

BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION AT PANCHKULA

Case No. HERC/Petition No. 62 of 2022

Date of Hearing : 22.06.2023

Date of Order : 20.07.2023

**In the Matter of
Suo-Motu petition upon complaint regarding use of old plant and machinery - PPA with
MIs GEMCO Energy Limited for their 15 MW Bio-mass power project – Issuance of
notice under Section 94 of the Electricity Act, 2003.**

Present

1. Shri Ravi Sher Singh, SE, HPPC
2. Shri Gaurav Gupta, XEN, HPPC
3. Shri Sanjay Sharma, Dy. Director Boiler, O/o Chief Inspector of Boiler, Haryana
4. Shri Yogesh Sachdeva, Director, M/s. Gemco Energy Ltd.
5. Shri Varun Pathak, Advocate, M/s. Gemco Energy Ltd.

Quorum

**Shri R.K. Pachnanda
Shri Naresh Sardana**

**Chairman
Member**

ORDER

Brief Background of the case

1. The sequence of events, which required intervention of this Commission vide the present suo-moto petition, are as under: -
 - 1.1 Sh. Y. K Sharma, a resident of Haryana, filed a complaint in the Commission, vide letter dated 13.04.2022, inviting attention to Clause 2.1.1 of the PPA dated 12.07.2012. The said clause provides that HPPC shall purchase and accept entire energy generated by the Company's facility (new plant and Machinery). It was submitted by the complainant that the company has installed old plant and machinery which can be verified from the records of chief boiler inspector wherein the registration number mention in the records is RJ-670, which was previously installed in Rajasthan State in the year 2008-10. The same has been shifted to Haryana in 2010. It is clear from the above that the company is being paid tariff which is otherwise payable to power plants commissioned with new plant and machinery whereas the company has installed old plant and machinery.
 - 1.2 The Commission, vide letter no 734/HERC/Tariff dated 10.05.2022, directed HPPC to investigate the matter after obtaining a fresh report from the Chief Inspector of Boiler (CIB) and submit a report to the Commission.
 - 1.3 Dy. Chief Inspector Boilers, Haryana, who has inspected the premises of M/s Gemco Energy Ltd, Bhiwani on 18.05.2022, submitted that M/S Gemco Energy Limited, Bhiwani in the year 2010 took permission for erection of 2 no. of Boilers RJ-669 and

RJ-670. RJ-670 was an old boiler already registered in Rajasthan and was installed with certain modifications. At the time of visit i.e. 18.05.2022, boiler no. RJ 670 was lying idle and not in use.

- 1.4 Accordingly, the Commission, vide letter dated 09.08.2022, directed HPPC to intimate the action taken or contemplated against M/s. GEMCO.
- 1.5 The Chief Engineer, HPPC, vide letter dated 31.08.2022, submitted that registration/inspection of the Boiler is the domain expertise of Chief Inspector of Boiler (CIB) as per the Boilers Act, 1923. The boiler was installed by the generator at its premises along with certain modifications/fabrications in the various parts of the boiler with the approval of Chief Inspector of Boiler, Chandigarh. HPPC further submitted that a similar complaint was also filed against the generator in the FY 2014-15 and the issue was referred to the Hon'ble Commission vide this office memo dated 03.12.2014. Thereafter, procurement of power from the project was approved by the Hon'ble Commission in various Discoms ARR orders. Further, a new boiler with registration number HA-7774 has been installed by the generator with a certificate issued by CIB on 06.07.2022 valid up to 05.07.2023. Thus, no action is required to be taken by HPPC as the installation of Boiler and replacement/modification of the parts of the Boiler has been done with the approval of the Chief Inspector of Boiler, Chandigarh.
- 1.6 Further, Chief Engineer, HPPC, vide its letter no. Ch-50/HPPC/SE/C&R-I/LTP-III/GEMCO/PPA-116/Vol-3 dated 21.10.2022, in reference to the Commission letter no 3171/HERC/Tariff dated 27.09.2022, vide which HPPC, was directed to intimate the action taken/ to be taken, as new machinery was not installed till 13.03.2021, submitted that no action is required to be taken by it against the generator in this regard.
- 1.7 In view of the above, the Commission, in exercise of the power conferred under Section 94 of the Electricity Act, 2003, directed the CE/HPPC, Technical Head of HAREDA and the Chief Inspector of Boiler, Haryana, to appear before it.
2. At the outset, the Commission enquired from Shri Randeep Singh, Chief Engineer, HPPC, if the generic tariff being paid to the generator is not in contravention of the HERC RE Regulations, 2010. Shri Singh replied that the generator had repaired and modified the coal fired boiler into a biomass fired boiler by replacing/modification the new water wall, tubes and Header, Super Heater, Riser tube, Roof tube bands, Water wall tubes, water wall panel, Left water wall panel, Economiser, Top and Bottom header bands, Front water wall panel, Roof water wall tubes, Drum to super heater tubes, Bank tubes for Boiler, Riser Tubes, left side water wall bottom header, water wall panel, Super Heater tubes, Economiser coil, Inner/ Outer Boiler parts and steam pipe line with IBR fittings in IBR approved manner. Shri Singh further averred that

although the generator is in contravention of the HERC RE Regulations, 2010, as amended from time to time, but, there is no provision in the PPA under which action can be taken against the generator.

3. The Commission observes that HPPC has signed PPA with M/s Gemco Energy Limited on 12th July, 2012. The plant was commissioned in August 2013 and has been running since then. The generator M/s. Gemco Energy Ltd. is being paid the generic tariff determined by the Commission under the HERC RE Regulations, 2010, as amended from time to time. Whereas, as per regulation 3 (c) of HERC RE Regulations, 2010, a project shall be treated as renewable energy power project only if it is using new plant and machinery. The relevant extract of regulation 3 of the HERC RE Regulations, 2010 is as under:-

“3. Eligibility Criteria. – For the purpose of these regulations a project shall be treated as renewable energy power project only if it meets the following criteria:

....

*(c) Biomass power project – Biomass power **projects using new plant and machinery** using biomass fuel sources, provided use of fossil fuel is restricted only to 15% of total fuel consumption on annual basis.” (Emphasis supplied)*

4. Hence, it is also not the case that the tariff, in the present case, was determined by this Commission after scrutiny of the capital/project cost and DPR/technical details of the Company. Further, the determination of generic tariff is based on project cost of new plant and machinery. Hence, any project developer who does not install new plant and machinery is not even eligible to get the benefit of the generic tariff. Needless to add, no generator can be allowed to reap windfall profit at the cost of electricity consumers of Haryana. To say the least it amounts to undue and illegal benefit by misrepresentation and warrants criminal action.
5. In view of the above, since the power plant was using old boiler despite reported retrofitment, it was not eligible to qualify as renewable energy power project. Accordingly, the tariff being paid as applicable to projects using new plant and machinery, should have been reduced to account for lower cost of old plant and machinery. Further, the plant is not qualified for ‘Must Run’ status, as provided for in regulation 10 of the HERC RE Regulations, 2010, reproduced hereunder:-

*“10. **Despatch principles for electricity generated from Renewable Energy Sources.** (1) All renewable energy power plants except for biomass power plants with installed capacity of 10 MW and above, and non-fossil fuel based cogeneration plants*

shall be treated as 'MUST RUN' power plants and shall not be subjected to 'merit order despatch' principles.

(2) The biomass power generating station with an installed capacity of 10 MW and above and non-fossil fuel based co-generation projects shall be subjected to scheduling and despatch code as specified under Haryana Grid Code (HGC) and other relevant regulations including amendments thereto."

6. In this regard, the Commission has taken the reply of Chief Engineer, HPPC dated 21.10.2022 that "no action is required to be taken by it against the generator in this regard.", very seriously and found him grossly negligent in the performance of his duties. Accordingly, the Commission deprecates the conduct of HPPC. The Chief Engineer/ HPPC, Sh. Randeep Singh was directed to file an affidavit of the action to be taken against the generator M/s. Gemco Energy Ltd. for availing generic tariff determined by the Commission for projects with new plant and machinery against the old boiler installed. Infact, M/s. Gemco Energy Ltd. should have approached this Commission for adjusting the generic tariff for the old equipment (s) utilized by them.

7. **SUBMISSIONS OF HPPC**

HPPC, vide its letter dated 17.03.2023, submitted as under: -

- 7.1 That a letter dated 16.02.2023 was written to M/s. Gemco Energy Ltd seeking parameters pertaining to their 8 MW biomass based power plant as per HERC RE Regulations 2010 i.e. breakup of capital cost along with purchase cost of old boiler (RJ- 670) & expenditure incurred on replacing/modification of its parts, fuel cost, GCV, SHR, O&M expenses, auxiliary consumption etc. along with relevant details, necessary documents and proof of payment/expenditure. A letter dated 16.02.2023 was also written to Chief Inspector of Boiler, Haryana seeking tentative market cost of a water cooled travelling grate boiler during FY 2013-14 corresponding to the capacity of 8 MW, so that amount to be recovered from M/s Gemco Energy Ltd on account of installation of old boiler at its premises against the new boiler be calculated. Chief Inspector of Boiler (CIB), Haryana vide its letter dated 20.02.2023 intimated that no such type of document is available in their office regarding travelling grate boiler with water cooled condenser.
- 7.2 That M/s Gemco Energy Ltd., vide its letter & reply in petition no. 62 of 2022 both dated 21.02.2023, intimated that the firm had purchased old coal fired boiler bearing no. RJ- 670 from Rajasthan in 2010-11 and took approval from CIB for transfer & installation. As the boiler was not suitable for biomass fuel, various pressure parts of the boiler like Tubes and Header, Super Heater Header, Riser tube, Roof tube bands, Water wall

tubes, water wall panel, Left water wall panel, Economiser, Top and bottom header bands, Front water wall panel, Roof water wall tubes, Drum to super heater tubes, bank tubes for Boiler, Riser tubes, left side water wall bottom header, water wall panel, Super Heater Tubes, Economiser coil, Inner/Outer Boiler parts and steam pipe line were replaced/modified by generator with the approval of Chief Inspector of Boiler. The only part which was not changed and replaced was the drum. It has been further intimated by generator that the difference in the cost of new drum and old drum in 2012 is approximately 9.54 lacs. The generator further stated that total capital cost invested in the plant (i.e. Rs. 39.99 crores) is higher than the generic capital cost (i.e Rs. 35.60 crores) granted by Commission. Later, M/s. GEMCO vide its email dated 15.03.2023 intimated the total cost incurred on erection & commissioning of the old boiler including material cost of boiler (mainly new & old parts) without any documentary proof as Rs. 9.98 Crore.

- 7.3 That HPPC has arranged a copy of purchase order of similar capacity of boiler (50 TPH, 65 Kg/Cm² steam pressure, 460+/- 10 degree Celsius steam temperature, multi fuel fired single drum travel grate boiler) issued by M/s Cheema Boiler to Sainsons Paper Industries during year 2013 wherein cost of boiler was 7 crore which includes erection & commissioning.
- 7.4 That on the perusal of the report dated 31.05.2022 of Chief Inspector of Boiler, it has been gathered that a total amount of Rs. 1,36,69,707/- (Rs. One Crore thirty six lacs sixty nine thousands seven hundred seven rupees) has been spent by M/s Gemco Energy Ltd on refurbishing/repairing/replacing/modification of the old boiler (RJ-670) with new pressure parts.
- 7.5 That for calculation of amount of differential amount to be recovered from M/s Gemco Energy Ltd on account of installation of old boiler against new boiler, the purchase cost of old boiler (RJ-670) with documentary proof is required which has not been provided by generator. In the absence of any authenticated purchase cost of old boiler (RJ-670), it is assumed that the old boiler (RJ-670) was purchased as scrap by the generator (i.e. at the salvage value of 10% of new boiler cost). Pertinent to mention that another old boiler (RJ-669) which was purchased by generator was withheld in between & declared scrap by the generator. As such, it would be correct to say that the old boiler (RJ-670) was also purchased as scrap. As the tentative cost of new boiler in year 2013 was around 7 crore, the salvage value at which the old boiler (RJ-670) was purchased comes out to be 70 lacs (i.e 10% of 7 Crore). Further, the generator has incurred a total extra expenditure of Rs. 1.37 crores on refurbishing/repairing/ replacing/ modification of the various pressure parts of the old boiler with new one for making it suitable for biomass fuel. As such, the total cost of the refurbished boiler (retaining the

registered no. RJ-670) is computed as Rs. 2.07 crore (i.e. Rs. 0.7 crore + Rs. 1.37 crore).

- 7.6 That the total purported capital cost and cost incurred on erection and commissioning of the old boiler including material cost of boiler (mainly new and old parts) as stated by generator are Rs. 39.99 crores and 9.98 crores respectively. The capital cost of plant without considering the old boiler cost as purported by generator comes out to be Rs. 30.01 crores (i.e. Rs. 39.99 crores – Rs. 9.98 crores). The cost of the refurbished boiler (retaining the registered no. RJ-670) is computed as Rs. 2.07 crore (i.e. Rs. 0.7 crore + Rs. 1.37 crore) as stated supra. Accordingly, the total cost of the biomass plant considering the cost of the refurbished boiler (RJ-670) comes out to be Rs. 32.08 crores (i.e. Rs. 30.01 crores + Rs. 2.07 crores) which is less than the generic capital cost (i.e. Rs. 37.42 crores) granted by the Hon'ble Commission to the generator.
- 7.7 That considering the capital cost of plant as Rs. 32.08 crores, the generic tariff granted by this Hon'ble Commission from time to time vide its orders dated 20.11.2013 & 09.10.2015 to generator has been re-worked by this office. The re-worked tariff sheets are annexed. A comparison sheet of tariff paid vis-à-vis re-worked tariff for the plant is placed as under: -

Sr No.	Period	Tariff Paid to Generator (in Rs/kWh)	Re-worked out Tariff (In Rs/kWh)	Differential Tariff (in Rs/kWh)
1	FY 2013-14	5.98	5.72	0.26
2	FY 2014-15	5.83	5.60	0.23
3	01.04.2015 to 11.08.2015	5.97	5.75	0.22
	12.08.2016 to 31.03.2016	7.34	7.22	0.12
4	FY 2016-17	7.56	7.45	0.11
5	FY 2017-18	7.79	7.68	0.11
6	FY 2018-19	8.03	7.94	0.09
7	FY 2019-20	8.29	8.21	0.08
8	FY 2020-21	8.56	8.49	0.07

On the basis the above table, a tentative differential amount to be recovered from the generator from the date of COD (i.e. 24.08.2013) to date of installation of new boiler (HA-7774) (i.e. 13.03.2021) has been computed and the same works out to be Rs. 3.12 crores approx.

8. Subsequently, HPPC, vide its letter dated 21.04.2023, submitted its revised proposal of the amount to be recovered from M/s. Gemco Energy Ltd., on account of installation of old boiler against provisions of PPA & HERC RE Regulations, 2010, after considering the bills submitted by the generator for refurbishing/modification of the old boiler (RJ-670) pertains to both pressure parts as well as non-pressure parts. HPPC submitted that the bills pertaining to the non-pressure parts of the boiler cannot be

substantiated as no approval for repairing/modification of the non-pressure parts of the old Boiler was taken by the generator and hence cannot be considered. Chief Inspector of Boiler had given its approval for repairing/modification of the pressure parts of the boiler only which tantamounts to Rs. 1.37 crores. HPPC has reiterated its submissions made earlier vide its letter dated 17.03.2023, wherein the tentative differential amount to be recovered from the generator from the date of COD (i.e. 24.08.2013) to date of installation of new boiler (HA-7774) (i.e. 13.03.2021) was worked out at Rs. 3.12 crores.

Now, HPPC has additionally submitted as under: -

- 8.1 That as the biomass based power plant of the generator was not set up in accordance with the abovementioned provisions of the HERC RE Regulations 2010 and the PPA dated 12.07.2012 executed with M/s Gemco Energy Ltd, the generator has violated and breached the terms of the PPA, which are sacrosanct in nature, by installing an old boiler against a new one. The average rate of power purchased by HPPC otherwise from various generators, determined by Hon'ble Commission is placed as under:-

Sr. No.	Period	APPC rate determined by HERC (in Rs/kWh)
1	FY 2013-14	3.52
2	FY 2014-15	3.69
3	01.04.2015 to 11.08.2015 12.08.2015 to 31.03.2016	3.907
4	FY 2016-17	3.77
5	FY 2017-18	3.89
6	FY 2018-19	3.74
7	FY 2019-20	3.99
8	FY 2020-21	3.96

- 8.2 That M/s Gemco Energy Ltd has been paid in excess of the APPC rate determined by the Commission. In this regard, a tabular sheet regarding the tariff paid to the generator vis-à-vis APPC rate, tariff paid in excess of APPC, energy (in Mus) supplied by Gemco and the amount paid in excess of APPC rate is placed as under: -

Sr No.	Period	Tariff Paid to Generator (in Rs/kWh)	APPC rate determined by HERC (in Rs/kWh)	Tariff paid in excess of APPC (in Rs/kWh)	Energy (in Mus) supplied by Generator	Amount paid in Excess (in Crores)
1	FY 2013-14	5.98	3.52	2.46	10.605	2.61
2	FY 2014-15	5.83	3.69	2.14	19.09008	4.09
3	01.04.2015 to 11.08.2015 12.08.2015 to 31.03.2016	5.97 7.34	3.907	2.063 3.433	12.987 24.254	2.679 8.32
4	FY 2016-17	7.56	3.77	3.79	40.21848	15.24
5	FY 2017-18	7.79	3.89	3.90	33.55968	13.09
6	FY 2018-19	8.03	3.74	4.29	42.8688	18.39

7	FY 2019-20	8.29	3.99	4.30	46.42272	19.96
8	FY 2020-21 (upto Feb 2021)	8.56	3.96	4.60	39.51756	18.18
	Total	102.56				

- 8.3 That the power purchased by HPPC from the generator has been counted towards the Non-solar RE Purchase Obligations set up by this Hon'ble Commission vide its HERC RE Regulations 2010 as amended and re-enacted from time to time. Considering the non-solar REC prices set by CERC from time to time and offsetting the benefit taken by HPPC for considering this power towards Non-solar RPO obligation, the penalty to be made from the generator on account of non-set up of the plant as per HERC RE Regulations 2010 and PPA comes out to be Rs. 61.72 Crores, as per the detailed calculations attached. Thus, the total recovery along with penalty is worked out to be Rs. 64.857 crores (Rs. 3.137 crores + Rs. 61.72).
- 8.4 That in view of the above, it is proposed that total amount along with penalty tantamount to Rs. 64.857 crores (Rs. 3.137 crores + Rs. 61.72) shall be recovered from the generator on account of installing old boiler at its premises against the provisions of PPA & HERC RE Regulations 2010 and breaching the terms of PPA.

9. **SUBMISSIONS OF M/S. GEMCO ENERGY LTD**

M/s. Gemco has submitted as under:-

PRESENT PROCEEDINGS HAVE BEEN INITIATED WITHOUT REASONABLE AND PROBABLE CAUSE

- 9.1 That the present proceedings have been initiated by the Haryana Electricity Regulatory Commission ("HERC") based on a complaint by Sh. Y. K Sharma by letter dated 13.04.2022, wherein it has been pointed out that the answering respondent, i.e. Gemco Energy Limited ("GEMCO"), has allegedly used old plant and machinery.
- 9.2 That from the perusal of the certified documents obtained from HERC, it is clear that HPPC by its letter dated 21.10.2022 had submitted that similar complaints, as compared to complaint by Sh. Y. K Sharma, were earlier received by HERC way back in 2014 and in light of the responses submitted by HPPC, no action was taken by HERC. HPPC in its responses refers to communications dated 31.10.2014, 03.12.2014, 30.05.2022, 31.05.2022, and 21.10.2022 to submit that the complaint filed by Sh. Y. K Sharma was not required to be acted upon as in 2014 no action was taken by HERC previously. The answering respondents relies on the contents of the above-mentioned communications for the purposes of the instant reply. Considering the documents submitted by HPPC, it is clear that: -

- (i) HERC has initiated the present proceedings based on a complaint filed by Sh. Y. K Sharma which is similar to a previous complaint instituted in 2014.
- (ii) The copy of complaint filed Sh. Y. K Sharma and the opportunity to cross-examine him have not been provided by HERC to the answering Respondent. Further, no further records of Mr. Y.K. Sharma are available and he has neither appeared nor has he been summoned to appear before this Hon'ble Commission. Thus, ulterior motive and malafide cannot be ruled out as to why GEMCO has been targeted by Mr. Y.K. Sharma.
- (iii) The status of the complaint instituted in 2014 has not been disclosed by HERC. Further, it has not been disclosed why no action was taken against GEMCO previously in 2014. Further, no rationale has been provided regarding why present proceedings on the same cause of action have been instituted after almost more than 9 years by HERC.
- (iv) The present proceedings have been instituted in violation of the procedure prescribed under Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 ("2019 Regulations") and in contravention of the provisions under the Electricity Act, 2003 ("2003 Act"). The due process prescribed under the 2019 Regulations has not been followed and jurisdictional facts and basis for the institution of the present proceedings have not been made out in the present *suo-moto* proceedings.

DEMAND MADE BY HPPC IN ITS LETTER DATED 21.04.2023 IS ILLEGAL, VEXATIOUS AND MALAFIDE

- 9.3 That pursuant to orders passed by this Hon'ble Commission, HPPC has now taken a complete "U-Turn" and has sought a recovery of more than Rs. 64 crores by its letter dated 21.04.2023. The contents of the said letter are disputed and denied by GEMCO.
- 9.4 That HPPC in its reply dated 21.10.2022, relied on previous communications (including 2014 complaint) to submit before this Hon'ble Commission that no further action was required. HPPC has given no justification as to what circumstances changed in its letter dated 21.04.2023 wherein it is seeking a recovery of more than Rs. 64 crores. Infact from its letter dated 21.10.2022 where it submitted that no action should be taken against GEMCO, in its subsequent letter dated 17.03.2023, HPPC submitted that Rs. 3 crores (approx) ought to be recovered from GEMCO. It is pertinent to mention that this amount was calculated whereas as the bills were still to be submitted by GEMCO. Infact, after the invoices were submitted, HPPC had verbally submitted that only the CA certificate for the authenticity of the invoices were required and that in light of the invoices submitted no amount was recoverable from GEMCO.

- 9.5 That the letter dated 21.04.2023 submitted by HPPC is wrong for the following reasons:
- (i) GEMCO was set up as a special purpose vehicle on 16th November, 2009 specifically for setting up of the biomass power plant. For this greenfield project, the answering respondent purchased a new land of 26.25 acres of land at Village Dinod, Bhiwani in May 2010. All mandatory registrations like Factory Act, PF, labour ESI, etc were done afresh. The requisite consents were taken from the relevant departments. A power purchase agreement dated 12.07.2012 as amended by agreement dated 22.03.2021, has been executed with HPPC. As per clause 2.1.1 and 2.1.2 of the PPA, tariff is to be determined by HERC. The issue of an '*purported*' old boiler is irrelevant. Clause 2.1.1. of the PPA talks about a new plant, which would be the generating plant set-up by the answering respondent and that is admittedly afresh and new and was not an old existing plant. The said clause 2.1.1 does not talk about new machinery but only '*machinery*'. This is because sometimes old machinery needs to be refurbished and made fit for working and the said clause clearly covers such a situation by only stating '*machinery*' and not '*new machinery*'.
 - (ii) For the new generating plant created by the answering respondent, it had brought old coal fired boilers from Rajasthan in 2010-11 bearing No. RJ-670 and took approval from CIB, Haryana for installing it. All appropriate approvals for installation and transfer were taken. Once the boiler was being installed, all the parts including water wall, tubes, headers, super heaters - primary, riser tubes, roof tube bends, water wall panels, water walls, economizer, top & bottom headers, front water wall, roof water wall, drum to super heater tubes – secondary, inner outer boiler parts, all steam pipings and IBR fittings which constitute the complete boiler were replaced and newly installed therefore, completely changing the old RJ-670 boiler. The only part which was not changed and replaced from RJ-670 was the drum (which bears the number RJ 670). The cost of this drum even today would be around 25 lacs INR only. The entire boiler insulation, boiler refractory and aluminium cladding was done new and all other major parts of the boiler like electro-static precipitator, ID Fans, SA Fans, FD fans, etc were bought and erected new. Further, besides the boiler, all the other equipments of the Power Plant like turbine, gear box, alternator, ESP, cooling tower, water treatment plant, electricals, DCS, weighbridge, cabling, etc. were also bought new. Presently, infact even this boiler has been replaced by the answering respondent in 2022 and a completely new boiler has been installed in its place [Boiler RJ 670 is presently being dismantled]. As per Clause 6.1 of the PPA, GEMCO was responsible for

obtaining clearances for the generating facility including clearance from State Inspector of Boilers. Under Clause 6.6, the regular maintenance of the plant is to be done by GEMCO. In the present case, there has been no allegation regarding supply of electricity and no such issue has been raised by HPPC till date. As per Clause 6.7, GEMCO had supplied particulars for examination of generation facility. Not once has HPPC raised any issue or grievance regarding the stability of generation facility. The requirement that the boiler should be a new boiler is not prescribed under any of the regulations framed by this Hon'ble Commission and neither is such a condition part of the PPA executed by the answering respondent with HPPC.

- (iii) All new construction including boundary wall, sheds, office blocks, boiler foundations, RCC raw water tank, fuel yard shed, WTP building, Turbine foundation & shed, cooling tower and conveyor foundations & all other new structures were built for this greenfield project by the answering respondent. Even assuming (without admitting) that this Hon'ble Commission were to consider the boiler RJ-670 as old, even then no loss has been caused to HPPC or the consumers of Haryana. This is because the total project cost of the 8 MW power plant was 39.99 crores. This works out to 5.00 crores per MW. As per HERC order vide Case No. HERC / Pro -15 of 2013 (Suo moto) dated 20.11.2013, the capital cost of biomass power plant (water cooled) was taken as Rs. 44.5 million per MW (sic). In the case of the answering respondent the capital cost has come out to be Rs. 50.0 million per MW, which is higher than the fixed cost ascertained by HERC while arriving at generic tariff.
- (iv) As the answering respondent is using 100% biomass and is raising invoices only for units exported to the grid, the nature of boiler (old or new) is inconsequential to the payments being made to it as the Project cost of the answering respondent was higher than the fixed cost allowed by the Hon'ble Commission under the generic tariff regime. Further, the answering respondent has not demanded any extra cost towards fixed investment it had incurred while installing the new boiler in 2022.
- (v) The invoices submitted by GEMCO to HPPC for Rs. 9.98 crore relate to the total cost incurred for the new items purchased in 2011 - 2013 by GEMCO for installation of its boiler. However, HPPC has totally ignored these invoices while making their last reply dated 21.04.2023.
- (vi) GEMCO is billing HPPC on the basis of actual units exported and there is no loss to HPPC. It is not as if power from another power source is supplied to HPPC. Further, as per the PPA, HPPC in the year 2014 already were aware of

the issue of the old boiler and therefore, they cannot raise and seek any amount from GEMCO in 2023. As the issue was never raised under the PPA, therefore, GEMCO cannot be prejudiced and punished after almost more than 9 years have passed and the issue of old boiler has been known both to HPPC and HERC collectively. GEMCO cannot be put in a position where after supplying to HPPC for more than around 9 years it's been prejudiced when actually in 2014, the situation may have been very different. At that point in time GEMCO may have been able to consider alternate avenues which have now been shut due to the delayed acts of both HPPC and this Hon'ble Commission.

- (vii) The entire calculations made by HPPC are based on conjecture, premises and assumptions with utter disregard to the data / information placed on record. It is strange that HPPC from nowhere has presumed 10% as value of scrap, which is irrelevant and contrary to the concept of recurring depreciation staggered over the entire useful life of the project. HPPC have considered cost of boiler as Rs. 1.37 crore which is the cost incurred towards pressure parts of the boiler and only for the invoices which are mandatorily submitted to Chief Inspector of Boiler by the manufacturer for approval of critical pressure parts. They have not taken into consideration the remaining cost of the boiler, the invoices of which have been submitted to HPPC on 21.03.2023. The additional invoices pertain to the same boiler for its structure, columns, beams, foundations, supports, travelling grates, pumps & motors, valves, casings, ducting, hardware, instrumentation, bellows, dampers insulation, refractory, painting, erection & commissioning, engineering & design charges, transportation charges & various other miscellaneous items incurred for the installation of the boiler.
- (viii) Further, enormous importance has been built into the calculation by assuming the cost of the boiler installed at some Sainson Paper Industries in 2013 (which cost or confirmation has not been submitted before this Hon'ble Commission) for arriving at cost of refurbished Boiler as Rs. 2.07 Crore {1.37 crore + 0.70 (10% of 7 crores)}.
- (ix) The relevance of bringing Average Power Purchase Cost ("APPC") into calculation is entirely misplaced. It may be noted that the APPC is the cost paid by discom on adhoc basis to the traders or generators till the tariff is determined by this Hon'ble commission. The APCC is of no relevance but to estimate power purchase cost and volume of the discom, which during the relevant year is 'trued up' or recovered under Fuel Surcharge Adjustment ("**FSA**"). Hence it is just an average estimated number which at times has been used by this

Hon'ble Commission in its interim tariff subject to adjustment as and when the final tariff is determined for the Power Project under consideration. In the present case, as on COD, the tariff payable i.e. generic tariff was already in place & so APPC is not applicable at all.

- 9.6 That in light of the above, it is submitted that the present proceedings are completely misplaced and ought to be dismissed as such. The demand raised by HPPC in its letter dated 21.04.2023 is illegal, malafide and vexatious and contrary to the provisions of law and the PPA executed between the parties.

PROCEEDINGS IN THE CASE

10. The case was heard on 04.01.2023, 01.02.2023, 29.03.2023, 27.04.2023 and 22.06.2023, as scheduled. The generator (M/s. Gemco) as well as the Discoms represented by HPPC, mainly reiterated the contents of their written submissions, which have not been reproduced herein for the sake of brevity.

COMMISSION'S ANALYSIS AND ORDER

11. The Commission has heard the arguments of the parties at length as well as perused the written submissions placed on record by the parties. The distribution licensees in Haryana (represented by HPPC) has submitted that the generator's power plant was not set up in accordance with the provisions of the HERC RE Regulations 2010 and terms of the PPA dated 12.07.2012, which provides for "new plant and machinery". Accordingly, HPPC has worked out an amount recoverable on account of excess capital cost allowed in the generic tariff, which is Rs. 3.12 crores. HPPC has further worked out excess tariff paid to the generator, since CoD to February, 2021, as Rs.61.72 crore, emphasizing that they would have purchased power, if required, at a price not higher than the average power purchase cost (APPC). Per-contra, M/s. Gemco has refuted the calculations of HPPC as well as the locus-standi of the present proceedings, per-se.
12. Upon hearing the rival contentions and careful examination of the documents placed on record by the parties, the Commission has framed the following issues for its consideration and order-
- a) Whether the present proceedings have been initiated without reasonable and probable cause?
 - b) Whether the Commission has the power to initiate the present suo-moto proceedings?
 - c) Whether the generator has defaulted in compliance of the HERC RE Regulations, 2010 and PPA dated 12.07.2012 signed with HPPC?

- d) Whether the installation of old machinery has posed any risk to the human life?
- e) What amount should be recoverable from M/s. Gemco, on account of installation of old boiler?

The findings of the Commission on the issues framed above are as follows: -

Issue (a):

Whether the present proceedings have been initiated without reasonable and probable cause?

The Commission has examined the averments of the generator that the present proceedings have been initiated on the basis of the complaint filed by Sh. Y. K Sharma, who has neither appeared nor summoned to appear before this Hon'ble Commission. The generator has argued that the basis for the institution of the present proceedings have not been made out in the present suo-moto proceedings.

In this regard, it is made abundantly clear that the Commission has not initiated the present proceedings on the basis of a complaint. The same have been taken up by the Commission, suo-motu, when on the basis of the report of the Chief Inspector of Boilers, Haryana dated 18.05.2022, it was established beyond reasonable doubt that old boiler 'RJ-670' was indeed installed from the date of CoD to 13.03.2021, which is a matter of grave concern wherein undue benefit of 'new plant and machinery' has been availed by the generator against the terms of the PPA and Regulations in vogue. Since a glaring wrong has been committed, even the motive of filing the said complaint becomes irrelevant.

Further, the Commission has carefully examined the provisions of Section 94 of the Electricity Act, 2003, reproduced below:-

“(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

.....

(d) discovery and production of any document or other material object producible as evidence;”

In view of the above, the Commission is of the considered view that even the written complaint is not necessary for the Commission to hold any inquiry of the wrong doings by a generator as it has to discharge its functions specified under Section 86 of the Electricity Act, 2003, which inter-alia provides for the State Commission to regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies. It has the

power of the civil court for discovery and production of any documents or other material object producible as evidence; in the present case the report of the Chief Inspector of Boilers, Haryana dated 18.05.2022.

In the present case, the generator M/s. Gemco, although fully aware of the terms and conditions of the PPA and provisions of the HERC RE Regulations in vogue, has deliberately misrepresented the fact that new plant and machinery, has been installed, to take financial benefit by availing higher tariff. The fact that old boiler was installed by the generator M/s. Gemco, was established from the report of the Chief Inspector of Boilers, Haryana dated 18.05.2022. The Commission cannot turn a blind eye to a blatant wrong being committed, leading to financial loss to the electricity consumers of the State of Haryana.

In terms of the above, the Commission answers the issue framed in negative i.e. the present proceedings have not been initiated without reasonable and probable cause.

Issue (b):

Whether the Commission has the power to initiate the present suo-moto proceedings?

The Commission has examined the submissions of the petitioner that this Commission does not have jurisdiction to initiate suo-moto proceedings on the basis of a complaint in light of the law laid down by the Hon'ble Supreme Court of India in Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd., (2017) 16 SCC 498, wherein it was held that ***"The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act."*** (Emphasis Supplied)

M/s. Gemco further averred that the Commission is empowered to discharge its functions referred to in section 86 of the Electricity Act. Section 86 (1) (f) of the Electricity Act empowers the Commission to *"adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration"*. Whereas, in the present case no dispute has been raised by Haryana Power Purchase Centre ("HPPC") and secondly assuming (without admitting) that even if present proceedings could be initiated on the basis of the complaint filed by the Complainant,

the present proceedings cannot be continued without affording an opportunity to the answering respondent to cross-examine the complainant. M/s. Gemco further averred that the present proceedings are not in accordance with the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019.

In order to examine the contentions of the generator (M/s. Gemco), the Commission has examined the following relevant provisions of the Electricity Act, 2003 and the HERC (Conduct of Business) Regulations, 2019: -

Section 86 of the Electricity Act, 2003 provides as under:-

“(1) The State Commission shall discharge the following functions, namely: -

- (a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State;*
- (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*

*....
.....*

(k) discharge such other functions as may be assigned to it under this Act.”

Section 94 of the Electricity Act, 2003 provides as under:-

“(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

- (a) summoning and enforcing the attendance of any person and examining him on oath;*
- (b) discovery and production of any document or other material object producible as evidence;*
- (c) receiving evidence on affidavits;*
- (d) requisitioning of any public record;*
- (e) issuing commission for the examination of witnesses;*
- (f) reviewing its decisions, directions and orders;”*

Regulation 22 of the HERC (Conduct of Business) Regulations, 2019, provides as under:-

“Initiation of Proceedings before the Commission

(1) The Commission may initiate Proceedings suo mottu under Section 86 and Section 181 of the Electricity Act, 2003 or on a petition or application filed by any person having an interest in the subject matter of the Proceedings.”

A combined reading of the provisions reproduced above, makes it crystal clear and beyond an iota of doubt that the Commission is within its rights to initiate suo-moto proceedings to regulate the electricity purchase as provided under Section 86. In discharge of its functions specified under Section 86, it can exercise its powers provided under Section 94 of the Electricity Act, 2003.

The judgement of the Hon'ble Supreme Court cited by M/s. Gemco is not relevant in the matter, wherein the issue involved was that the Commission had altered the applicability of the tariff by extending the control period, altering the terms of the PPA. In this regard, the Hon'ble Apex court had held that there cannot be any exercise of the inherent power for dealing with any matter which is otherwise specifically provided under the Act. Whereas, the present matter deals with the rights of the Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity is purchased, specifically provided under Section 86 (1) (b) of the Electricity Act, 2003. Further, the Commission is bound by its own regulations and has to ensure the compliance of the same. In the present case, the Commission, on the basis of report of the Chief Inspector of Boilers, was informed that the HERC RE Regulations, 2010 are infringed, therefore, the Commission had to initiate the suo-moto proceedings in order to regulate the power purchase at the price which was wrongly claimed as per the HERC RE Regulations, 2010, based on new Plant and Machinery.

The Commission has perused the judgement of the Hon'ble Appellate Tribunal for Electricity (APTEL) dated 28.01.2021 (Appeal No. 271 of 2019) in the matter of HPPC vs. HERC and others., wherein the extract of the judgement of K. Ramanathan v. State of T.N., (1985) 2 SCC 116 : 1985 SCC (Cri) 162, was cited. The word "regulate" was expounded as under:

19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of

suppression. It would therefore appear that the word “regulation” cannot have any inflexible meaning as to exclude “prohibition”. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.”

(emphasis supplied)

Further, the Hon'ble APTEL in its judgement dated 13.01.2011 in the matter of GVK Govindval Sahib Limited v. Punjab State Electricity Regulatory Commission (Appeal No. 70 of 2009), had decided that *“the power to regulate procurement process of a Distribution Licensee is wide ranging power. There is no provision in the Act which overrides the said powers of the State Commission.”*

In terms of the above, the Commission answers the issue framed in affirmative i.e. the Commission has the power to initiate the present suo-moto proceedings.

Issue (c):

Whether the generator has defaulted in compliance of the HERC RE Regulations, 2010 and PPA dated 12.07.2012 signed with HPPC?

The Commission observes that HPPC has signed the PPA with M/s Gemco Energy Limited on 12th July, 2012. The plant was commissioned in August 2013 and has been running since then. The generator M/s. Gemco Energy Ltd. is being paid the generic tariff as determined by the Commission under the enabling provisions of the HERC RE Regulations, 2010, as amended from time to time. Regulation 3 (c) of the HERC RE Regulations, 2010 provides that a project shall be treated as renewable energy power project only if it is using 'new plant and machinery'. The relevant extract of regulation 3 of the HERC RE Regulations, 2010 is as under:-

“3. *Eligibility Criteria. – For the purpose of these regulations a project shall be treated as renewable energy power project only if it meets the following criteria:*

....

*(c) Biomass power project – Biomass power **projects using new plant and machinery** using biomass fuel sources, provided use of fossil fuel is restricted only to 15% of total fuel consumption on annual basis.” (Emphasis supplied)*

Clause 2.1.1 of the PPA entered into by M/s Gemco Energy Limited with HPPC, on 12th July, 2012, provides for the use of 'new plant and machinery' by the generator. The relevant clause is reproduced here under: -

*“The HPPC shall purchase and accept entire energy generated by the Company’s facility (**new plant and machinery**) up to the contracted capacity 15 MW (8MW+7MW) delivered at the interconnection point pursuant to the terms and conditions of this agreement at the tariff decided/notified by the Commission and amended from time to time”. (**Emphasis supplied**)*

Thus, use of ‘new plant and machinery’ was a condition precedent for the eligibility of the project as a ‘renewable energy power plant’. Accordingly, generic tariff determined for ‘renewable energy power plant’ on the basis of parameters specified in the HERC RE Regulations, 2010, was made applicable to the generator (M/s. Gemco). Further, the plant was scheduled as ‘Must Run’ because of its status of renewable energy power plant with the capacity of less than 10 MW.

In this regard, the Commission is in receipt of report of Dy. Chief Inspector Boilers, Haryana, who has inspected the premises of M/s Gemco Energy Ltd, Bhiwani on 18.05.2022. Dy. Chief Inspector Boilers has submitted that M/S Gemco Energy Limited, Bhiwani took the permission for erection of 2 no. of Boilers RJ-669 and RJ-670, in the year 2010. RJ-670 was an old boiler already registered in Rajasthan and was installed with certain modifications. At the time of visit, boiler no. RJ 670 was lying idle and not in use. HPPC has submitted that a new boiler with registration number HA-7774 has been installed by the generator with the certificate issued by CIB on 06.07.2022 valid up to 05.07.2023.

Admittedly, once the old boiler was installed, all the parts including water wall, tubes, headers, super heaters - primary, riser tubes, roof tube bends, water wall panels, water walls, economizer, top and bottom headers, front water wall, roof water wall, drum to super heater tubes – secondary, inner outer boiler parts, all steam pipings and IBR fittings which constitute the complete boiler were replaced, completely changing the old RJ-670 boiler. The generator (M/s. Gemco) has further submitted that the only part which was not changed and replaced from RJ-670 was the drum (which bears the number RJ 670). The net saving for using the old drum would be less than approx. 9 lacs which is insignificant considering the total Project cost of the Plant.

The Commission has considered the submissions of M/s. Gemco. At the outset, the admitted position is that the boiler in question was an old boiler. Further, M/s. Gemco signed a PPA with eyes wide open and fully knowing that the entire plant has to be a new plant. Hence, the onus was on M/s. Gemco to disclose the same to HPPC and also to this Commission at the time of source/PPA approval and get the tariff

determined based on its completed cost instead of taking the benefits of 'generic tariff' without fulfilling the eligibility criteria.

The Commission is not convinced with the arguments of the generator (M/s. Gemco) that clause 2.1.1. of the PPA provides for a 'new plant', which would be the generating plant set-up by the answering respondent and the said clause does not provide for a 'new machinery' but only '*machinery*'. The adjective 'new' added to 'plant and machinery', cannot by any means be construed to have been attached to 'plant' only and not to 'machinery'. In power generation, the plant also includes machinery forming part of it. In this regard, the Commission has perused the terms 'electrical plant' and 'generating station' defined under section 2 (22) and 2 (30) of the Electricity Act, 2003, respectively. The relevant provisions are reproduced hereunder:-

"22. electrical plant" means any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity but does not include-

- (a) an electric line; or*
- (b) a meter used for ascertaining the quantity of electricity supplied to any premises; or*
- (c) an electrical equipment, apparatus or appliance under the control of a consumer;"*

"(30) "generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switch yard, switch-gear, cables or other appurtenant equipment, if any used for that purpose and the site thereof, a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station;" (emphasis supplied).

Even otherwise a power plant comprises of BTG (Boiler, Turbine and Generator) and other components are clubbed as 'balance of plant'.

From the examination of the above, it is apparent that a 'boiler' is an integral part of a power plant and even the equipment used in the power station forms part of the plant and the regulation 3 (c) of HERC RE Regulations, 2010 as well as Clause 2.1.1 of the PPA entered into by M/s Gemco Energy Limited with HPPC, on 12th July, 2012, provides for the use of 'new plant and machinery' by the project.

Further, the contention of the petitioner that the word “new plant and machinery” has two constructions and the phrase does not imply new machinery is wrong and misconceived.

In Nokes v. Doncaster Amalgamated Collieries Ltd, [1940] AC 1014, the house of lords observed that where two constructions are possible, the court will avoid the one that would prevent the object of the statute from being achieved, thus defeating the intent of the legislature. One should always adopt that meaning which gives a reasonably clear meaning to the expression.

The Supreme Court in Nabha Power Limited ("NPL") vs Punjab State Power Corporation Limited ("PSPCL") and another, Civil Appeal No.179 of 2017 was seized with the issue of interpretation of the Charges Formula Clause in the Agreement. The Court held that

"In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

In the Union of India vs. M/s. D.N. Revri and Co. and Ors. (1976) 4 SCC 147, Justice P.N. Bhagwati, observed that the meaning of commercial contracts should be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic, legalistic interpretation.

From the above mentioned case laws it is clear that the Commission in such cases has to adopt the balanced approach and will adhere to that meaning of the word reflecting the intention of the parties while entering into the PPA. Therefore, in the present case it is evident that the phrase “new plant and machinery” does not only means new plant but new machinery as well.

In terms of the above, the Commission answers the issue framed above in affirmative i.e. the generator has defaulted in compliance of HERC RE Regulations, 2010 and terms PPA dated 12.07.2012 signed with HPPC.

Issue (d):

Whether the installation of old machinery has posed any risk to the human life?

The Commission has examined the submission of the generator (M/s. Gemco) that it had brought old coal fired boilers from Rajasthan in 2010-11 bearing No. RJ-670 and took approval from the Chief Inspector of Boiler (CIB), Haryana for installing it. All appropriate approvals for installation and transfer were taken. The entire boiler insulation, boiler refractory and aluminium cladding was done new and all other major

parts of the boiler like electro-static precipitator, ID Fans, SA Fans, FD fans, etc were bought and erected new. Further, besides the boiler, all the other equipments of the Power Plant like turbine, gear box, alternator, ESP, cooling tower, water treatment plant, electricals, DCS, weighbridge, cabling, etc. were also bought new. Presently, infact this boiler has been replaced by the answering respondent in 2022 and a completely new boiler has been installed in its place.

The Commission is of the considered view that Boilers Act, 1923 has provided safety standards for boilers to be observed in order to prevent accident/explosion of boilers and boiler components thereby bringing safety of human lives and properties in and around steam generating units. The Chief Inspector of Boiler, Haryana, has been entrusted with the responsibility of granting registration of the boiler after ensuring the compliance of all the safety standards and other provisions of the Boilers Act, 1923. In the present case, the old boiler was modified/fabricated with the permission of the Chief Inspector of Boiler, Haryana.

In view of the above, the Commission answers the issue framed above in negative i.e. the installation of old machinery did not pose any risk to the human life. Since, the old boiler has been replaced with a new one, this issue is of academic interest only.

Issue (e):

What amount should be recoverable from M/s. Gemco, on account of installation of old boiler?

It has been established in the preceding part of this order that the generator has defaulted in compliance of the HERC RE Regulations, 2010 and PPA dated 12.07.2012 signed with HPPC. Resultantly, the generator has reaped the benefits of higher tariff, determined by the Commission based on the cost of 'new plant and machinery' as part of capital cost. Further, the generator has availed benefit of 'must run' status available to a renewable energy project.

The Commission observes that the initial stand of HPPC on the default of the generator was that no action is required to be taken by it as there is no provision in the PPA under which action can be taken against the generator. However, later on HPPC, carefully examined that clause 2.1 of the PPA dated 12.07.2012, provides for the applicable tariff at which the HPPC shall purchase the energy generated by the Company's facility (new plant and machinery). Accordingly, the generic tariff decided by the Commission in its order dated 27.05.2011 and clarification dated 17.08.2011, was made applicable to the generator. It was further provided in the PPA that the rates as decided/notified

and amended/modified/clarified by the HERC from time to time will be applicable. The ibid tariff was based on the cost of new plant and machinery. The power plant of the generator was commissioned in August, 2013. Accordingly, the generic tariff determined by the Commission for the projects commissioned in the FY 2013-14 was made applicable to the generator. **The capital cost considered in the said order was Rs. 4.6778 crore/MW, on the precondition that the generator shall install new plant and machinery.**

Further, regulation 10 of the HERC RE Regulations, 2010, provides that only the renewable energy power plants, shall be treated as 'MUST RUN'. The relevant regulations is reproduced hereunder:-

“10. Despatch principles for electricity generated from Renewable Energy Sources. (1) All renewable energy power plants except for biomass power plants with installed capacity of 10 MW and above, and non-fossil fuel based cogeneration plants shall be treated as 'MUST RUN' power plants and shall not be subjected to 'merit order despatch' principles.

(2) The biomass power generating station with an installed capacity of 10 MW and above and non-fossil fuel based co-generation projects shall be subjected to scheduling and despatch code as specified under Haryana Grid Code (HGC) and other relevant regulations including amendments thereto.”

Thus, the plant was scheduled as 'Must Run' because of its status of renewable energy power plant less than 10 MW. Otherwise, the plant at the tariff of Rs. 5.98/kWh to Rs.8.56/kWh, might not have been scheduled, considering the 'merit order'.

Considering the above, HPPC has calculated an amount of Rs. 64.857 crores, as the total amount recoverable from the generator on account of installing old boiler at its premises against the provisions of PPA and the HERC RE Regulations 2010 and breaching the terms of PPA.

The Commission observes that HPPC has calculated the recoverable amount of Rs. 64.857 crore on two counts viz. Rs. 3.12 crore on account of excess capital cost claimed for old boiler (by reworking the tariff from the date of COD i.e. 24.08.2013 to date of installation of new boiler i.e. 13.03.2021, by taking the capital cost as Rs. 32.08 crores instead of the generic capital cost of Rs. 37.42 crores) and Rs. 61.72 crore on account of wrong claim of 'must-run' status by the generator. The detailed calculations

submitted by HPPC have been referred to earlier in this order. The same have not been reproduced here for the sake of brevity and to avoid prolixity.

The Commission observes that the cost of new boiler in the year 2013 (the present generator has achieved CoD in August, 2013) was around Rs. 7 crores. Therefore, the claim of the generator M/s. Gemco for the cost of refurbished boiler as Rs. 9.98 crore does not appear to be logical and prudent. Whereas, the generator M/s. Gemco has itself provided the details of amount spent by it on refurbishing /repairing /replacing/modification of the old boiler (RJ-670) with new pressure parts. The same is mentioned in the report dated 31.05.2022 of the Chief Inspector of Boiler at Rs. 1,36,69,707/- (Rs. One Crore thirty six lacs sixty nine thousands seven hundred seven rupees). Accordingly, taking into consideration the facts and circumstances of the present case, the amount of Rs. 3.12 crore, calculated by HPPC on account of difference in the capital cost, appears to be logical and prudent.

The Commission has also examined the claim of Rs. 61.72 crore, raised by HPPC, on account of wrong claim of 'must-run' status by the generator. In this regard, the Commission is of the view that both the generator as well as HPPC have erred; the generator M/s. Gemco has not strictly complied with the Regulations occupying the field and the terms of the PPA. While HPPC, despite knowing the fact of installation old boiler by the generator since 2014, has miserably failed to intervene for a prolonged period and direct the generator herein to comply with the Regulations, failing which no adjustments shall be granted.

Reference to various ARR/Tariff orders passed by this Commission wherein power purchase quantum and cost from M/s. Gemco's power plant are mentioned, is of no significance. In all such order (s), the Commission quantifies on projection basis, the quantum and cost of power during the ensuing financial year from all sources. Hence, as mentioned in the order (s) that the same should not be conferred as source/PPA approval.

Taking into consideration of the facts and circumstances of the present case where approximately 10 years have passed since the date of CoD, the Commission observes that the differential amount to be recovered from M/s. Gemco can be calculated by substituting the generic capital cost of Rs. 37.42 crore with the reworked capital cost of Rs. 32.08 crore. Based on the same, the differential tariff of Rs. 3.12 crore, has been reworked from the date of CoD to the date of installation of new boiler i.e. 13.03.2021, as per the details submitted by HPPC at para 7.7 of the present order.

Resultantly, in order to balance the equity on both sides, the Commission Orders that Rs. 3.12 crore shall be payable by the generator M/s. Gemco to HPPC, as differential tariff on account of differential capital cost, within 3 billing cycles of the invoices raised by M/s. Gemco for sale of power to the Discoms, from the date of this order, failing which interest @ 1.5% per month shall also be levied.

13. Having held as above, the Commission observes that HPPC vehemently argued at the first instance that no action is to be taken against M/s. Gemco, as this Commission having received a similar complaint in 2014 did not take any action and continued to take its power in the ARR power purchase quantum and cost. On the insistence of this Commission, subsequent to the report of the Chief Inspector of Boilers, Haryana dated 18.05.2022, HPPC changed its stance from 'no action' to a recovery of Rs. 3.12 crore and then Rs. 61.72 Crore. Chief Engineer, HPPC should note that in all such matters proper due diligence is a must. Moreover, it is not the case that the Commission initiated action on an 'anonymous complaint', as vehemently argued by M/s. Gemco, but the report dated 18.05.2022 of the Chief Inspector Boilers, Haryana establishing the fact that old boiler 'RJ-670' was indeed installed from the date of CoD to 13.03.2021, which is a matter of grave concern wherein undue benefit of 'new plant and machinery' has been availed by the generator against the terms of the PPA and Regulations in vogue.

This is misrepresentation to take financial benefit and this has been ignored by HPPC for such a long time. The Commission cannot turn a blind eye to a blatant wrong being committed. However, since the plant was commissioned way back in August 2013 and HPPC also did not initiate any action even after receipt of complaint and establishment of the fact that an old boiler has been installed in violation of Regulations, no action is being taken to recall the status of must run or RE project at this stage. Prudence demands that the undue benefit of difference of cost in the old boiler and the new boiler must be transferred to consumers, who are ultimately affected by higher tariff being given to generator because of misrepresentation of facts.

14. In terms of the above order, the present petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 20.07.2023.

Date: 20.07.2023
Place: Panchkula

(Naresh Sardana)
Member

(R.K. Pachnanda)
Chairman