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

Case No. HERC/RA-4 of 2021

Date of Hearing	**:**	**30.06.2021**
Date of Order	**:**	**05.07.2021**

IN THE MATTER OF:

Petition seeking Review of the order dated 18.01.2021 passed by the Commission in Petition No. HERC/PRO-56 of 2020 in accordance with powers vested in the Commission under Section 94 (1)(f) of the Electricity Act, 2003 read with Regulation 57(1) of the HERC/47/2019 Conduct of Business Regulations, as amended till date.

Review Petitioner
M/s. Oasis Commercial Pvt. Ltd.

Respondent
Haryana Power Purchase Centre, Panchkula (HPPC)

Present On behalf of the Petitioner, through Video Conferencing
Shri R.K. Jain

Present On behalf of the Respondent, through Video Conferencing
Smt. Sonia Madan, Advocate

Quorum

Shri R.K. Pachnanda	**Chairman**
Shri Pravindra Singh Chauhan	**Member**
Shri Naresh Sardana	**Member**

ORDER

1. The Petition has been filed by M/s. Oasis Commercial Pvt. Ltd., seeking review of the Commission's Order dated 18.01.2021 in case no. HERC/PRO-56 of 2020, under Section 94 (1) (f) of the Electricity Act, 2003 read with regulation 57 (1) of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019.

2. The case was taken up for hearing by the Commission on 30.06.2021, through Video Conferencing, in view of COVID-19 pandemic.

3. Shri R.K. Jain, appearing on behalf of the Petitioner, vehemently argued that this Commission, having concluded that HPPC had no right to decide the tariff on its own and making the same applicable to the Petitioner (issue listed at (c) of the impugned Order); as a corollary the conclusion of the Commission listed at (d)

was not correct. He averred that once the Respondent had no right to change the tariff, then the very origin of the demand notice was wrong and hence the action of the Respondent deserved to be set aside. In similar situations, the Commission has set aside the demands raised by HPPC in the case of M/s Star Wire (India) in Petition No. HERC/PRO-51/2020 dated 27.01.2021 and for M/s Gemco Energy in Petition No. HERC/PRO-50 of 2020 dated 27.01.2021, but did not set aside a similar demand notice in the case of the Petitioner herein. That there being a clear similarity in the PPAs entered into with different RE Generators, it would be totally unjust to apply generic tariff for all other similarly placed co-terminus generators and ask the petitioner to go for project specific tariff. There was no mention in any of the above PPAs signed in the year 2012 of the project specific tariffs to be paid. At that time all projects were given the generic tariff. Thus, there exists an error apparent on face of record in the impugned Order dated 18.01.2021. Hence the present review petition is maintainable. In the hearing, the Ld. Counsel argued at length that the HERC RE Regulations, 2010 had no provision for determination of project specific tariff for biomass based co-generation project like that of the petitioner. Consequently, the generic tariff, suo-moto, determined by the Commission is applicable. As a corollary, the Commission's directive, in the impugned Order, is an error apparent and hence needs to be reviewed. The Ld. Counsel Sh. Jain further submitted that the answering Respondent has not complied with the Commission's Order to the extent that they are not making any payments whatsoever for the power being supplied by the Petitioner herein.

4. Per-contra, Smt. Sonia Madan, Ld. Advocate, appearing for HPPC, argued that there are no errors apparent on the face of the record in the impugned Order dated 18.01.2021, warranting the Commission to exercise its Review Jurisdiction, as provided in catena of judgements and the Code of Civil Procedure, 1908. The impugned Order dated 18.01.2021 is a speaking Order with cogent reasons provided with respect to all the issues raised by the Review Applicant. The Ld. Advocate brought to the notice of the Commission, the contradiction in the stand taken by the Petitioner in the original petition and now in the Review Petition under consideration of the Commission. Additionally, the Ld. Advocate brought to the notice of the Commission that the contention of the Petitioner that the HERC RE Regulations, 2010 had no provision enabling the Commission to determine project specific tariff for biomass based co-generation projects, is not true; regulation 6 (1) (d) regarding project specific tariff provides that the Commission

can determine project specific tariff for 'any other new renewable energy technologies approved by MNRE'. Further, regarding non-payment of dues for energy that is being supplied by the Petitioner, the Ld. Advocate submitted that if payments are made, the Respondents would have no recourse left for recovering the differential amount pursuant to tariff determination by the Commission.

5. Upon hearing both the parties at some length, the Commission considered it appropriate to examine the issue of maintainability of the present Review Petition, before deliberating on the merits of the case. Accordingly, the Commission has perused the scope of review jurisdiction, as per the provision of Regulation 57 & 58 of the HERC (Conduct of Business) Regulations, 2019. The relevant Regulation is extracted below:-

*"**REVIEW OF THE DECISIONS, DIRECTIONS, AND ORDERS:***

57(1) All relevant provisions relating to review of the decisions, directions and orders as provided in the Code of Civil Procedure 1908, as amended from time to time, shall apply mutatis mutandi for review of the decisions, directions and order of the Commission.
Provided that the Commission may on the application of any party or person concerned, filed within a period of 45 days of the receipt of such decision, directions or order, review such decision, directions or orders and pass such appropriate orders as the Commission may deem fit.
(2) No application for review shall be considered unless an undertaking has been given by the applicant that he has not preferred appeal against the decision, direction, or order, sought to be reviewed, in any Court of Law.
(3) No application for review shall be admitted/ considered unless an undertaking has been given by the applicant that in case he files an appeal of the decision, direction or order of which review is pending adjudication, he shall immediately inform the Commission regarding the fact of filing the appeal.
58 The Commission may on its own motion or on the application of any party correct any clerical or arithmetical errors in any order passed by the Commission."

Additionally, the relevant clause of Order no. XLVII of Code of Civil Procedure 1908, has also been examined. The same is reproduced below:-

"1. Application for review of judgment-

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes.

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order

made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

[Explanation - The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]"

Further, the Commission has perused the judgment of Hon'ble Delhi High Court in Aizaz Alam Versus Union of India & Others (2006 (130) DLT 63: 2006(5) AD (Delhi) 297. The relevant extract from the aforesaid judgment is reproduced below:-

"We may also gainfully extract the following passage from the decision of the Supreme Court in Meera Bhanja V. Nirmala Kumari Choudhury, where the Court, while dealing with the scope of review, has observed:

The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. The review petition has to be entertained on the ground of error apparent on the face of record and not on any other ground (emphasis added). An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivable be two opinions. The limitation of powers of courts under Order 47 Rule 1, CPC is similar to the jurisdiction available to the High Court while seeking review of the Orders under Article 226.

Applying the above principles to the present review petition, there is no gainsaying that the review of the Order passed by this Court cannot be sought on the basis of what was never urged or argued before the Court (emphasis added). The review must remain confined to finding out whether there is any apparent error on the face of the record. As observed by the Supreme Court in Lily Thomas and Ors.V Union of India & Ors., the power of review can be used to

correct a mistake but not to substitute one view for another (emphasis added). That explains the reason why Krishna Iyer, j. described a prayer for review as "asking for the moon" M/s Northern India Caterers (India) Ltd. V. Lt. Governor of Delhi".

The Commission has also perused the following judgment of Hon'ble Supreme Court cited by the Respondent (HPPC):-

Kamlesh Verma Vs. Mayawati and others, (2013) 8 SCC 320

"17. In a review petition, it is not open to the Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto.

19. Review proceedings are not by way of an Appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in disguise that an alternative view is possible under the review jurisdiction.

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337: JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

6. The Regulations/Statutes and Case Laws encompass the scope of Review Jurisdiction in very narrow confines. The Commission, upon perusal of the records available and averments made by the parties, is of the considered view that all the issues raised by the Petitioner herein, were duly dealt with by the Commission while passing the impugned Order. Hence, it is not open for the Petitioner to re-agitate the issues without identifying errors apparent or bringing to the table new facts and figures that were not available at the time of passing of the impugned Order. A manifest illegality must be shown to exist or a patent error must be shown in an Order to review a judgement. No such grounds or patent error has been shown by the Review Petitioner. The cogent reasons for arriving at the conclusions were duly spelt out in the Order dated 18.01.2021, as is evident from the relevant part of the Commission's Order, reproduced hereunder:-

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

(page 34 of the impugned Order dated 18.01.2021)

"The arguments of the Ld. Counsel Sh. R.K. Jain, appearing for the petitioner herein, that a biomass based power project remains a biomass project whether it is co-generation or not, is far fetched as far as tariff determination is concerned, for simple reason that a part of the process heat (in form of steam) can be passed through turbine to generate electricity and the steam leaving the turbine can also be used for Industrial processes. This is not the case in a pure coal/gas/biomass based power plant as such. Even if thermal power plants with waste heat recovery mechanism, the same is used for generation of electricity alone and there is no extraction of steam for Industrial processes as in the case of co-generation.

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

(page 35 of the impugned Order dated 18.01.2021)

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

(page 36-37 of the impugned Order dated 18.01.2021)

7. Additionally, the Review Applicant has raised the issue that there was no mention in the PPAs signed in the year 2012 of the project specific tariffs to be paid and at that time all projects were given the generic tariff, suo-moto, determined by the

Commission. In this regard, the Commission has examined Clause 2.1 (Article-2) of the PPA dated 25.10.2012, reproduced hereunder:-

"2.1 Sale of Energy by Company:

2.1.1 The HPPC shall purchase and accept entire energy generated by the Company's facility (new Plant and Machinery) up to the contracted capacity (5 MW) delivered at the interconnection point pursuant to the terms and conditions of this agreement ***at the tariff decided/notified by the commission and amended from time to time****……." (Emphasis supplied)*

Further, the Commission, in its impugned Order dated 18.01.2021, has observed that the Commission has not determined tariff for non-bagasse based co-generation power projects commissioned during the FY 2014-15. The relevant part of the Order is reproduced hereunder:-

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

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

(page 31 of the impugned Order dated 18.01.2021)

Evidently, generic tariff, in respect of non-bagasse based co-generation power projects commissioned during the FY 2014-15, was not determined, by the Commission, therefore, in order to balance equities on both the sides, the feasible option available with the Commission now is to determine project specific tariff.

8. The Petitioner, in its 'rejoinder to the reply of HPPC' filed an affidavit dated 23.06.2021, and has referred to the Order of the Commission dated 20.10.2013 (sic), wherein the Commission addressed the submission of HPPC regarding applicability of tariff for the projects using in – house bagasse during the cane -

crushing season and for the remaining days (off season) the same would be using biomass purchased from outside.

The relevant extract of the Order dated 20.11.2013 (wrongly referred as 20.10.2013 by the Petitioner), is reproduced below:-

*"**10.4 Multiple Fuel Generation Projects:***

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

On the above submission the Commission is of the view that project cost of biomass based projects and co-generation projects are not significantly different. However, fuel cost, GCV, SHR is considerably different in two cases thus the tariff in the case of co-generation projects vis – a – vis biomass project is considerably lower. ***Consequently, subject to regulation 41 of RE Regulations, 2010, beyond the sugarcane crushing period, HPPC at their own discretion and in order to meet their RPO obligation, may procure power from co-generation projects at the tariff determined for biomass fuel based generation projects in Haryana.*** *In such cases the generating company shall certify and HPPC / Discoms shall verify that the generation is from biomass and not bagasse. However, it is made clear that procuring such power shall not be binding on HPPC / Discoms."* **(Emphasis supplied).**

Citing the extract supra, the Petitioner has argued that the Commission had permitted the Respondent to purchase power from cogeneration projects (using biomass fuel other than Bagasse) at the tariff determined for biomass fuel based generation projects.

The Commission has examined the submissions of the Petitioner and observes that para 10.4 of the ibid Order of the Commission dated 20.11.2013, has dealt with the submission of HPPC on bagasse based co-generation projects who intends to use biomass fuel during non crushing season. The fixed cost of bagasse based cogeneration projects are already covered in the tariff applicable for the crushing season and what remains to be addressed is the fuel cost during the off crushing season. During the off crushing season, *'bagasse based cogeneration projects*', proposed to use biomass as fuel. Accordingly, the direction

in the Order dated 20.11.2013 was made to procure power during the non crushing season at variable cost/fuel cost applicable for 'biomass fuel based generation projects in Haryana'.

Thus, the directions of the Commission to HPPC to '*procure power from co-generation projects at the tariff determined for biomass fuel based generation projects in Haryana'*, pertains to bagasse based co-generation projects during the off crushing season only and not applicable to entirely 'biomass based cogeneration projects throughout the year'.

9. Further, the claim of the Petitioner seeking parity with the Orders of the Commission dated 27.01.2021 passed in PRO-50 and 51 of 2020, is devoid of merit and is clearly distinguishable on facts and circumstances. It needs to be noted that those projects were biomass based power projects, for which the Commission had determined generic levelized tariff, whereas in the present case i.e. biomass based co-generation power project, generic levelized tariff was not determined by the Commission.

10. In view of the above discussions, the Commission is of the considered view that in the garb of invoking review jurisdiction of this Commission, the petitioner is seeking re-consideration of the issues involved in the present case. The order against which review has been sought by the petitioner has not been shown to suffer from any error apparent or patent irregularity. The bar against re-consideration of its own decision is a settled principle in adjudicatory jurisprudence. Once a case has been finally heard and adjudicated upon by the authority concerned, the resultant adjudication can be re-opened for consideration only in appellate jurisdiction.

11. It is amply clear that apart from re-examination of the issues in exercise of appellate jurisdiction, no review is permissible except in the limited cases where the matters requiring review fall within the statutorily prescribed contours of threefold grounds viz, firstly, previously unavailable or newly discovered fact, secondly, an error apparent on record, and thirdly, any other sufficient reason. A perusal of the record of the case un-ambiguously establishes the absence of any of the aforesaid threefold statutory pre-conditions. The petitioner has neither been able to establish the discovery of new fact that was not in the knowledge of the Commission nor any error apparent on the face of record. As far as the third statutory requirement for review is concerned, this Commission is conscious of the fact that the order, as impugned in this petition, contains adequate reasons to justify the conclusions arrived at therein, and there being sufficient reasons for the

Commission to pass the said order, no other sufficient cause for review is made out in the present petition.

12. Having observed as above, the Commission is constrained to add as under:-

i) In case the Petitioner herein is aggrieved by non-compliance of the Commission's Order by the answering Respondent, it could have taken recourse to the remedies provided under Section 142 and 146 of the Electricity Act, 2003, instead of preferring to file the present review petition.

ii) However, in case the dispute between the Petitioner and the answering Respondent is regarding the amount withheld pursuant to the demand notice, the Petitioner should have complied with the Order of the Commission and filed a tariff petition instead of contesting the said Order.

13. The petition is accordingly disposed of as devoid of merits and not maintainable.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 05.07.2021.

Date: 05.07.2021 (Naresh Sardana) (Pravindra Singh Chauhan) (R.K. Pachnanda)
Place: Panchkula Member Member Chairman