

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION AT
PANCHKULA**

Case No. HERC/RA-4 of 2018

Date of Hearing : 19.12.2018

Date of Order : 19.12.2018

In the Matter of

Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulations 17 and 78 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 for reviewing and recalling the order dated 13.11.2017 passed by this Commission in Case No. HERC/PRO-24 of 2017 filed by Haryana Power Purchase Corporation under Section 86(1)(b) of the Electricity Act, 2003 approving the procurement of power at regulated tariff from 110 MW (2X55 MW) Chuzachen Hydro Electric Project situated at East District, Sikkim and to direct Gati Infrastructure Pvt. Ltd. to refrain from supplying the said 110 MW of power to Haryana Power Purchase Centre.

Review Petitioner

Tata Power Trading Company Limited

Respondents

1. Haryana Power Purchase Centre, Panchkula (HPPC)
2. Gati Infrastructure Pvt. Ltd (GIPL)

Present On behalf of the Review Petitioner

1. Smt. Divya Chaturvedi, Advocate
2. Shri Vipul Joshi, Advocate

Present On behalf of the Respondents

1. Smt. Sonia Madan, Advocate/HPPC
2. Shri Randeep Singh, SE/HPPC
3. Shri Rajiv Mishra, XEN/HPPC.
4. Shri Ravi Juneja, AEE/HPPC.
5. Shri Randhir Singh, AEE/HPPC.
6. Shri Tarbez Malawat, Advocate/GIPL.

Quorum

Shri Jagjeet Singh,

Chairman

ORDER

Brief Background of the Case

1. The review petition has been filled by M/s. Tata Power Trading Company Limited, Mumbai against Haryana Power Purchase Centre (Respondent No. 1) and Gati Infrastructure Pvt. Ltd. (Respondent No. 2), against the Order of the Commission dated 13.11.2017 in the case of HERC/PRO-24 of 2017.
2. M/s. Tata Power Trading Company has submitted as under:-
 - a) That the present review petition is being filed before this Commission being aggrieved by the order dated 13.11.2017 passed by this Commission in Case No. HERC/PRO-24 of 2017 (hereinafter "the said Case") filed by Haryana Power Purchase Corporation (hereinafter "Respondent No.1") under Section 86(1)(b) of the Electricity Act, 2003 (hereinafter "Electricity Act") seeking approval of this Commission for procuring of power at regulated tariff from 110 MW (2X55 MW) Chuzachen Hydro Electric Project situated at East District, Sikkim (hereinafter referred to as "Power Plant").
 - b) That the Power Plant belongs to the generating company namely Gati Infrastructure Pvt. Ltd. (hereinafter referred to as "Respondent No.2"). It is noteworthy that the Respondent No.2 was an active participant in the said Case and even sought to implead itself as a party therein, which was refused by this Commission. However, this Commission granted liberty to the Respondent No.2 to assist the Respondent No.1 with the relevant data/information that may be required for making submissions. Pursuant thereto, the Respondent No. 2, being represented by its Counsel, made requisite submissions in support of the approval of aforesaid power procure arrangement.
 - c) That this Commission vide the said order dated 13.11.2017 approved the procurement of power from the Power Plant throughout the year, at the tariff to be determined by this Commission on a separate petition to be filed by the Respondent No.2 with INR 4.69/kWh being the ceiling tariff for the first 35 years of the power purchase agreement between the Respondent No.1 and Respondent No.2. This Commission, as an interim measure, also observed that in case energy drawl was

resorted to from the Power Plant prior to determination of final tariff by this Commission the same may be paid for the APPC subject to adjustments vis-à-vis the final tariff.

- d) That the said order dated 13.11.2017 has caused severe hardship and prejudice to the Review Petitioner as the said order has in effect, rendered the Power Purchase Agreement dated 26.05.2009 (hereinafter "Main PPA") read with Supplementary Power Purchase Agreements dated 08.04.2013, 14.05.2014 and 31.03.2015 (collectively "Supplementary PPAs") entered between the Review Petitioner and the Respondent No.2, otiose and unenforceable. This is because under the Main PPA read with Supplementary PPAs, the Respondent No.2 had promised supply of the same 110 MW power from the Power Plant to the Review Petitioner for a continuous period of 10 years from COD of the Project on an exclusive basis, which is ending only in the May 2023.
- e) That the said order dated 13.11.2017 has been obtained by the Respondents by fraud as the Respondents have not only suppressed material facts from this Commission including the aforesaid facts but have also misled this Court by making incorrect statements. It is respectfully submitted the suppression and misrepresentation constitutes fraud and it is a settled position of law, as held by the Hon'ble Supreme Court of India in the case of S.P. Chengalvaraya Naidu (Dead) by LRs v. Jagannath (Dead) by LRs. (1994) 1 SCC 1, that fraud avoids all judicial acts, ecclesiastical or temporal; that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law; that such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior; that it can be challenged in any court even in collateral proceedings. It is therefore respectfully submitted that said order dated 13.11.2017 deserves to be set aside on this ground alone, amongst others.
- f) That once the Review Petitioner became privy to the said order dated 13.11.2017 and raised objections to the aforesaid illegal approval sought by the Respondents from this Commission, the Respondent No.2 sought to illegally terminate the Main PPA read with the Supplementary PPAs. Such termination is mala fide and in gross violation of the terms and conditions agreed between the Respondent No. 2 and the Review Petitioner. Such illegal termination has caused severe detriment to

operational and financial interests of the Review Petitioner. The Review Petitioner reserves its rights to seek appropriate remedies against the Respondent in this regard.

- g) That in fact, pursuant to the aforesaid order, the Respondent No. 2 has also made an application for registration on the Indian Energy Exchange (IEX) platform through Arunachal Pradesh Power Corporation Private Limited (APPCPL), despite that fact that the Respondent No. 2 is already registered on the said platform through the Review Petitioner. This clearly shows that mala fide intention of the Respondent No.2. The Review Petitioner states that it has already issued legal notices in the aforesaid termination and application and, in the meanwhile, tried to amicably resolve the matter with the Respondent No.2, however to no avail. The Review Petitioner craves leave of this Commission to place requisite documents regarding the aforesaid, if deemed necessary and/or if so directed by this Commission. The Petitioner also reserves its rights to seek appropriate remedies against the Respondent in this regard.
- h) That the brief factual matrix of the present matter to which the Review Petitioner is privy and/or which appears from the said order dated 13.11.2017 is stated hereinbelow in seriatim:
- (i) The Power Project was allocated to the Respondent No. 2 through the memorandum of understanding (MoU) route. The Implementation Agreement (IA) with Government of Sikkim was signed on 14.11.2003. The Respondent No.2 also signed a Long-Term Access Agreement with Power Grid Corporation of India Limited (PGCIL).
- (ii) On 26.05.2009, the Respondent No. 2 executed the Main PPA with the Review Petitioner and thereafter continued the supply of 110 MW power to the Review Petitioner from the Power Plant under the Main PPA read with Supplementary PPAs executed on 08.04.2013, 14.05.2014 and 31.03.2015.
- (iii) During the subsistence of the Main PPA, the Respondent No.2, without any notice to the Review Petitioner, approached the Respondent No.1, vide letter dated 28.10.2016 for sale of said 110 MW of power from the Power Plant for a duration of 35 years from May to September every year. The same was clearly in flagrant disregard to the exclusivity enjoyed by the Review Petitioner under the Main PPA

read with Supplementary PPAs. In fact, as already pointed out above, the Respondents suppressed the aforesaid material facts even from this Commission for seeking approvals to the aforesaid effect.

(iv) On 13.11.2017, this Commission passed the aforesaid order approving the procurement of 110 MW of power by the Respondent No. 1 from the Respondent No. 2's Power Plant, as already elaborated herein above. It is stated that the Respondents for obtaining the said order, not only suppressed the factum of the aforesaid Main PPA read with Supplementary PPAs but also suppressed that fact that the entire generating capacity has been contracted with the Petitioner under the Main PPA on a long-term basis.

(v) Upon coming to know of the aforesaid order dated 13.11.2017, the Review Petitioner, vide its letter dated 23.01.2018 objected to the illegal approval sought by the Respondents from this Commission vide the said order dated 13.11.2017 and inter alia called upon the Respondent No.2 to continue selling power through the Review Petitioner and pay the trading margin in accordance with the terms and conditions of the Main PPA.

(vi) The Respondent No. 2 however, instead of taking corrective action, vide its letter dated 28.02.2018, raised frivolous allegations against the Review Petitioner and illegally terminated the Main PPA. The Review Petitioner responded with its letter dated 16.03.2018 again calling upon the Respondent No. 2 to continue selling power through the Review Petitioner and pay the trading margin as per the Main PPA. However, all efforts of the Review Petitioner went in vain as the Respondent No. 2, vide its letter dated 29.03.2018 again expressed its intention of illegally terminating the Main PPA.

(vii) Subsequently, by an email dated 12.04.2018 forwarded to the Review Petitioner by APPCPL enclosing an email of the Respondent No. 2 dated 12.04.2018 written to APPCPL, the Review Petitioner came to know that the Respondent No.2 had applied to the Indian Energy Exchange Limited and was pursuing to bid the power generated by the Respondent No. 2 through APPCPL on Indian Energy Exchange (IEX) platform, even though the Respondent No. 2 is already registered on the IEX platform through the Review Petitioner. It is pertinent to note that the neither did the Respondent No. 2 give any prior notice to the Review Petitioner about such application nor did the Respondent No. 2 obtain a 'no objection certificate' from

the Review Petitioner. This clearly shows the mala fide intentions of the Respondent No. 2.

- i) That that Respondents have illegally, by suppressing material particulars and by misrepresentation, obtained the aforesaid order dated 13.11.2017 from this Court. The Respondents have sought to unjustly enrich and benefit themselves on the strength of the said order, in utter disregard to the contractual rights vested in the Review Petitioner, as already stated hereinabove.
- j) That without prejudice, it is also respectfully submitted that the said order dated 13.11.2017 as passed by this Commission fails to comply with the mandate of the Electricity Act. In this regard, it is respectfully submitted that this Commission in the said order has observed the approval being sought by the Respondents was regarding the approval for procurement of power by the concerned distribution companies and approval of power purchase agreement thereto under Section 86(1)(b) of the Electricity Act. This Commission further observed that for approval of source of power / power purchase agreement there was no legal requirement as such for issuing public notice and holding public hearing thereto. This Commission furthermore observed that Section 64 of the Electricity Act laid down the procedure for tariff order on an application filed for determination of tariff under Section 62 of the Electricity Act and that the application before it as filed by the parties were restricted to Section 86(1)(b).
- k) That the aforesaid conclusion arrived at by this Commission to the effect that no public hearing under Section 64(3) of the Electricity Act was required before approving the application, which in any event was in breach of the Main PPA, is incorrect as material facts including the existence of Main PPA were not placed before this Commission and thus the same is in contravention of Section 64(3) of the Electricity Act. Section 64(3) of the Electricity Act mandates issuance of public notice and reasonable opportunity being granted to the concerned stakeholders to place their objections before passing any form of tariff order. It is pertinent to state that this Commission vide the said order determined the ceiling tariff for the first 35 years of the power purchase agreement under consideration at INR 4.69/kWh while keeping the determination of tariff on a yearly basis open to be adjudicated by a separate petition. It is respectfully submitted that the fact this Commission determined the ceiling tariff is a testament to the fact that the order dated

13.11.2017 is a tariff order under Section 64(3) of the Electricity Act which mandatorily requires public notice and public hearing consequent thereto, of the stakeholders including the Review Petitioner.

- l) That this Commission while passing the order dated 13.11.2017 and failing to grant public hearing to the stakeholders, has failed to ensure transparency while discharging its function of determination of tariff as required by Section 86(3) of The Electricity Act and the principles of natural justice. In this regard, reference may be placed upon the judgment of the Hon'ble Appellate Tribunal for Electricity passed in the case of Nav Bharat Ferro Alloys Ltd. vs. A.P. Electricity Regulatory Commission (Appeal No. 173 of 2005 – Order dated 02.03.2006). In this case, the Hon'ble Appellate Tribunal for Electricity while citing the settled law and the decision of the Hon'ble Supreme Court of India passed in the case of Udit Narain Singh Malpharia vs. Addl. Member, Board of Revenue, Bihar AIR 1963 SC 786, held that the order impugned therein was violative of the principles of natural justice when the contents of the notice which did not indicate the possibility of the appellants therein being adversely affected and when the affected party was not given an opportunity and hearing before affecting their rights/interests.
- m) That this Commission in the said order dated 13.11.2017 has further observed that the draft power purchase agreement submitted by the Respondent lacked a lot of details that a contract of the nature of power purchase agreement should state. It is respectfully submitted that the Review Petitioner is aggrieved as even though all necessary details had not been incorporated in the power purchase agreement, the application was allowed by this Commission and even the tenure of the said power purchase agreement was extended from 25 years to 35 years without giving any reasons whatsoever. It is further noteworthy that though initially the tariff of INR 4.60/kWh was offered for the period of 25 years but the same was escalated to INR 4.69/kWh for a period of 35 years. Therefore, the extension of term of power purchase agreement between the Respondents is causing a substantial escalation of tariff of INR 0.09 per kWh for the entire 35 years, which is also detrimental to the interest of the consumers.
- n) That in view of the foregoing, it is submitted that Review Petitioner is seeking review of the order dated 13.11.2017 passed by this Commission in Case No. HERC/PRO-24 of 2017 on the ground that the said order dated 13.11.2017 passed by this

Commission in effect has been used by the Respondent No. 2 to illegally terminate the Main PPA with the Review Petitioner. It is submitted that the facts of the present matter constitute 'sufficient reasons' necessitating the review/clarification of the Order dated 13.11.2017.

o) That it is well settled position of law that an adjudicating authority can review its order if a person aggrieved by a decree or order of a court applies to the same court for review of the Judgment or order on following grounds:

- (a) Discovery of a new 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;
- (b) Some mistake or error apparent on the face of the record; or
- (c) Any other sufficient reason.

It is submitted that the aforesaid principles of the reviewing the decision is also enshrined in Regulation 78 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, which is reproduced for the ease of reference:

"78 (1) Within 30 days after making any decision, direction or order, the Commission may on its own motion or on the application of any party or person concerned review any decision, direction or order against which an appeal has been referred for the reasons set forth in sub-regulation (2) below.

(2) The Commission may review its orders or decisions if:

- (a) there exists an error apparent on the face of the record; or*
- (b) any new and important matter of evidence was discovered which after the exercise of due diligence, was not within the knowledge of or could not be produced by the party concerned at the time when the order or decision was made; or*
- (c) for any other sufficient reason."*

p) That a perusal of the Order dated 13.11.2017 clearly reflects that the Respondent No.2 has not apprised either the Respondent No.1 or this Commission of the existence of the Main PPA with the Review Petitioner, thereby rendering the 110 MW of electricity generated from the Power Plant as tied up power and not free to be sold to third parties.

q) That the expression “any other sufficient reason” as a ground for review has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held by the courts to be sufficient ground to exercise power of review. In this regard reliance is placed upon the judgment passed by the Hon’ble Supreme Court of India in S. Nagaraj & Ors. vs. State of Karnataka & Anr., (1993) Supp (4) SCC 595, wherein the Hon’ble Supreme Court has, inter-alia, held as under:

“18. *Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. ...Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness.Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. ...*

19. *Review literally and even judicially means re- examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. **Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality.** When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution.In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Code of Civil Procedure Code. The expression, ‘for any other sufficient reason’ in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power.”*

[emphasis supplied]

The above principle has been re-affirmed and followed by the Hon’ble Supreme Court in various other subsequent judgments.

r) That the present Review Petition would also lie in the light of the judgment of the Hon’ble Supreme Court of India in the case of Board of Control for Cricket, India & Anr. vs. Netaji Cricket Club & Ors. (2005) 4 SCC 74, wherein the Hon’ble Court observed as under:

“...the words “sufficient reason” occurring in rule 1 is wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine ‘actus curiae neminem gravabit’. Order 47, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason”

[emphasis supplied]

- s) That it is settled law that an order/judgment has to be read in the context of the issue urged before it and decided by it and a decision is only an authority for what it actually decides. The ratio of any decision must be understood in the background of the facts of that case. Therefore, in facts of the present case, it is necessary for the Review Petitioner to seek review/modification/clarification of the Order dated 13.11.2017 which has been obtained by the Respondent No. 2 fraudulently by not intimating this Commission of the true status of 110MW of power which is generated from the Power Plant. It is submitted that had the Respondent No. 2 brought the fact of existence of Main PPA to the fore, this Commission would not have passed the Order dated 13.11.2017 without any public hearing. In this context, it is submitted that the order dated 13.11.2017 passed by this Commission in Case No. HERC/PRO-24 of 2017 violates the principles of natural justice as it has been not only passed behind the back of the Review Petitioner but also affects the substantial rights of the Review Petitioner flowing from the Main PPA.
- t) That in case the order dated 13.11.2017 passed by this Commission in Case No. HERC/PRO-24 of 2017 is not reviewed/modified/clarified, the Review Petitioner will face undue hardships. It is submitted that the present Review Petition is being filed bona fide as the substantial rights of the Review Petitioner have been affected by the order dated 13.11.2017 passed by this Commission in Case No. HERC/PRO-24 of 2017.
- u) In view of the above, the Review Petitioner has prayed that this Commission may:
- i) Review, recall/set aside the order dated 13.11.2017 passed by this Commission in Case No. HERC/PRO-24 of 2017 filed by Haryana Power Purchase Corporation under Section 86(1)(b) of the Electricity Act;

- ii) Recall/Set aside the approval accorded vide order dated 13.11.2017 to the Respondents for the procurement of power from the Power Plant throughout the year, at the tariff to be determined by this Commission on a separate petition to be filed by the Respondent No.2 with INR 4.69/kWh being the ceiling tariff for the first 35 years of the power purchase agreement between the Respondent No.1 and Respondent No.2;
 - iii) Direct the Respondent No. 2 from refrain from acting upon the order dated 13.11.2017 passed by this Commission in supplying 110 MW of power to the Respondent No. 1;
 - iv) Direct the Respondent No.2 to commence supplying the said 110 MW of power to the Review Petitioner as mandated under the terms and conditions contained in the Main PPA;
 - v) Recall/Set aside the interim measures permitted to be resorted to by the Respondents;
 - vi) Expeditiously dispose of the Petition keeping in view the facts of the present matter; and
 - vii) Pass such other or further order(s) as this Commission may deem fit and proper in the facts and circumstances of the case.
3. That the Review Petitioner has also submitted an application for condonation of delay, submitting that it could not approach this Commission at an earlier date for the following reasons:
- i) Since the Review Petitioner was not a party to the proceedings initiated by the Respondents i.e. Case No. HERC/PRO-24 of 2017, the Review Petitioner was not privy to the order dated 13.11.2017. The Review Petitioner learnt about the passing of the aforesaid order only in the third week of January 2018 and thereafter immediately wrote a letter to the Respondent No.2 on 23.01.2018 objecting to the illegal approval sought by the Respondents vide the said order dated 13.11.2017 and calling upon the Respondent No.2 to continue selling power to the Petitioner and pay the requisite fee as per the terms of the Main PPA, as already stated hereinabove.
 - ii) Several communications were exchanged between the Petitioner and the Respondent No. 2, wherein the Petitioner continuously raised the issue of the wrongful and illegal approval obtained by the Respondents but the Respondent No. 2 refused to adhere to

the valid and legal demands of the Petitioner and illegally proceeded to terminate the Main PPA read with the Supplementary PPAs.

- iii) Due to the aforesaid illegal termination of the Main PPA read with the Supplementary PPA by the Respondent No.2, the Petitioner was constrained to issue a legal notice through its Advocates on 20.04.2018 whereby the Petitioner called upon the Respondent No.2 (a) withdraw its application for registration on the IEX platform through APPCPL and/or refrain to pursue the same; (b) withdraw its termination letter dated 28 February 2018 and honour its obligations under the Main PPA for the remaining period of the Main PPA; (c) refrain from acting upon the said order dated 13.11.2017 in supplying 110 MW of power to Respondent No.1 and commence supplying the power to the Petitioner as mandated under the terms and conditions contained in the Main PPA. It may be noted that the Petitioner, without prejudice to the aforesaid and the rights available to it under law and the Main PPA read with Supplementary PPAs, expressed its intention to discuss and resolve any or all issues, to avoid the possibility of any dispute arising between the Respondent No.1 and the Petitioner.
- iv) The Respondent No.2 responded to the aforesaid legal notice of the Petitioner on 04.05.2018, wherein the Respondents again reiterated their previous stand and asserted that the termination of Main PPA read with the Supplementary PPAs was not illegal and stated that they would initiate action if the Petitioner interferes in their business dealings including their business dealings with APPCL. The Respondent No. 2 also denied that they had obtained the order dated 13.11.2017 from this Commission illegally. It may be prudent to point out that the Respondent No. 2 also expressed willingness to convene a meeting for discussing the impending issues.
- v) Even though the Petitioner was severally aggrieved and prejudiced from the aforesaid response dated 04.05.2018, the Petitioner with the intention of amicably resolving the matter wrote a without prejudice email to the Respondent No.2 on 08.05.2018, through its counsel proposing a date and time for a meeting between the representatives of the Petitioner and the Respondent No.2.
- vi) The Respondent No.2 responded to the said email on 10.05.2018 asking for the list of participants who would attend the meeting and proposed that the meeting should be confined only among the members belonging to the commercial team.

- vii) The Petitioner's counsel immediately responded to the aforesaid email vide its e-mail dated 11.05.2018, whereby the Petitioner duly conveyed its acceptance to the aforesaid proposal given by the Respondent No.2; indicated the list of participants for the meeting; and proposed the date of 16.05.2018 as the date of the meeting.
- viii) Since no response was forthcoming from the Respondent No.2, the Petitioner's counsel followed up the aforesaid email with another dated 15.05.2018 requesting the Respondent No.1 for its confirmation for the meeting proposed for 16.05.2018.
- ix) On 23.05.2018, the Petitioner learnt from the Respondent No.2 that the concerned representative of the Respondent No.2 was travelling and hence could not schedule a meeting. Accordingly, the Petitioner's counsel immediately wrote another without prejudice email on 23.05.2018 proposing for a meeting to be convened on either 24.05.2018 or 25.05.2018. It may be noted that in the said email, the Petitioner's counsel categorically pointed out that considerable time had elapsed from 04.05.2018 when the Respondent No.2 had agreed for the proposed meeting and therefore, requested the Respondent No.2 to expedite the same.
- x) The said meeting between the representatives of the Petitioner and the Respondent No.2 was duly held on 25.05.2018, however, the Petitioner and the Respondent No.2 failed to arrive at a mutually agreed settlement.
- xi) Pursuant to the settlement talks failing on 25.05.2018, several internal discussions were held amongst the Review Petitioner/Applicant's Senior Management, in-house legal team and concerned officials dealing with the transaction. In this context, the Review Petitioner/Applicant also held an internal discussion on 04.06.2018 between the aforesaid officials, to discuss the next course of action. Considering the illegal actions of the Respondent No. 2, the Review Petitioner/Applicant decided to pursue the appropriate judicial remedy. It is pertinent to note that concerning the fact that the aforesaid officials were located in different parts of the country, the Review Petitioner/Applicant had to coordinate and facilitate communication between such aforesaid officials during the first week of June, 2018 on various occasions.
- xii) The Review Petitioner/Applicant thereafter, on 07.06.2018 held a meeting with its counsels to discuss the next course of action. The Review Petitioner/Applicant's counsels were of the prima-facie view that a Review Petition

should be filed against the Order dated 13.11.2017 of this Commission and in this context a Senior Advocate's view should also be sought.

- xiii) The Review Petitioner/Applicant on 11.06.2018, arranged a meeting with a Senior Advocate to discuss the next course of action. Owing to the fraudulent suppression by Respondent No. 2, it was decided that a Review Petition, is required to be filed before this Commission against the Order dated 13.11.2017 passed by this Commission.
- xiv) Pursuant thereto, the Review Petitioner/Applicant's counsel circulated the first draft of the Review Petition on 22.06.2018 and sought comments and views of the Review Petitioner/Applicant.
- xv) The Review Petitioner/Applicant provided its comments on the draft Review Petition on 01.07.2018 after discussing the Review Petition internally. It is reiterated that concerning the fact that the concerned officials and the Senior Management were located in different parts of the country, the Review Petitioner/Applicant had to coordinate and facilitate communication between such aforesaid officials and invite various segments of its Company to collate the relevant data required to provide comments and suggestions on the draft Review Petition.
- xvi) The Review Petitioner/Applicant's counsels incorporated the relevant comments and suggestions. The counsels of the Review Petitioner/Applicant also held multiple telephonic discussions with the concerned officials of the Review Petitioner/Applicant in the first week of July, 2018 while finalizing the Review Petition. The counsels circulated the amended draft Review Petition for approval of Review Petitioner/Applicant on 10.07.2018.
- xvii) The Review Petitioner/Applicant after having an internal discussion with the concerned officials and reviewing the draft Review Petition decided to get the said draft settled by a Senior Advocate. The Senior Advocate settled the draft Review Petition on 17.07.2018.
- xviii) The final draft of the Review Petition, taking into account the views and suggestions of the Senior Advocate, was circulated on 23.07.2018 for approval by the counsels of the Review Petitioner/Applicant.
- xix) The final draft was approved by the Review Petitioner/Applicant and the relevant documents were signed, executed and sent to the counsels on 27.07.2018. The said documents along with the final Review Petition was sent by the Review

Petitioner/Applicant's counsels to the local counsel for filing before this Commission on 28.07.2018.

xx) The Review Petition has been filed on 01.08.2018, i.e. with a delay of 216 days along with the present Application.

4. That the Review Petitioner/Applicant acted diligently and in a bona fide manner and continuously engaged with the Respondent No. 2 to mutually put a closure to the issues which had arisen between the said parties. Since, the efforts of the Review Petitioner/Applicant have gone in vain and the Respondents are defiant and have continued to proceed with the illegalities committed by them, the Review Petitioner/Applicant is now constrained to approach this Commission with the accompanying Review petition for redressal of its grievances.
5. That the delay is neither intentional nor deliberate and is caused due to reasons stated above. It is therefore respectfully submitted that the delay may kindly be condoned in the interest of justice, or else the Review Petitioner/Applicant will suffer irreparable loss and injury.
6. That it is established principle of law that the Courts while dealing with applications for condonation of delay should adopt a liberal approach. The substantive rights of the Parties should not be affected merely on account of procedural delay in filing. It has been further submitted that when substantive justice and technical approach are pitted against each other, the Hon'ble Supreme Court of India as well as various High Courts have consistently held that the former shall prevail. In this context reliance is placed on **State of Nagaland v. Lipok Ao, (2005) 3 SCC 752: 2005 SCC (Cri) 906**. The relevant extracts of the said Judgment are reproduced below for ease of reference:

*"7. The trial court noted that the ballistic report established that the bullets were fired from the guns of the accused-respondents. A finding was also recorded that the respondents exceeded their power of opening fire, and this constituted misfeasance, but absence of the post-mortem report was held to have vitally affected the prosecution case. It was also held that the accused persons had fired with AK-47 and M-22 rifles in self-defence. Therefore, benefit of doubt was given to them. **A pragmatic approach has to be adopted and when substantial justice and technical approach are pitted against each other the former has to be preferred.***

*8. The proof by sufficient cause is a condition precedent for exercise of the extraordinary restriction (sic discretion) vested in the court. **What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In N.***

Balakrishnan v. M. Krishnamurthy [(1998) 7 SCC 123 : AIR 1998 SC 3222] it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the court has to go in the position of the person concerned and to find out if the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient. Although no special indulgence can be shown to the Government which, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

...

12. In O.P. Kathpalia v. Lakhmir Singh [(1984) 4 SCC 66] a Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In Collector, Land Acquisition v. Katiji [(1987) 2 SCC 107] a Bench of two Judges considered the question of limitation in an appeal filed by the State and held that Section 5 was enacted in order to enable the court to do substantial justice to the parties by disposing of matters on merits. The expression "sufficient cause" is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice — that being the life purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational, common-sense, pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the State is the applicant. The delay was accordingly condoned.

..."

[Emphasis Supplied]

7. That the Review Petitioner/Applicant was prevented by genuine and bona-fide reasons from approaching this Commission at an earlier date, as has already been stated hereinabove. The Review Petitioner/Applicant would thus be gravely prejudiced if the prayer of the Review Petitioner/Applicant is not allowed by this Commission.
8. That the present application is bona fide and made in the interest of justice.
9. That in the facts and circumstances mentioned above, it is respectfully prayed that this Commission may be pleased to:-
 - (a) condone the delay of 216 days which has occurred in filing of the present Application on behalf of Applicant/Appellant; and
 - (b) Pass such other or further order(s) as this Commission may deem fit and proper in the facts and circumstances of the case.

Proceedings in the Case

10. The case was first heard on 29.10.2018, wherein the Commission, vide its Order dated 30.10.2018, after considering the arguments/submissions of the parties, condoned the delay in filing the present Review Petition, in the interest of natural justice and further directed the Respondents to file their reply on merits of the case.
11. HPPC filed its reply dated 26.10.2018, submitting as under:-

Preliminary objections on maintainability of the Petition:

1. That the petition filed by the Petitioner, Tata Power Trading Company Limited is for review/ recalling/ setting aside of order dated 13.11.2017 passed by this Hon'ble Commission in Case no. HERC/ PRO-24 of 2017 and seeking directions to refrain Respondent no. 2, i.e. Gati Infrastructure Pvt. Ltd. from supplying 110 MW of Power to HPPC in terms of order of the Commission dated 13.11.2017.
2. That at the outset, it is pertinent to highlight brief facts that led to impugned order dated 13.11.2017. Respondent no. 2 (GIPL) had set up a 110 MW (2x55MW) run of the river hydro power project stationed at District Rongli, Sikkim on a build, own, operate and transfer basis. GIPL submitted its proposal to sale power to HPPC. The HPPC after scrutinizing the benefits of Chuzachen HEP and upon satisfaction of the feasibility of the said project, decided to source power from GIPL. Accordingly, in terms of Section 86(1) (b) of the Electricity Act, 2003 ("**Electricity Act**") a petition

being Case No. HERC/PRO-24 of 2017 was filed by HPPC before the Hon'ble Haryana Electricity Regulatory Commission. After hearing the parties, the Hon'ble Commission vide its order dated 13.11.2017 passed the final order. In the said order, the Hon'ble Commission deliberated on all the issues. Further, the Hon'ble Commission in the said order had also dealt with objections of Mr. Sunil Kumar Nehra who appeared on behalf of general public. After conducting the detailed hearing on all the aspects and issues relating to the procurement of power and being satisfied with the merit of the proposal of GIPL, the Hon'ble Commission granted its approval for the procurement of power from the Chuzachen HEP throughout the year at the tariff to be determined by the Hon'ble Commission in separate petition to be filed by the generator.

3. That the petition filed by the Petitioner is untenable in its present form. The petitioner has under the garb of review has sought setting aside of impugned order, which is not permissible under law. The present petition is an abuse of process of law and deserves outright rejection. Based on the grounds referred hereunder, the present petition deserves to be dismissed being untenable and illegal –

PETITIONER HAS NO LOCUS STANDII TO FILE PRESENT PETITION -

4. That it is a well-settled rule of law that the review application/petition can be filed only by a party to the case in which the order sought to be reviewed has been passed. It cannot be preferred by a third party. A bare perusal of Regulation 78 of the HERC Regulations, 2004 clearly specify that the person applying for review has to be a person who was a party to the case decided by the impugned order. It is submitted that without being party, it cannot file a review petition. In this regard, reliance is placed upon the Judgment of the Division Bench of the Hon'ble High Court of Delhi, *Bharat Singh vs. Sheo Parshad Giani Ram and Ors.* wherein it was held as under:

"(31) Order 47, rule 1 Civil Procedure Code reads as under :-

"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."

On a very reading of the rule it is clear that a review application can be filled only by a party to the lis in which the order sought to be reviewed has been passed. It cannot be preferred by a third party. It was urged on behalf of the petitioner that the phrase "any person considering himself aggrieved" would include anyone who is adversely affected by the impugned order, whether that person is or is not party to the list in which the impugned order has been passed. We do not agree. As will be apparent from a reading of the rule any person considering himself aggrieved by a decree or order may apply for review provided he can establish that he "from the discovery of new and important matters of 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." This postulates that the person applying for review has to satisfy two conditions, namely, that he is aggrieved by the order and also that he for the reasons mentioned was not in a position to bring that fact to the notice of the Court earlier which resulted in a wrong order being passed. If these two conditions are necessary before a review application can be moved, it follows that the review application has to be made by a person who was a party to the list decided by the impugned order or decree"

5. That the Petitioner has misled this Commission by giving wrongful interpretation of the provisions of Review. It is pertinent to note that petition under Section 86 (1) (b) of the Electricity Act was filed solely by HPPC only. Even, GIPL was not party to it. In the said petition, neither any party was impleaded by the Commission nor there was any other person who was made party to the said Petition by HPPC. The ambit of the said petition was also solely limited for approval of source of procuring power. Therefore, Petitioner being not a party to the said Petition nor had any role in the petition relating to approval of source of procuring power under Section 86 (1) (b) of the Electricity Act has no right or locus file review petition in the Petition filed by the

HPPC. The plain fact that the Petitioner was not a party to the Petition filed by HPPC, the order of which is subject matter of challenge in the present Petition, is suffice to dismiss the instant petition. It is the own admitted case of the Petitioner in Para 20 of the Petition that the Review petitioner was not a party to the proceedings. The filing of Review Petition in proceedings in which Petitioner has no locus has sole malicious intent to stall supply of power which is competitive, clean and in consumer interest.

THE PRESENT PETITION IS BEYOND THE SCOPE AND AMBIT OF REVIEW

6. That it is settled principle of law that the scope and ambit of review is restricted to what has been laid down in Order XLVII Rule 1 of Code of Civil Procedure, 1908 which is pari-materia with Regulation 78 of the HERC Regulations, 2004. In Parsion Devi & Ors. vs. Sumitri Devi & Ors., (1997) 8 SCC 715, the Hon'ble Supreme Court of India held as under -

"9. ...In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise."

7. That it is the own case of the Petitioner that it is aggrieved by the order of this Commission dated 13.11.2017. Mere grievance against the Order does not give any right to the person to seek setting aside of same in a Review Jurisdiction. The Petitioner has no right to seek adjudication of commercial dispute in proceedings before Hon'ble Commission which relates to sourcing of power from a generating station.
8. That the prayer for review of the order of the Commission has no basis in view of the fact that the petitioner has failed to establish as to what constitutes in this case "sufficient grounds" and "sufficient reasons" as enshrined in the CPC for seeking review of an order / direction passed by a Court including a misconception of fact or law or even a misapprehension of the true state of circumstances. The petitioner cannot seek modification of the findings of this Hon'ble Commission in a subsequent petition. The review petition, thus, deserves to be dismissed.

THE PETITION IS TIME-BARRED DUE TO LAW OF LIMITATION

9. That It is submitted that the review petition filed by TPTCL is hopelessly barred by law of limitation in terms of the Regulation 78 of the Conduct of Business Regulations, 2004 ("HERC Regulations, 2004") of the Hon'ble Commission. The Regulation 78 of the HERC Regulations, 2004 provides as under

“Review of the decisions, directions, and orders

78 (1) Within 30 days after making any decision, direction or order, the Commission may on its own motion or on the application of any party or person concerned review any decision, direction or order against which an appeal has been referred for the reasons set forth in sub-regulation (2) below.

(2) The Commission may review its orders or decisions if:

(a) there exists an error apparent on the face of the record; or

(b) any new and important matter of evidence was discovered which after the exercise of due diligence, was not within the knowledge of or could not be produced by the party concerned at the time when the order or decision was made; or

(c) for any other sufficient reason”

Further, Article 124 of the Limitation Act, 1963 clearly specifies a period of 30 days limitation for filing review of judgment by a court other than the Supreme Court.

10. That in view of the aforesaid provision, the limitation for filing Review Petition is only 30 days. The present petition has been filed after a considerable delay. The reasons for delay cited by the Petitioner in its Application seeking condonation of delay are flimsy and fabricated on the face of it. The Petitioner does not have any sufficient reason to justify delay in filing of the Review Petition. The matter was within the knowledge of public and the information was available in public domain since June, 2017. The said fact is evident from the participation of representatives of public in the hearing before Commission. Thus, where a public spirited person had a chance to represent before the Hon'ble Commission and raise his objections, the Petitioner could as well participate and raise its claim and objections at the time when hearings were undertaken before the Commission. Had the claims of Petitioner been genuine and bonafide, it would have definitely participated in the hearing before the Hon'ble Commission. The present petition is nothing but the malicious intent of the Petitioner to derail the proceedings which goes against the interest of general public. The petition, thus, is barred by law and cannot be adjudicated upon.

PETITIONER IS SEEKING ADJUDICATION OF INTERSTATE COMMERCIAL DISPUTE FOR WHICH HON'BLE COMMISSION HAS NO JURISDICTION

11. Without prejudice to foregoing, it is submitted that that jurisdiction of the Commission in terms of Section 86 of the Electricity Act is territorial centric. By way of present petition, Petitioner has sought adjudication of a commercial dispute between the GIPL and Petitioner. As per the Section 86 of the Electricity Act, the

Commission does not have jurisdiction to adjudicate the dispute involving a generating company i.e. GIPL based in State of Sikkim and an inter-state trading licensee, i.e. the Petitioner who has no nexus with the territorial jurisdiction of the Commission.

12. That the Hon'ble Appellate Tribunal for Electricity ("Hon'ble Tribunal") in Appeal No. 7 of 2009 decided on 06.08.2009 titled as Lanco Amarkantak Power Pvt. Ltd. v. MPERC and Ors. (in which PTC, an inter-state trading licensee was a party), has held that State Commission has no jurisdiction in the cases where dispute involves parties which are not situated or comes within the jurisdiction of the State Commission. In the present case as well Gati, a generating company is situated in State of Sikkim and Petitioner, an inter-state trading licensee which holds a license not granted by the Hon'ble Commission. The relevant part of the Judgment is reproduced hereunder for ready reference:

" The Learned Senior Counsel appearing for the R-2 placed heavy reliance on the decision of Supreme Court in 2008 (4) SCC 755 to state that all the disputes between licensees and generating companies can only be resolved by the State Commission. This judgment is of no use to the R-2 since the said judgment has not considered the scope and ambit of the term "licensee" for the purpose of Section 86(1)(f). The Hon'ble Supreme Court has clarified that High Court cannot resolve the dispute by referring to arbitration but it is a Commission alone who can solve the dispute between the licensees and the generators either by itself or by referring it to the arbitration. In the above judgment, Supreme Court did not go into the question as to who can be called a licensee to invoke the jurisdiction of the State Commission. In this case, as referred to earlier, the R-2 who is a trading licensee who has been granted license by the Central Commission cannot be construed to be licensee to invoke the jurisdiction of the State Commission as he has not got any licence from the State Commission.

29. As mentioned earlier, the words "The State" as incorporated in Section 86 would mean that every State Commission has to have jurisdiction to adjudicate upon every dispute between its licensee and a generator. Otherwise every State Commission would have jurisdiction to adjudicate upon every dispute between any generator and any licensee which could not have been the intention behind adjudicatory mechanism under the Act.

30. A reference has been made by the Learned Counsel for the Respondents to Rule 9 as well as some Clauses of Regulations to strengthen their submission. That submission is not sustainable. As referred to above, Clause 10 (2) of the Regulations as well as the amended Regulation 1.4(t) as amended on 21.12.2005 would clearly define the trading licensee as a person who is granted a trading license for intra-state trading in Madhya Pradesh and not a person granted lincense by the Central Commission for inter-state

trading or any other person who has been granted licence for trading by the other State Commission. In short, these two provisions would give the exact answer for the question which arises in this case.

32. To put it briefly, the conjoint reading of Clause 10(2) and Clause 14(t) and Section 86(1)(f) would clearly indicate that the Madhya Pradesh State Commission could deal with the disputes only between the trading licensee who has been granted a trading licence for intra-state trading in Madhya Pradesh and the generator and that person cannot be called to be trading licensee to invoke the jurisdiction of the Commission merely because he has been granted licence either by the Central Commission for inter-state trading or by any other Commission for trading

34. In the light of the said objection, we do not want to give any liberty. As such, the Appeal has to be allowed on the ground that the Order impugned is liable to be set aside as it suffers from the lack of jurisdiction. Accordingly, the order dated 25.8.2008 is quashed and set aside. This Appeal is allowed. No costs."

13. That it is worthwhile to highlight that similar cases relating to commercial dispute between inter-state trading companies and generators are being contested before commercial courts such as Hon'ble High Courts and District Courts. The reference in regard is made to FAO (OS) 72/2016: M/s PTC India Ltd. vs. Lanco Power Limited and CS (COMM) 174/2016:Global Energy Private Limited vs. Jindal Power Limited.

14. That in light of the above mentioned Order, it is safe to conclude that this Commission has no jurisdiction to adjudicate upon the dispute between Petitioner and Respondent no. 2 (GIPL) Therefore the Petition is untenable on merits as well
In view of the foregoing, it is established that the Review Petition filed by the Petitioner is not maintainable in any form. The same is hopelessly barred by the law of limitation. It is, therefore, most humbly prayed that this Hon'ble Commission may kindly dismiss the petition with exemplary cost.

12. The Review Petitioner, filed its rejoinder on the reply filed by HPPC, as under:-

PRELIMINARY OBJECTIONS

1. That Respondent No.1/HPPC has failed to file its detailed Reply within two weeks from the Order dated 30.10.2018 and thus not complied with the directions of this Hon'ble Commission. In light of the negligent and lackadaisical attitude of Respondent No.1/HPPC it is most humbly prayed that no further opportunity may be

provided to the Respondents to file their Reply and the present Reply may be treated as the detailed Reply on merits as well.

2. That the Respondent No.2/Gati was an active participant in the said case and even sought to implead itself as a party therein, and this Hon'ble Commission granted liberty to the Respondent No.2/Gati to assist Respondent No.1/HPPC with the relevant data/information that may be required for making submissions. Pursuant thereto, the Respondent No.2/Gati, being represented by its Counsel, made requisite submissions in support of the approval of aforesaid power procurement arrangement.

3. Respondent No.2/Gati was so brazen in playing fraud on all parties concerned that while it was negotiating the execution of the power purchase agreement with Respondent No.1/HPPC without disclosing the pre-existing Main PPA (read with the Supplementary PPAs), it was also simultaneously requesting the Review Petitioner to revisit the trading margins as contemplated under the Main PPA read with the Supplementary PPAs. In this context, reliance is placed upon letters dated 13.04.2017 and 20.04.2017 issued by the Respondent No.2/Gati, which clearly demonstrate that Respondent No.2/Gati expressed its desire to continue with the Main PPA read with the Supplementary PPAs with the request to revisit the issue of trading margins only. Further, Respondent No.2/Gati vide its email dated 03.11.2017 forwarded a list of pointers seeking amendment in the existing Main PPA (read with the Supplementary PPAs) which clearly indicate (a) existence of a valid PPA between the Review Petitioner and the Respondent No.2/Gati for the power generated from the Power Plant even in November 2017, when the Order dated 13.11.2017 was passed by this Hon'ble Commission; and (b) Respondent No.2/Gati was indulging in gaming with intent to play fraud with all the concerned parties. Therefore, Respondent No.2/Gati never revoked the existing Main PPA (read with the Supplementary PPAs) before entering into negotiation with the Respondent No.1/HPPC nor when it approached this Hon'ble Commission at the time when the approval was being sought for procurement of the already tied-up power generated from the Power Plant.

4. That the Order dated 13.11.2017 has been obtained by the Respondents by fraud as the Respondent No.2/Gati has not only negotiated the power purchase agreement with Respondent No.1/HPPC on the basis of a fraudulent

misrepresentation, but also played fraud upon the Review Petitioner and this Hon'ble Commission, as it has surreptitiously entered into a contract with Respondent No.1/HPPC and got the same approved by the Hon'ble Commission vide the Order dated 13.11.2017 while the same power was contracted to the Review Petitioner. Admittedly, while approving the purchase of power from the Power Plant, this Hon'ble Commission had perused the draft PPA (entered into between Respondents) submitted for approval, made some observations and instructed Respondent No.1/HPPC to recast the PPA and then submit the initialled PPA for this Hon'ble Commission's approval. Therefore, the Review Petitioner is constrained to approach this Hon'ble Commission challenging the approval of the PPA executed by Respondent No.2/Gati with the Respondent No.1/HPPC as the same power i.e. the entire capacity of 110 MW generating from the Power Plant was already tied-up with the Review Petitioner on exclusive basis till 10 years from COD. Accordingly, the Main PPA (read with the Supplementary Agreements) was still in existence without any dispute when the power procurement process with Respondent No.2/Gati was initiated and got approved by this Hon'ble Commission. In this context, it is respectfully submitted that the present review petition is only challenging the aforesaid power procurement process and hence, this Hon'ble Commission is the appropriate forum to revisit, review and settle the challenge to such approval.

5. That Respondent No.1/HPPC, being the power procurement agency established for the purpose of procuring electricity from various sources for its onward supply to the Distribution Licensees and the consumers at large in the State of Haryana, has the onus to ensure that no generator is allowed to fraudulently enter into a PPA with utilities in Haryana, which might in the long run be detrimental to their interests. Therefore, Respondent No.1/HPPC by supporting the fraudulent conduct of Respondent No.2/Gati is setting unquestionably a bad precedent.

I. THE REVIEW PETITIONER HAS THE LOCUS TO FILE THE PRESENT REVIEW PETITION

6. The Review Petitioner vehemently denies that it does not have the locus to file the present Review Petitions the Review Petitioner was not a party before the Commission. It is submitted that contention that the present Review Petition cannot be filed by the Review Petitioner is absurd and falls short of any logic.

7. The Review Petitioner should have ideally been arrayed as a party in the original proceedings, but for Respondent No.2/Gati's suppression of fact of the existence of prior agreement with the Review Petitioner before the Hon'ble Commission. The Review Petitioner was unaware till the last week of January 2018 that such proceedings were pending before the Hon'ble Commission. Hence, the Respondents cannot take advantage of their own wrongdoing and now raise the argument that the Review Petitioner was not a party before the Hon'ble Commission in the Said Case.

8. Further, it is pertinent to note that Regulation 78 of the Conduct of Business Regulations, 2004 provides for filing of review petition not only by the parties but also by any 'party concerned'. Regulation 78 of the Conduct of Business Regulations, 2004 is quoted below for ease of reference:

78 (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 making 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"

[Emphasis Supplied]

9. Therefore clearly, not only the parties to a proceeding but anyone who would be affected can approach this Hon'ble Commission seeking review of its decision or

order. The said Regulations nowhere indicate that only the original parties can approach this Hon'ble Commission for review. Since it is not denied by the Respondents that the Main PPA and the Supplementary PPAs were signed with the Review Petitioner, there is no doubt as to the fact that the Review Petitioner is a 'party concerned' in terms of the Regulation 78 of the Conduct of Business Regulations, 2004.

10. The Main PPA and the Supplementary PPAs when read together, clearly establish that a valid Power Purchase Agreement for a period of 10 years existed between the Parties. Therefore, in terms of the Regulation 78 of the Conduct of Business Regulations, 2004, the Review Petitioner having a pre-existing PPA with Respondent No.2/Gati, is a party concerned and entitled to file the present Review Petition.

11. It is also noteworthy that Regulation 78 of the Conduct of Business Regulations, 2004 is in line with the legally settled position that any 'sufficient cause' allows the adjudicating authority to review its decision/order and such sufficient cause including the disclosure of new fact can be put forth by any 'person concerned'.

II. THE ISSUES RAISED HEREIN ARE WITHIN THE PURVIEW OF A REVIEW PETITION

12. It is submitted that the present Review Petition is not a fresh Petition filed by the Review Petitioner for determination of the status of the PPAs executed by it with Respondent No.2/Gati. If Respondent No.1/HPPC's submission is accepted for the sake of argument-that there is a blanket ban on the Review Petitioner to approach this Hon'ble Commission even as a Review Petitioner, it would lead to an absurd outcome where the Review Petitioner is left remediless. Since the Review Petitioner cannot get any relief from another forum till the Order dated 13.11.2017 is not reviewed by this Hon'ble Commission and the Review Petitioner will never have any effective redressal of its grievance as the said Order will come in the way of the other proceedings. Further, it is humbly submitted that no party should be allowed to play

fraud and indulge in gaming and then seek to avoid meeting the issue(s) on merits by raising frivolous contentions.

13. It is well settled position of law that an adjudicating authority can review its order if a person aggrieved by a decree or order of a court applies to the same court for review of the judgment or order on following grounds:

- (a) Discovery of a new 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;
- (b) Some mistake or error apparent on the face of the record; or
- (c) Any other sufficient reason.

The aforesaid requirements are also enunciated under Regulation 78 (2) of the Conduct of the Business Regulations, 2004.

14. It is submitted that a perusal of the Order dated 13.11.2017 clearly reflects that the Respondents have not apprised this Hon'ble Commission of the existence of the Main PPA with the Review Petitioner, thereby rendering the 110 MW of electricity generated from the Power Plant as tied up power and not free to be sold to any other person.

15. Further, it is submitted that the expression "*any other sufficient reason*" as a ground for review has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held by the courts to be sufficient ground to exercise power of review. In this regard reliance is placed upon the judgment passed by the Hon'ble Supreme Court of India in **S. Nagaraj & Ors. vs. State of Karnataka & Anr., (1993) Supp (4) SCC 595** and **Board of Control for Cricket, India & Anr. vs. Netaji Cricket Club & Ors. (2005) 4 SCC 74**. The relevant portions of the aforesaid Judgments have already been extracted at ***Paragraphs 17-18 of the Review Petition at Pages 17-19.***

16. Therefore, in facts of the present case, it is necessary for the Review Petitioner to seek review/modification/clarification of the Order dated 13.11.2017 which has been obtained by the Respondents fraudulently by not intimating this Hon'ble Commission of the true status of 110MW of power which is generated from the Power Plant. It is submitted that had the Respondents brought the fact of existence of Main PPA to the fore, this Hon'ble Commission would not have passed the Order dated 13.11.2017 without any public hearing. In this context, it is

submitted that the Order dated 13.11.2017 passed by this Hon'ble Commission in Case No. HERC/PRO-24 of 2017 violates the principles of natural justice as it has been not only passed behind the back of the Review Petitioner but also affects the substantial rights of the Review Petitioner flowing from the Main PPA.

III. THIS HON'BLE COMMISSION HAS THE JURISDICTION TO ENTERTAIN THE PRESENT MATTER

17. It is submitted that in terms of the Electricity Act, no hierarchy exists between the Hon'ble Central Electricity Regulatory Commission ("**Hon'ble Central Commission**") and the State Electricity Regulatory Commissions ("**State Commissions**"). The Order dated 13.11.2017 passed by this Hon'ble Commission in terms of Section 62 of the Electricity Act, cannot be set-aside by the Hon'ble Central Commission or any other State Commission.

18. While the issue of termination of PPA might be under the jurisdiction of the Hon'ble Central Commission, the Order dated 13.11.2017 can only be reviewed by this Hon'ble Commission. The Review Petitioner relies on the averments made by it in the Review Petition to state that the Order dated 13.11.2017 is liable to be reviewed in light of *inter alia* the fraud played by Respondents.

19. It is further submitted that even if the question of termination is determined by the Hon'ble Central Commission or the adjudication of dispute between the Review Petitioner and Respondent No.2/Gati is done by another State Commission, the same can only be enforced once this Hon'ble Commission's Order is suitably reviewed. Pursuant to the flow of power beginning in the state of Haryana in terms of the Order dated 13.11.2017, any order passed by the Hon'ble Central Commission or another State Commission will come in the way of any adjudication by the Hon'ble Central Commission.

20. It is submitted that Respondent No.1/HPPC has sought to mislead this Hon'ble Commission by relying upon the Hon'ble Tribunal's **Judgment dated 06.08.2009 in Appeal No.07 of 2009: Lanco Amarkantak Power Pvt. Ltd. vs. MPERC & Ors.** It is submitted that question dealt with in the aforesaid Judgment by the Hon'ble Tribunal was whether the Madhya Pradesh Electricity Regulatory Commission ("**Ld. MPERC**") had the jurisdiction to entertain a Petition in relation to **termination of PPA** between the generating company (situated outside the State of Madhya Pradesh) and inter-state trader (which had not been provided license by Ld.

MPERC) therein. It was held by the Hon'ble Tribunal that Ld. MPERC can only deal with the dispute relating to the licensees that operate under a trading licence granted by the Ld. MPERC. It is submitted that the present Review Petition has been filed by the Review Petitioner without prejudice to its right to seek appropriate remedies against the Respondent (**Paragraph 7 at Page 7 of the Review Petition**). Therefore, the Review Petitioner in the present Petition has not sought any adjudication on the termination of the PPAs executed with Respondent No.2/Gati or any other dispute. The Review Petitioner is seeking review of the Order dated 13.11.2017 *inter-alia* on the following grounds:-

- (a) the Order dated 13.11.2017 can only be reviewed by this Hon'ble Commission and not by any other authority;
- (b) Unless the Order dated 13.11.2017 is set aside, till then even if the Review Petitioner pursues another remedy to address the dispute with Respondent No.2/Gati before another forum, such recourse will not be fruitful; and
- (c) Respondent No.2/Gati ought not to be allowed to get away with the fraud which it has played on this Hon'ble Commission and the Review Petitioner in obtaining the Order dated 13.11.2017, which is highlighted by the fact that Respondent No.2/Gati attempted to terminate the arrangement with the Review Petitioner only after obtaining the Order dated 13.11.2017 approving the Draft PPA for sale of 110 MW of power from its Power Plant.

21. Respondent No.1/HPPC has erred in understanding this as a dispute between trading-licensee and generator. The present Review Petition simply seeks review of the Order dated 13.11.2017, in light of the fact that a valid PPA was subsisting at the time the approval of PPA was obtained by the Respondents fraudulently from this Commission.

22. It is submitted that though the Review Petitioner may choose to pursue its contractual dispute independently and separately from the present issue, but this Hon'ble Commission's order can be reviewed only by this Hon'ble Commission as neither the Hon'ble Central Commission nor any other forum can stand in the way of this Hon'ble Commission's order.

PARA-WISE REJOINDER

23. The contents of Paragraphs 1-2 of the Reply of Respondent No.1/HPPC merit no response to the extent the same are a matter of record. It is reiterated that the Review Petitioner was not a party to the Said Case since Respondent No.2/Gati surreptitiously got the Power Purchase Agreement with Respondent No.1/HPPC approved by the Hon'ble Commission without any intimation to the Review Petitioner. It is pertinent to note that neither any public notice was issued nor any public hearing held in the Said Case. It is submitted that the limited submissions made by one Mr. Sunil Kumar Nehra, Advocate cannot be equated with sufficient public consultation.

24. The contents of Paragraphs 3 of the Reply of Respondent No.1/HPPC are misconceived and hence denied. It is denied that the Review Petition is untenable or illegal in any manner. The Review Petitioner has been constrained to approach this Hon'ble Commission on account of the fraudulent misconduct on part of the Respondents.

25. The contents of Paragraphs 4-5 of the Reply of Respondent No.1/HPPC are misconceived and hence denied. It is denied that the Review Petitioner does not have the locus to file the present Review Petition. The Review Petitioner relies on paragraphs 14-20 of the Preliminary Submissions above to submit that the Respondents cannot on the one hand fraudulently get the PPA approved for power already tied-up with the Review Petitioner and on the other hand allege that the Review Petitioner has no locus in the present matter.

26. The contents of paragraphs 6-8 of the Reply of Respondent No.1/HPPC are misconceived and denied. It is denied that the dispute raised herein is a commercial dispute between the Review Petitioner and Respondent No.2/Gati. The Review Petitioner in this context relies upon paragraphs 21-25 of the Preliminary Submissions made hereinabove. This Hon'ble Commission has the sole jurisdiction to review its order and no commercial claim can be pursued by the Review Petitioner while the Order dated 13.11.2017 stands in the way without being reviewed. The Review Petitioner reiterates that the present Review Petition merely seeks to bring the fraudulent conduct on part of Respondent No.2/Gati in the said case to the fore and is thus, seeking a correction of an error apparent on the face of the record. It is also reiterated that the definition of "sufficient cause" to file Review Petition is required to be interpreted liberally and Respondents cannot be allowed to get away

with fraud by relying on flimsy grounds of technicality. It is submitted that Respondent No.1/HPPC has erred in supporting Respondent No.2/Gati in its fraudulent conduct.

27. The contents of Paragraphs 9-10 of the Reply of Respondent No.1/HPPC are misconceived and hence denied. It is submitted that in light of the Order dated 30.10.2018 of this Hon'ble Commission in the present Review Petition, the objection with respect to delay in filing of the Review Petition is infructuous as the delay already stands condoned and the said order of this Hon'ble Commission has not been challenged by either of the Respondents, thus attaining finality.

28. The contents of Paragraphs 11-13 of the Reply of Respondent No.1/HPPC are misconceived and hence, denied. It is denied that this Hon'ble Commission lacks jurisdiction to decide the present matter between Respondent No.2/Gati which is a generating company embedded in State of Sikkim and the Review Petitioner-an Inter-State Trading Licensee. In this context reliance is placed on paragraphs 26-31 of the Preliminary Submissions above to state that only this Hon'ble Commission has the power and jurisdiction to review its Orders and neither the Hon'ble Central Commission nor any arbitral tribunal has the power to circumvent or overcome the Order dated 13.11.2017.

The Review Petitioner further relies on paragraphs 29-31 of the Preliminary Submissions above to state that the reliance placed by the Respondent No.2/Gati on Hon'ble Tribunal's **Judgment dated 06.08.2009 in Appeal No.07 of 2009: Lanco Amarkantak Power Pvt. Ltd. vs. MPERC & Ors.** is misconceived because the factual matrix in the present Review Petition is entirely different from that in the aforesaid Judgment. In light of the peculiar circumstances in the present case, the Order dated 13.11.2017 is liable to be reviewed by this Hon'ble Commission.

29. The contents of Paragraphs 14 of the Reply of Respondent No.1/HPPC are misconceived and denied. The Respondent No.1/HPPC cannot be allowed to delay the reliefs claimed by the Review Petitioner by filing frivolous pleadings and not responding to the actual merits of the matter. Therefore, the present Reply shall be treated as the detailed Reply filed on behalf of Respondent No.1/HPPC and no further opportunity shall be provided to the Respondent for filing of a detailed Reply.

13. The case was finally heard on 19.12.2018, wherein the parties mainly reiterated the contents of their written submissions which for the sake of brevity has not been reproduced here.

Commission's Analysis and Order

14. The Commission has taken serious view of the fact that the material information relating to pre-existing PPA between M/s. Gati and M/s. Tata Power, was not disclosed to the Commission at the time of filing of the petition for source approval. Accordingly, the petition was decided by the impugned order dated 13.11.2017 on the basis of wrong affidavit given by HPPC in this regard.
15. However, the Commission is constrained to observe the fact established in the hearing that M/s Tata Power has filed a petition in the Central Electricity Regulatory Commission (CERC) on the issue of termination of the PPA between M/s. Tata Power and M/s Gati Infrastructure Pvt. Ltd. Admittedly, M/s Gati has submitted to the jurisdiction of CERC in the matter. Hence, it will not be appropriate for this Commission to go into the dispute between the parties which is already under consideration of the Hon'ble CERC.
16. The Commission further observes clause 1.1 of the PPA between the Review Petitioner and M/s. Gati (page 72 of the paper book) specifies "CERC" as the "Appropriate Commission". Hence, under these circumstances this Commission is constrained to go into the merits of the present case and no cause of action seems to have arisen to M/s. Tata Power under the present review petition for consideration of the Commission.
17. In view of the above, the Review Petition is dismissed as not maintainable.
18. In terms of the above Order, the I.A. filed by M/s. GIPL has also become infructuous and accordingly dismissed.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 19.12.2018.

Date: 19.12.2018
Place: Panchkula

(Pravindra Singh Chauhan)
Member

(Jagjeet Singh)
Chairman