-One) on account of excess amount paid by HPPC to the Petitioner towards reimbursement of MAT / Corporate Tax.**

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

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

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

Date: 27.01.2021  
Place: Panchkula

(Naresh Sardana)  
Member

(Pravindra Singh Chauhan)  
Member