

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

Case No. HERC/RA – 16 of 2020

**Date of Hearing : 07.07.2021
Date of Order : 13.07.2021**

IN THE MATTER OF:

Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 57 of the HERC (Conduct of Business) Regulations 2019 for review of Order dated 07.09.2020 passed by the Hon'ble Commission in Case No. HERC/PRO-46 of 2019 relating to determination of tariff for 1.2 MW Biogas Project of M/s Mor Bio Energy Pvt. Ltd.

Review Petitioner (Respondent No. 1 in case no. HERC/PRO-46 of 2019)
Haryana Power Purchase Centre, Panchkula (HPPC)

Respondents

1. M/s. Mor Bio Energy Pvt. Ltd. (Petitioner in case no. HERC/PRO-46 of 2019)
2. Haryana Renewable Energy Development Agency (HAREDA)

Present On behalf of the Review Petitioner, through Video Conferencing

1. Shri Shubham Arya, Advocate

Present On behalf of the Respondent, through Video Conferencing

1. Shri Raj Kumar, Director

Quorum

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

**Chairman
Member
Member**

ORDER

1. The Petition has been filed by HPPC seeking review of the Commission's Order dated 07.09.2020 determining project specific tariff in case no. HERC/PRO - 46 of 2019, as per the normative values specified in the HERC RE Regulations, 2017 along with project specific parameters w.r.t. 'O&M expenses', 'Specific Fuel Consumption (SFC)' and 'Fuel Cost'.
2. The case was taken up for hearing by the Commission on 07.07.2021, through Video Conferencing, in view of COVID-19 pandemic.
3. Arguments were heard on the maintainability of the present Review Petition. The main argument advanced by the Review Petitioner is that there are errors apparent on the face of record in the impugned Order dated 07.09.2020. Hence, the present review petition is

maintainable. The errors apparent cited by Mr. Shubham Arya, Ld. Advocate appearing on behalf of the Review Petitioner is that the Commission has erred in allowing O&M expenses as per the norms specified 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 (hereinafter referred to as 'HERC RE Regulations, 2017'), whereas proviso to Regulation clause 6 of HERC RE Regulations, 2017 provides that *'the financial norms as specified under Chapter-3 of these Regulations, except for capital cost, shall be ceiling norms while determining the project specific tariff'*. Further, 'Specific Fuel Consumption (SFC)' was allowed at 5.35 kg/kWh, which is in contravention of the Regulation in vogue i.e. 3kg/kWh. The Petitioner further submitted that 'Fuel cost' has been erroneously allowed at Rs. 685/-MT, which should be allowed at Rs. 570/MT on the basis of fuel cost of Poultry Litter based power project decided by the Commission in its Order dated 21.09.2010 (in the matter of M/s Green Indus Bio- Energy Pvt Ltd.), at Rs. 370/MT with inflation factor @ 5% for 10 years.

4. Per-contra, Shri Raj Kumar, Director, M/s. Mor Bio Energy Pvt. Ltd. submitted that there are no errors apparent on the face of the record in the impugned Order dated 07.09.2020, warranting the Commission to exercise its Review Jurisdiction, as provided in catena of judgements and the Code of Civil Procedure, 1908. The actual O&M expenses are more than the expenses allowed by the Commission in its impugned Order dated 07.09.2020 on the basis of norms specified in the HERC RE Regulations, 2017. As per the Detailed Project Report (DPR) approved by HAREDA, submitted along with the Original Petition and further substantiated by the Operation & Maintenance Agreement dated 01.06.2019, the O&M expenses are on the higher side vis-à-vis than allowed by the Commission. Further, the 'Fuel cost' approved by the Commission in its impugned Order dated 07.09.2020 has been amply elaborated, warranting no further explanation in the matter. As far as approval of SFC at 5.35kg/kWh is concerned, it has been submitted by the Respondent herein that the Committee constituted by HAREDA and HPPC has itself recorded the SFC at 7.7kg/kWh. Further, as per the DPR submitted earlier, SFC can be calculated as 7.96 kg/kWh (kindly refer page 29 of the DPR: Raw Material: 185 MT/Day, Electricity/units for sale: 23232 units/day, SFC: $185000/23232 = 7.96\text{kg/kWh}$). However, the Commission has approved the same at 5.35 kg/kWh i.e. average of norms specified in HERC RE Regulations, 2017 and actual Specific Fuel consumption recorded by the inspection committee ($3+7.7 = 10.7/2 = 5.35\text{ kg/ kWh}$). HERC RE Regulations, 2017 does not specify SFC for poultry litter based biogas power plants. In poultry litter, the content of moisture is natural, due to which the weight of the raw material fed into the digester

increases. Therefore, the issue of 'moisture and solid content variation', raised by the Review Petitioner, is not relevant.

5. After hearing both the parties at length, the Commission considered it appropriate to examine the issue of maintainability of the present Review Petition. The Commission has perused the scope of review jurisdiction, contained within the provision of Regulation 57 & 58 of the HERC (Conduct of Business) Regulations, 2019, which empowers the Commission to exercise review jurisdiction. The relevant Regulation is reproduced 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.”

Further, the relevant clause of Order no. XLVII of Code of Civil Procedure 1908, 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 gain saying 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:-

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 Poulouse 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. All the issues raised by the Petitioner herein, were duly dealt with by the Commission while passing the impugned Order. The cogent reasons for arriving at the conclusions were duly spelt out in the Order dated 07.09.2020, as is evident from the relevant part of the Commission’s Order, reproduced hereunder:-

“Other Project specific parameters: The Commission in its Order dated 20.12.2019 at para 52, has determined technology specific parameters for Biogas Power Projects, summarized as under, considered by the Commission for determining tariff in the present case:-

- i) Useful life of the project: 20 years*
- ii) Plant Load Factor (PLF): 80%*
- iii) Operation and Maintenance (O&M Expenses): Rs. 0.53 Crore / MW for the base year i.e. the FY 2017-18, the same shall be subject to an escalation factor @ 5.72% per annum i.e. Rs. 0.592 Crore/MW for the FY 2019-20, which shall include repair and maintenance (R&M), establishment including employee expenses of 10 staff claimed in the DPR, and administrative and general expenses.”*

(page 21 of the impugned Order dated 07.09.2020)

“In order to balance the equity on both sides and after examining all the facts and circumstances of the case and the concerns raised by HPPC as well as HAREDA, the Commission, given the anomalies/ inconsistencies pointed out in reporting fuel cost including the invoices by the Petitioner, is of the considered view that genuineness of such invoices cannot be benchmarked in the absence of organised market for such feedstock. Further, the feedstock of Rs. 300/ MT contained in the DPR submitted by the Petitioner herein to HAREDA cannot also be relied upon as the project was initially envisaged on the basis of poultry waste generated from its own poultry farm situated in the vicinity of the power plant on the basis of specific fuel consumption (SFC) of 3kg/kWh. Further, a time lag of three years has passed,

since the date of submission of DPR with HAREDA. Much water has flown down the river since then and actual parameters turned out to be different than envisaged at the time of preparation of the project report. It is evident from the fact that Fuel Consumption of 3 kg/kWh projected in the DPR was actually recorded at 7.7 kg/kWh, by the committee of HPPC and HAREDA during inspection regarding CoD of power plant on 11/03/2020 to 15/03/2020. Therefore, it can be construed in most unequivocal terms that the requirement of fuel (Kg / kWh) turned out to be much higher than it was projected in DPR, due to significantly higher SFC.

Since, the plant has achieved CoD and started generated electricity, the economics on the realistic platform has to be considered, where it is found that the waste internally generated is not sufficient to meet the fuel requirement of the power plant. Out of the total fuel requirement, only 30% is actually met from poultry waste generated internally (for which fuel cost has been taken at Rs. 300/MT) and remaining 70% quantity of fuel (poultry and other biomass waste) is required to be procured from nearby area. The high transportation cost involved in lifting the highly stinking poultry litter, as argued by the Petitioner, cannot be ruled out.

The Commission is further concerned about the viability of the project at fuel cost of Rs. 300/- per MT and taking into consideration of socio-economic benefit of the project as well as base year (FY 2017-18) fuel cost of Rs. 1229/- per MT (FY 2019-20 Rs. 1355/- per MT) considered by the Commission in its Order dated 20.12.2019, in order to balance both sides, considers it appropriate to consider the lowest rate invoice of Rs. 850/MT, submitted by the Petitioner, as cost of feedstock procured from outside market.

Taking the fuel mix of 70:30 for externally procured and internally sourced fuel, the first-year fuel cost has been considered at Rs. 685/- MT (Rs. 850 x 70% + Rs. 300 x 30%), for the purpose of tariff determination with an annual escalation of 5% p.a. going forward.”

(page 23-24 of the impugned Order dated 07.09.2020)

“The Commission observes that Specific Fuel Consumption of 3 kg/kWh provided in HERC RE Regulations, 2017 is generic for all kind of biogas-based project. In the poultry litter-based fuel, the Specific Fuel Consumption is bound to be higher due to high moisture content and less TVS content. The Commission further observes that it might

cause immense hardship to the Petitioner as well endanger the viability of the project, in case Specific Fuel Consumption of 3 kg/kWh which is much less than Specific Fuel Consumption of 7.7 kg/kWh, witnessed by the committee of HPPC and HAREDA during inspection regarding CoD of power plant on 11/03/2020 to 15/03/2020. The Commission is of the view that it may not fair to reduce fuel cost on one hand (even less than the norm provided in HERC RE Regulations, 2017) and freeze the Specific Fuel Consumption to normative level of 3 kg/ kWh, on the other.

Considering the above, the Commission approves the average of the Specific Fuel Consumption provided in the HERC RE Regulations, 2017 and actual Specific Fuel Consumption recorded by the inspection committee i.e. 5.35 kg / kWh ($3 + 7.7 = 10.7/2 = 5.35 \text{ kg/kWh}$)."

(page 26 of the impugned Order dated 07.09.2020)

7. On the basis of examination of the scope of Review Jurisdiction and record of the case, the Commission is of the considered view that all the issues raised were already appropriately dealt with by the Commission while passing the impugned Order. It is not open for the Petitioner to re-agitate without identifying errors apparent or brining to the table new facts and figures which 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.
8. Additionally, the issue raised by the Review Applicant w.r.t. the O&M expenses is settled by the submission of 'Operation & Maintenance Agreement dated 01.06.2019' by the Respondent herein; this supports its submissions that the actual O&M expenses incurred are more than the expenses approved by the Commission in the impugned Order dated 07.09.2020. Regarding, approval of SFC at 5.35kg/kWh, as against the norms of 3kg/kWh specified in the HERC RE Regulations, 2017, the Commission has already discussed the issue in detail in its impugned Order dated 07.09.2020 that the specified norm of 3kg/kWh is generic and not specific to poultry litter based biogas power plants. In the poultry litter-based fuel, the Specific Fuel Consumption is bound to be higher due to high moisture content and less TVS content. The Committee constituted by HAREDA and HPPC has recorded the SFC at 7.7kg/kWh. Further, the Commission finds force in the submission of the generator that as per DPR approved by HAREDA, SFC works out to 7.96 kg/kWh. Therefore, the Commission, after exercising due diligence, has approved

the same at 5.35 kg/kWh i.e. average of norms specified in HERC RE Regulations, 2017 and actual Specific Fuel consumption recorded by the inspection committee ($3+7.7 = 10.7/2 = 5.35$ kg/ kWh). The issue of fuel cost has not been pressed upon by the Review Applicant during the hearing. However, the approval of the same at Rs. 685/MT, has been adequately reasoned in the impugned Order dated 07.09.2020.

9. 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.
10. It is amply clear that apart from a 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 unambiguously 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.
11. The petition is accordingly disposed of as not maintainable.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 13.07.2021.

Date: 13.07.2021	(Naresh Sardana)	(Pravindra Singh Chauhan)	(Shri R.K. Pachnanda)
Place: Panchkula	Member	Member	Chairman