

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

**Case No. HERC/Review Petition No. 8 of 2023 and IA No. 16 of 2023**

<b>Date of Hearing</b>	<b>:</b>	<b>13.03.2024</b>
<b>Date of Order</b>	<b>:</b>	<b>20.03.2024</b>

**In the Matter of**

**Review Petition under clause (f) of Sub-section (1) of Section 94 of the Electricity Act, 2003 read with Regulation 57 (1) of the HERC (Conduct of Business) Regulations, 2019 as amended from time to time, praying for review of the ex-parte Tariff Order dated 28.07.2023 in Case No. HERC / Petition No. 40 of 2023 Suo Motu**

**Petitioner (Review applicant)**

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

**Respondent**

Haryana Power Purchase Centre, Panchkula (HPPC)

**Present on behalf of the Petitioner**

1. Shri Buddy Rangnathan, Advocate
2. Shri Raukan Jain, Advocate

**Present on behalf of the Respondent**

1. Ms. Sonia Madan, Advocate on behalf of HPPC
2. Shri Gaurav Gupta, XEN, HPPC

**Quorum**

**Shri Nand Lal Sharma**  
**Shri Naresh Sardana**  
**Shri Mukesh Garg**

**Chairman**  
**Member**  
**Member**

**ORDER**

**Brief Background of the case**

1. M/s. Star Wire (India) Vidyut Pvt. Ltd. (SWIVPL) has filed the present petition seeking review of the suo-moto order dated 28.07.2023 (P. No 40 of 2023), passed by the Commission, whereby the levelized tariff for RE projects based on biomass mix 100% paddy straw/stubble, biogas and cogeneration (bagasse, non bagasse) for the FY 2023-24 was determined. The review has been sought, primarily on the fuel cost, fuel mix and Gross Calorific Value (GCV), considered by the Commission, in the ibid order. The review applicant has also sought condonation of delay in seeking the review, vide IA no. of 2023. As the period of limitation of 45 days from the date of the Order i.e. 28.07.2023 expired sometime around 11.09.2023 and around 26.09.2023, if reckoned

from the date of coming into knowledge of the order passed by the Commission. Hence, the delay.

**2. Petitioner's submissions: -**

**Grounds for condonation of delay: -**

2.1 That the reasons for delay in filing the present review are as under: -

- a) The Tariff Order dated 28.07.2023 was not communicated to the petitioner separately. The petitioner accessed the Commission's website on 12.08.2023 and came to know of the impugned tariff order.
- b) The petitioner approached its advocate in Delhi, seeking legal advice on 14.08.2023
- c) The advocate advised to file an appeal before Hon'ble APTEL on 22.08.2023.
- d) The appeal was drafted by 28.08.2023.
- e) The petitioner approached the advocate with draft appeal along with relevant documents on 31.08.2023.
- f) On 13.09.2023, upon perusal of the draft appeal, the advocate advised to file a review application, since the Commission is already seized of the similar matter for the FY 2022-23.

2.2 That the Hon'ble Supreme Court in the case of A.P. Power Coordination Committee & Others v. M/s Lanco Kondapalli Power Ltd. & Others; 2016 (3) SCC 468, has held that in appropriate cases, a specified period may be excluded on account of principle underlying salutary provisions like Section 5 or 14 of the Limitation Act. Since the Tariff Order dated 28.07.2023 has been passed by the Ld. HERC ex-parte, which is adversely affecting the rights of the petitioner, the principles of limitation are squarely applicable to the present proceedings.

2.3 That the period of limitation of 45 days from the date of the Order i.e. 28.07.2023 expired on 11.09.2023. However, if the time period is reckoned from the date of knowledge/ communication of the ex-parte order passed by the Ld. HERC, it expired on 26.09.2023.

2.4 There are catena of judgments of Hon'ble Supreme Court which provides that the limitation period would begin to run from the date of the receipt of the impugned order and not from the date of the order. The ratio decided by the Hon'ble Supreme Court in these cases is as under: -

- (a) The knowledge of the party affected by the impugned order is an essential element which must be satisfied before the decision can be brought into force.
- (b) If the date of pronouncement of the impugned order is communicated to the party and it is accordingly pronounced on the date as previously announced, the

impugned order is said to be communicated to the said party on that date even if the said party is not actually present.

- (c) If without notice of the date of its pronouncement, the impugned order is pronounced and the party was not present on the date of pronouncement, the impugned order can be said to have been passed only when it is communicated to the party.
- (d) Where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned.
- (e) The expression “the date of the order” has to be construed as meaning the date of communication of the order to the party concerned.

- 2.5 That applying the above principles of law laid down for calculating the limitation period, there is delay of approximately 34 days in filing the present review petition from the date of knowledge of the tariff order, which is not deliberate but due to the order being passed ex-parte, time taken in obtaining legal advice and changing the legal recourse, in collating the summary of fuel procurement and handling bills for FY 2021-22 to FY 2023-24, which involved scrutiny of thousands of pages of the documents.

**Grounds for seeking review:-**

- 2.6 That the Commission issued a draft discussion paper for determination of fuel cost for renewable energy projects set up / to be set up in Haryana viz. Biomass, Paddy Stubble, Biogas, Biomass Gasifier & Bagasse / Non-bagasse (cogeneration) on the basis of parameters, except fuel cost, provided under the HERC RE Regulations, 2021 and invited comments/suggestions/objections from the public by 31.12.2021.
- 2.7 That on 31.12.2021, the present review applicant filed its comments/ suggestions/ objections on the parameters of Fuel Cost, Fuel Mix, SHR & GCV, inter alia, specifically pointing out that the alleged MDU Rohtak Report as referred to in the draft discussion paper had never been made available in the public domain and is therefore not a public document. No opportunity to rebut the contents of the said alleged report had been given to the stakeholders, including the petitioner and as such, it is squarely a violation of the sacrosanct principles of “audi alteram partem”.
- 2.8 That the Commission held an online public hearing on 05.01.2022 and heard the objectors, including the applicant herein. The Commission observed that HPPC had not yet filed its comments on the draft order. Therefore, HPPC was given another opportunity to submit its views on the draft paper and the comments/response of various generators. In response, HPPC filed its comments, vide letter dated

21.01.2022 (sic 21.12.2022). The HPPC agreed with the petitioner and submitted as under: -

*“2. The Hon’ble Commission has relied upon a report of MDU Rohtak for determining the fuel cost for renewable projects in its draft Suo Moto order. **The authenticity of the facts and figures present in the said report are unknown. Also, the parameters considered and the background analysis made for the preparation of report has not been disclosed thereby making the report not worthy of any consideration.** Moreover, the report has not been shared in public domain despite specific provision of section 86 (3) of the Electricity Act 2003 which provides that that the Commission shall ensure transparency while exercising its powers and discharging its functions.”*

[Emphasis added]

- 2.9 That the Commission issued the levelized tariff order dated 21.02.2022, for the FY 2022-23 (HERC/Petition No. 52 of 2021), on the basis of parameters, except fuel cost, provided in the HERC RE Regulations, 2021. The said tariff order relied on an alleged MDU Rohtak Report in respect of the fuel cost.
- 2.10 That HERC RE Regulations, 2021 notified on 30.04.2021, are the subject matter of challenge before the Hon’ble Punjab and Haryana High Court bearing CWP No. 10555 of 2022 titled - Star Wire (India) Vidyut Private Ltd. and another Vs. HERC, wherein the vires of the HERC RE Regulations, 2021 is assailed, insofar as the changed norms for Fuel Cost, Fuel Cost Escalation, Fuel Mix, SHR and GCV for the biomass projects are concerned. and which are in deviation to the norms specified by the Ld. CERC, without conducting any State-specific market-based survey or study, contrary to the Judgement dated 23.03.2015 in O.P. No. 3 of 2012 passed by the APTEL. The said writ petition is sub-judice before the Hon’ble High Court, however, no stay is operating.
- 2.11 That on 30.03.2022, the petitioner preferred an RTI application with the Ld. HERC to obtain certain documents. In reply to the above, on 18.04.2022, the Ld. HERC supplied the information, including the MDU Rohtak Report dated 10.11.2021. The said Report titled *“Research/ Study for assistance of the Haryana Electricity Regulatory Commission (HERC) in assessing the quantum and delivered cost of paddy stubble & bagasse at the power generator’s site”*, is admittedly, confined to the suggestions on the cost of paddy stubble only, without reference to cost of other biomass fuels. Even assuming the Report to be genuine, the compulsory usage of paddy has been restricted to 30% of the minimum Fuel Mix. For the remaining 70% cost of biomass fuel, there is no determination at all and no independent State specific study based on current market trends.

- 2.12 That the petitioner, on 04.07.2022, preferred an appeal bearing Appeal No. 609 of 2023 (earlier DFR No. 261 of 2022) against the Tariff Order dated 21.03.2022 before the Hon'ble APTEL. Vide Order dated 14.08.2023, the said appeal is included in the 'List of Finals', along with connected Appeal No. 364 of 2023 filed by respondent (HPPC) against the same Tariff Order, wherein HPPC has contended that the Ld. HERC erred in giving prospective application to the impugned Tariff Order dated 21.03.2022 from 01.04.2022 and that it should have been made retrospectively applicable from the date of notification of the HERC RE Regulations, 2021 i.e. 30.04.2021.
- 2.13 That the petitioner filed a petition (Petition No. 8 of 2023) in the Commission, seeking directions for removing certain difficulties that arose in implementation of the Tariff Order dated 21.03.2022. Even in the said petition, the petitioner herein has, *inter-alia*, pointed out that as per the letter dated 01.12.2022 of Hafed Sugar Mill Assandh (a Govt. mill), the price of bagasse for crushing season 2022-23 is fixed at Rs. 4,410/MT plus taxes and the loading/ unloading and transportation charges are extra. On the other hand, the Ld. HERC has assumed the cost of bagasse as Rs. 2,000/MT for FY 2022-23 (without any escalation), which is completely contrary to the Government's own mill rates for FY 2022-23. The petitioner has further brought on record that the MDU Rohtak Report dated 10.01.2021 recommends for cost of Paddy straw as Rs. 3113.14/MT, provided the same is procured in square bales and transported from within a distance of 25 kms of power plant's vicinity. However, fact is that paddy straw is unavailable within 25 kms from the Petitioner's Power Plant and in most cases, transported from around 150 kms away, that too in bale form. The Hon'ble Commission ought not to have placed reliance on the Tariff Order dated 21.03.2022 for FY 2022-23 while passing the *ex-parte* Tariff Order dated 28.07.2023 for FY 2023-24, in view of the pendency of petition No. 8 of 2023 filed by the petitioner, or at least the Ld. HERC ought to have dealt with and decided both the petitions together.
- 2.14 That the Central Government's Commission for Air Quality Management (CAQM) issued a ban in June, 2022, on the use of coal and other unapproved fuels in the Delhi-National Capital Region (NCR). This led to sharp supply demand imbalances which in turn increased the cost of procurement, transportation and other associated costs of biomass fuel. The problems were further compounded by the SAMARTH Scheme (Sustainable Agrarian Mission on use of Agri-Residue in Thermal Power Plants), notified by the Central Government which mandates the use of biomass pellets by thermal power plants. In the second half of FY 2022-23, the only two biomass projects

approved by HAREDA were unable to procure the biomass at the cost provided by the Ld. HERC and the plants were shut down and could not operate at the rated PLF.

- 2.15 That the Hon'ble Commission passed the *ex-parte* Suo-Moto Tariff Order dated 28.07.2023 (Petition No. 40 of 2023), inter-alia determining the Fuel Cost for renewable energy projects set up / to be set up in the State of Haryana for the FY 2023-24, on the basis of earlier Tariff Order dated 21.03.2022 for FY 2022-23. The Tariff Order has been passed without any public consultation process or hearing, contrary to the provisions of Section 64(3) of the Act, in gross violation to the procedure specified under Regulations 20 & 22(2) of the CoB Regulations, 2019. As such, the order is liable to be reviewed.
- 2.16 That the reason provided by the Ld. HERC for dispensing with the entire transparent public consultation process contemplated under Section 64 is that the Fuel Cost for FY 2023-24 is purportedly determined based on the cost of fuel for the FY 2022-23, escalated by 2.93% per annum, "as provided in the regulations in vogue" (para 8 of the Order). However, this reason is *prima facie* erroneous because the Fuel Cost for 2022-23 itself was not determined by the Commission on the basis of the extant regulations, but on the basis of MDU Rohtak Report dated 10.01.2021.
- 2.17 That the impugned Tariff Order thus suffers from the vice of not only arbitrariness but also contrary to the mandate of Section 86(3) of the 2003 Act which requires transparency in all its functions.
- 2.18 That, during FY 2023-24 (uptil September 2023), Petitioner procured NIL amount of Bagasse, primarily due to huge mismatch between the cost approved by the Hon'ble Commission and the prevailing market rates. In FY 2022-23, the Petitioner could only manage to procure 1.20% of its total fuel consumption from Bagasse, that too at a net rate of **Rs. 5052.17/MT** (including the handling costs), which is more than twice the cost approved by the Hon'ble Commission for FY 2022-23 i.e. Rs. 2,000/MT as well as for subsequent FY 2023-24 (Rs. 2059/MT). Further, the petitioner procured 0.29% Paddy of its total fuel consumption in FY 2023-24 (uptil September 2023), that too at a net rate of **Rs. 5990.20/MT** (including handling costs), which is almost twice as compared to the cost of Paddy approved the Hon'ble Commission for FY 2023-24 i.e. Rs. 3204/MT.
- 2.19 That summary of actual fuel consumption (quantum) of the petitioner for FY 2021-22 to FY 2023-24 is as under:-

SUMMARY OF ACTUAL FUEL CONSUMPTION (QUANTUM)						
FUEL TYPE	2021-22		2022-23		2023-24	
	Qty (Tonnes)	Fuel %	Qty (Tonnes)	Fuel %	Qty (Tonnes)	Fuel %

BAGGASS E	3320.53	3.97%	792.49	1.20%	0.00	0.00%
PADDY	1714.47	2.05%	187.78	0.29%	160.51	0.33%
OTHER BIOMASS	78502.24	93.97%	64802.31	98.51%	40814.10	99.61%
TOTAL	90185.73	100	61027.73	100	48408.80	100

Summary of actual fuel costs (net rate) of the petitioner for FY 2021-22 to FY 2023-24 is as under:-

SUMMARY OF ACTUAL FUEL COSTS (NET RATE)					
FUEL TYPE	2021-22				
	Qty (Tonnes)	Amount	Gross Rate Per MT	Handling Cost	Net Rate Per MT
BAGGASSE	3320.53	15813806	4762.43	308.10	5070.53
PADDY	1714.47	7938340	4630.20	308.10	4938.30
FUEL TYPE	2022-23				
	Qty (Tonnes)	Amount	Gross Rate Per MT	Handling Cost	Net Rate Per MT
BAGGASSE	792.49	3710642	4682.23	369.94	5052.17
PADDY	187.78	1143820	6091.16	369.94	6461.10
FUEL TYPE	2023-24 (Sep 23)				
	Qty (Tonnes)	Amount	Gross Rate Per MT	Handling Cost	Net Rate Per MT
PADDY	160.51	921342	5739.95	250.24	5990.20

Summary of actual handling costs of the Petitioner for FY 2021-22 to FY 2023-24 (till September 2023) in relation to the biomass fuels is as under:-

SUMMARY OF ACTUAL HANDLING COSTS					
SN	PARTICULARS	2021-22	2022-23	2023-24 (Sep 23)	TOTAL
1	MANPOWER CHARGES	1955316	1559166	635426	4149908
2	VEHICLE EXPENSES	23189494	18126207	10219291	51534993
3	LAND, WEIGHING & SYSTEM COST	2641525	2891249	1259249	6792023
	TOTAL	27786335	22576622	12113966	62476924
	Handling Cost/MT of Biomass Fuel	308.10	369.94	250.24	

- 2.20 That the average GCV considered by the Hon'ble Commission for the Biomass plants (Air Cooled - TG, Biomass Mix) under the Tariff Order dated 28.07.2023 i.e. 3100/kCal is also not aligned to the actual GCV of the biomass fuels. Hence, the quantum of fuel required by the Biomass plants is much higher in order to produce the amount of heat, as compared to the assumptions by the Ld. HERC. This further has an adverse impact on the procurement costs of biomass fuels. In this context, it may be noted that the petitioner, in ordinary course of business, conducted regular sampling tests from certified and approved testing agency. The test results dated 30.12.2021, 14.02.2021 & 18.03.2022 of testing agency would show that the actual average GCV of 2380/kCal is observed for Bagasse with around 40-43% moisture content. Further, the test results

dated 21.12.2021, 16.11.2022 & 20.09.2023 of testing agency would show that the actual average GCV of 2513/kCal is observed for Paddy with around 13-16% moisture content. It is clear from the above that the Ld. HERC has assumed far higher average GCV of biomass fuels than what is actually prevailing in the State.

2.21 That the following prayers have been made: -

- (a) Review the Haryana Electricity Regulatory Commission *ex-parte* Tariff Order dated 28.07.2023 in Case No. HERC / Petition No. 40 of 2023 Suo Motu, to the extent indicated above;
- (b) Pass necessary order(s)/ direction(s) to carry out extensive market-based studies based on actual ground realities for determination of fuel cost for FY 2023-24, as directed by the Hon'ble APTEL vide its Judgement dated 23.03.2015 in O.P. No. 3 of 2012, and give due opportunity to all the stakeholders to submit their views;
- (c) Pass such further order(s) as this Hon'ble Commission may deem fit in the interest of justice, equity and good conscience.

### **3. The respondent's (HPPC) reply:-**

REVIEW PETITION IS TIME-BARRED:

- 3.1 That as per Regulation 57 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019, the time limit to prefer the review petition is 45 days. The order under review, was passed on 28.07.2023, as such the review petition was liable to be filed by 11.09.2023. However, as per the information available on the website of the Hon'ble Commission, the present review petition has been registered on 30.10.2023. Thus, the review application has been filed after a considerable delay. Moreover, no day-to-day explanation of delay is coming forth. Thus, the present petition is liable to be rejected at the threshold being time-barred.
- 3.2 That the prescribed period for filing review i.e. 45 days from 12.08.2023 i.e. date on which the order came to the knowledge of the petitioner also lapsed on 26.09.2023. Thus, assuming (but not admitting) the averments made in the application seeking condonation of delay to be true, in such a scenario, the present review petition is barred by the law of limitation.
- 3.3 That the application seeking condonation of delay may kindly be decided at the preliminary stage, only after which the matter may be heard on merits.



RES SUB-JUDICE, POSSIBILITY OF CONFLICTING DECISIONS, AS SUCH THE PRESENT PETITION MAY KINDLY BE KEPT IN ABEYANCE UNTIL THE DECISION IS RENDERED IN THE CASES PENDING BEFORE SEPARATE FORUMS:

- 3.4 That vide the impugned order dated 28.07.2023, the Hon'ble Commission has determined fuel cost for the FY 2023-24 on the basis of the fuel cost for the FY 2022-23 while escalating the same @ 2.93% per annum. Since the cost of fuel was not being determined afresh by the Hon'ble Commission and only an escalation factor was being applied by the Hon'ble Commission to the already determined cost. The operative part of the order of the Commission is reproduced below:

*"7. The Commission observes that since the cost of fuel has already been determined, for the FY 2022-23, as per the HERC RE Regulations, 2021 in vogue and extensive study by MDU, Rohtak, the same needs to be escalated by 2.93% per annum to arrive at the cost of fuel for the FY 2023-24.*

**8. The Commission further observes that the cost of fuel for the FY 2023-24, has not been determined afresh. Rather the same is determined based on the cost of fuel for the FY 2022-23, escalated by 2.93% per annum, as provided in the regulations in vogue. Therefore, the suggestions and objection from public are not required to be considered. Further, the matter does not warrant a public hearing."**

*(Emphasis Added)*

- 3.5 That by way of the present review petition the petitioner has not raised any argument against the applicability/ validity/ correctness of the escalation @ 2.93% p.a. A bare perusal of the petition shows that the petitioner is aggrieved by the methodology of determination of fuel cost which is based on the report by MDU Rohtak. However, the petitioner has already filed an appeal against the order dated 21.03.2022, passed in HERC / Petition No. 52 of 2021 whereby the Hon'ble Commission had determined the cost of biomass mix fuel as Rs. 3313.94/MT and cost of paddy straw as Rs. 3113.14/MT, for the FY 2022-23, based on the report of MDU, Rohtak. In fact, the petitioner has challenged the report of MDU, Rohtak itself before various forums. The following proceedings are pending which relate to the determination of fuel cost:-

- a. Petition bearing HERC/PRO-08 of 2023 titled Star Wire (India) Vidyut Pvt. Ltd Vs. HPPC & Anr. before the Hon'ble Commission. The said petition has been filed by the petitioner seeking removal of difficulties which have been alleged to have arisen in the implementation of the Tariff Order dated 21.03.2022 passed by the Hon'ble Commission in Case No. HERC/PRO No. 52 of 2021.

- b. Appeal bearing DFR No. 261 of 2022 titled- Star Wire (India) Vidyut Private Limited Vs. HERC & Ors. before the Hon'ble APTEL, wherein the Petitioner has prayed as under:

*"The Appellant humbly prays that the Hon'ble Tribunal be pleased to-*

- (a) Quash and set aside the Tariff Order dated 21.03.2022 in case number HERC/Petition No. 52 of 2021 passed by the Ld. Haryana Commission on account of violation of principles of natural justice;*
- (b) Direct the HERC to adopt the norms of fuel cost as determined by the Ld. CERC, as has consistently been done in the past by HERC;*
- (c) Direct the HERC to continue the norms with respect to fuel mix, fuel cost escalation, SHR and GCV as per the year of commissioning of the plant;"*

*Alternatively, HERC may be directed to carry out extensive market the study based on actual ground realities for determination of fuel cost, as directed by the Hon'ble APTEL vide its judgement dated 23.03.2015 in O.P. No.3 of 2012, and give the opportunity to all the stakeholders to submit their views;*

- (d) Pass such further orders/orders/directions which the Hon'ble Tribunal may deem fit in the justice, equity and good conscience."*

- c. Civil Writ Petition bearing CWP No. 10555 of 2022 titled- Star Wire (India) Vidyut Private Ltd. and another Vs. HERC before the Hon'ble Punjab and Haryana High Court, wherein the petitioner has challenged the vires of the HERC RE Regulations, 2021 notified by the Hon'ble Commission on 27.04.2021.

- d. The Answering Respondent (HPPC) in Appeal (DFR) No. 299 of 2022 has challenged the Tariff Order dated 21.03.2022 on the aspect of applicability of revised of fuel cost from the date of notification of HERC RE Regulation 2021 i.e., 30.04.2021 rather than 01.04.2022.

3.6 That, both- (1) the tariff order dated 21.03.2022 (on the basis of which the impugned order dated 28.07.2023 has been passed), as well as (2) the HERC RE Regulations, 2021 (in accordance of which the tariff stands determined vide the impugned order dated 28.07.2023), have been challenged by the petitioner before separate forums. In case any of the aforementioned proceedings are decided in the favour of the petitioner, the present proceedings would render otiose. Whereas, the law doesn't contemplate multiple adjudications of the same dispute and contrary or inconsistent decisions on the same issues, facts and law between the parties. If the cause of action (being that

bundle of facts material and germane to the arising of the dispute) and/or the issues (factual and legal) are not severable distinctly, in such cases, only one adjudication is permissible. Therefore, the doctrine of res sub-judice is squarely applicable and the present petition is liable to be dismissed given the possibility of conflicting decisions. Alternatively, the present petition may kindly be kept pending/ in abeyance until all the aforesaid proceedings are finally heard and decided by the respective forums.

#### PETITION AGAINST THE WELL-SETTLED PRINCIPLES OF 'REVIEW':

3.7 That Regulation 57 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019, stipulates that all relevant provisions relating to the 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 Hon'ble Commission. As per the Code of Civil Procedure 1908, review of a judgment can only be entertained under following circumstances -

- (a) If there exists an error apparent on the face of the record; or
- (b) If 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.

3.8 That the Hon'ble Supreme Court of India in the matter of Kamlesh Verma v. Mayawati and others [(2013) 8 SCC 320], has summarized the principles of review under the Civil Procedure Code, 1908 in the following manner:

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

#### *Summary of the principles*

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

#### *20.1. When the review will be maintainable:*

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

- (ii) Mistake or error apparent on the face of the record;
- (iii) Any other sufficient reason.

....

20.2. When the review will not be maintainable:

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
- (ii) Minor mistakes of inconsequential import.
- (iii) Review proceedings cannot be equated with the original hearing of the case.
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.**
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.**
- (vi) The mere possibility of two views on the subject cannot be a ground for review.
- (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.**
- (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.
- (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated.”**

(Emphasis Added)

3.9 That in Jain Studios Limited through its President vs. Shin Satellite Public Co. Ltd. [2006(3) RCR (Civil) 601], the Hon'ble Supreme Court while considering a petition for review of order has held as under:

*“8. So far as the grievance of the applicant on merits is concerned, the learned Counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negated. **Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter.** It is settled law that the power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. **A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.** When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the Arbitration Petition was heard and was rejected, **the same relief cannot be sought by an***

***indirect method by filing a review petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted."***

*(Emphasis Added)*

A bare perusal of the petition shows that the petitioner is aggrieved by the methodology of determination of fuel cost and is not aggrieved by the escalation factor applied by the Hon'ble Commission. The petitioner is unable to point out any error apparent w.r.t. escalation factor. It is quite evident that the present review has been preferred by the Petitioner to re-argue the same matter without making any comment on the escalation factor of 2.93%. The present review petition is nothing but a second round of appeal whereby the grounds of challenge to the order dated 21.03.2022 have been reiterated and reagitated. Such an attempt of the review petitioner would not be maintainable and cannot be entertained. The petitioner in the present case has gone ahead to re-argue the complete matter from scratch expecting every merit to be reconsidered afresh. The present case is, therefore, liable to be dismissed outrightly.

#### FORUM SHOPPING AND MULTIPLICITY OF PROCEEDINGS ON SAME ISSUE:

- 3.10 The present petition is also not maintainable in view of non-compliance of Regulation 23(8) of the HERC (Conduct of Business) Regulations, 2019 which provides that *"Every affidavit shall be drawn up in the first person and shall state the full name, age, occupation and address of the deponent and the capacity in which he is signing and shall be signed and sworn before a person lawfully authorized to take and receive affidavits. The affidavit shall also declare that there is no case pending in any Court of Law with regard to the matter referred to the Commission."*

The Petitioner has deliberately suppressed the aforementioned facts regarding the pendency of the petition before this Hon'ble Commission, Hon'ble APTEL as well Hon'ble Punjab and Haryana High Court in its affidavit and has indulged in the practice of forum shopping. The petitioner's action of invoking jurisdiction of multiple forums, in order to obtain the relief in some way or the other, is liable to be deprecated.

Attention in this regard is brought towards the following extract of the judgment of the Hon'ble APTEL in the case of Delhi Jal Board Varunalaya Vs. Delhi Electricity Regulatory Commission Viniyamak Bhawan [Appeal No. 157 of 2012, decided on 04.01.2013]:-

***"26. In addition to this, we ought to state that the Appellant has not only taken the contradictory stand by approaching to different forums for seeking contrary***

***reliefs but also suppress the facts of having approached different form thereby the Appellant indulged in Forum shopping as well as in multiplicity of proceedings. Under those circumstances we are of the view that the Appellant is not entitled to the relief sought for in this Appeal as it has not come with the clean hands.”***

(Emphasis Supplied)

Reliance is also placed on the judgment of Hon'ble Apex Court in Udyami Evam Khadi Gramodyog Welfare Sanstha & Anr. Vs. State of Uttar Pradesh and others [(2008) 1 SCC 560] wherein the Hon'ble Apex Court dismissed the writ petition with costs, on account of 'Forum Shopping' while observing as under:-

***“9. Although the prayers made in the four writ applications are apparently different, having gone through the writ applications, it became evident that the core issue in each of the matter centers round recovery of the amount advanced to the appellants by the bank. Evidently, orders passed in different stages of the proceedings as also new proceedings based upon fresh calculation on interest on the principal sum had been in question from time to time. As indicated hereinbefore, even a public interest litigation was filed wherein also Appellant No. 2 was a party. Maybe that validity of Section 35A of the U.P. Khadi and Village Industries Board Act, 1960 was one of the issues raised therein but even the recovery proceeding was the subject matter thereof.***

...

***We, therefore, are of the opinion that the attempt on the part of the appellants herein must be termed as 'abuse of the process of law'.***

...

***15. A writ remedy is an equitable one. A person approaching a superior court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law.***

...

***16. For the reasons aforementioned, there is not merit in this appeal which is dismissed accordingly with costs. Counsel's fee quantified at Rs. 50,000/-.”***

(Emphasis Supplied)

- 3.11 That Hon'ble Supreme Court in the case of Dnyandeo Sabaji Naik Vs. Pradnya Prakash Khandekar [2017 (5) SCC 496] directed the courts across the country to

impose exemplary cost while negating undeserving cases. Para 13 and 14 of the said judgment reads as under:

*"13. This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth.*

*14. Courts across the legal system - this Court not being an exception - are choked with litigation. Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Productive resources which should be deployed in the handling of genuine causes are dissipated in attending to cases filed only to benefit from delay, by prolonging dead issues and pursuing worthless causes. No litigant can have a vested interest in delay. **Unfortunately, as the present case exemplifies, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The present case is an illustration of how a simple issue has occupied the time of the courts and how successive applications have been filed to prolong the inevitable. The person in whose favour the balance of justice lies has in the process been left in the lurch by repeated attempts to revive a stale issue. This tendency can be curbed only if courts across the system adopt an institutional approach which penalizes such behavior.** Liberal access to justice does not mean access to chaos and indiscipline. A strong message must be conveyed that courts of justice will not be allowed to be disrupted by litigative strategies designed to profit from the delays of the law. Unless remedial action is taken by all courts here and now our society will breed a legal culture based on evasion instead of abidance. It is the duty of every court to firmly deal with such situations. **The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases.** It is only then that the courts can set apart time to resolve genuine causes and answer the concerns of those who are in need of justice. Imposition of real time costs is also necessary to ensure that access to courts is available to citizens with genuine grievances. Otherwise, the doors would be shut to legitimate causes simply by the weight of undeserving cases which flood the system.*

*Such a situation cannot be allowed to come to pass. Hence it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal system is not exploited by those who use the forms of the law to defeat or delay justice. We commend all courts to deal with frivolous filings in the same manner."*

**SUBMISSION WITH RESPECT TO THE MERITS OF THE PRESENT PETITION:**

- 3.12 That the Fuel Cost was based on the report submitted by Maharshi Dayanand University (MDU), Rohtak. This Hon'ble Commission had followed the principle under Section 86(3) of the Electricity Act, 2003 and had acted in a transparent manner while passing the earlier order dated 21.03.2022 vide which the fuel cost already stands determined. The fuel cost already determined has simply been escalated vide the impugned order. The Hon'ble Commission had issued a formal work order to MDU seeking assistance in assessment of the quantum and delivered cost of paddy stubble and bagasse at various power generators' sites, in the State of Haryana. Thereafter, the Hon'ble Commission issued a public notice on its website inviting comments/suggestions/objections from the stakeholders (including the Petitioner herein) on the fuel cost which is different from the fuel cost provided under the HERC RE Regulations, 2021. Thereafter, the Hon'ble Commission has, inter-alia, held as under:

*"The interveners have raised a preliminary issue regarding not making available the research study got conducted by the Maharshi Dayanand University (MDU), Rohtak, a NAAC Accredited A+ Grade University, the findings of which has been relied upon by the Commission.*

*The Commission has considered the above objections and observes as under. The research / study commissioned by this Commission for its assistance, was not a technical research. The report prepared by the MDU and submitted in October, 2021 was based on first establishment of the entire value chain of paddy stubble procured by the power generators i.e. cutting, raking, baling, loading, transportation and unloading, storage etc. within a catchment area of 25 KMs. The major stakeholders in the value chain i.e. farmers, aggregators, power generators/ end – user were consulted. The findings of the study was therefore based on descriptive, exploratory, empirical and analytical research design. The primary data was collected from 12 districts in Haryana that are actively involved in the paddy cultivation viz. Ambala, Fatehabad, Hisar, Jind, Kaithal, Karnal, Kurukshetra , Panipat, Sirsa, Sonapat, Yamunanagar and Jhajjar. Further, the major aggregators / balers and power generators including bagasse-based co-generators were also contacted for the*



*purpose of collecting primary data. Accordingly, the random sample size comprised of 9 aggregators and 2143 farmers. Given, the uniformity in the activity as against diverse practices from farm to generator's site, the sample size, dispersed over 12 districts, has been considered as significant for the purpose of generalization of the findings."*

- 3.13 That the Hon'ble Commission has in its earlier orders, such as in order dated 13.08.2014, relied on state specific study conducted by HAREDA, for arriving at the rate of biomass fuel cost. The said order passed while relying on the report of HAREDA or any such state specific study conducted by the Hon'ble Commission in the past was never challenged by the petitioner.
- 3.14 That the petitioner has averred that the Fuel Cost determined vide Tariff Order dated 21.03.2022 is low and does not depict the true market trend. The petitioner has however, not substantiated such averment by placing on record actual fuel bills of the petitioner and audited financial statements for past years. The vague and unsubstantiated averment cannot be the basis to seek review of the cost. Further, the Petitioner has nowhere raised any allegation with respect to the validity of the escalation factor applied by the Hon'ble Commission. It is the case of the Answering Respondent that the petitions challenging the order dated 21.03.2022 is already pending adjudication before separate forums. Any submission raised by the petitioner against the computation made by the Hon'ble Commission vide its earlier tariff orders cannot be questioned by way of a fresh proceeding. As such, all the submissions raised by the petitioner as against the fuel cost which already stands determined by the Hon'ble Commission is not liable to be taken into consideration. The repeated attempts made by the petitioner to revive a stale issue is liable to be depreciated. Thus, the present petition being non-maintainable and also being bereft of merit is liable to be rejected.
- 3.15 That no application has been filed by the generating company or licensee for determination of tariff in the present case, as such the provisions of Section 64 are not applicable to the facts and circumstances of the present case. Insofar as the Regulation 20 and 22 of the HERC Conduct of Business Regulations are concerned, it is submitted that no public hearing was necessitated in the present case as no re-determination of tariff was being undertaken by the Hon'ble Commission and only an escalation factor was being applied by the Hon'ble Commission to the already determined cost, in terms of the RE Regulations, 2021 in vogue. Be that as it may, the Hon'ble Commission was well within its right to dispense with the requirement of service of notice in view of the following provisions:

*“66. Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act a procedure at variance with any of the provisions of these Regulations if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.*

...

*Power to dispense with the requirement of the Regulations*

*71 The Commission shall have the power, for reasons to be recorded in writing and with notice to the affected parties, to dispense with the requirements of any of the Regulations in a specific case or cases subject to such terms and conditions as may be specified.*

...

*Effect of non-compliance*

*73 Failure to comply with any requirement of these Regulations, practice directions or guidelines shall not invalidate any Proceedings merely by reason of such failure unless the Commission is of the view that such failure has resulted in miscarriage of justice.”*

- 3.16 That the Commission in its order has categorically spelt out that since there was no fresh determination of fuel cost, no public hearing was called for. As such, it is wrong and denied that there had been any complete go-bye to the procedure established under law. It is further denied that there is any error apparent on the face of record. It is further denied that the Tariff Order dated 28.07.2023 is liable to be reviewed.
- 3.17 That Regulation 38 of the HERC RE Regulations, 2021, in vogue, provides that- “Biomass fuel price during first year of the Control Period shall be Rs. 3000 /MT and shall be escalated at the rate of 2.93% per annum for arriving at the levelised tariff for the entire useful life of the project.” Further, the Hon’ble Commission, vide its order dated 21.03.2022, had determined the cost of biomass mix fuel as Rs. 3313.94/MT and cost of paddy straw as Rs. 3113.14/MT, for the FY 2022-23, based on the report of MDU, Rohtak dated October. Thus, vide the impugned order, the escalation factor has been applied to the fuel cost which already stands determined as per Regulation 38 of the RE Regulations, 2021. Since, the action was being taken in terms of the Regulations in vogue, as such, no public consultation process was required to be undertaken. As such, it is wrong and denied that any reason given by the Hon’ble HERC is palpably wrong.
- 3.18 That MDU Report has already been challenged by the petitioner. During the pendency of a number of cases before separate forums, the petitioner being a chronic litigant, is

trying to re-agitate the same issues by way of the present review. Any submission made by the Petitioner against the MDU Report cannot be looked at this stage. The review petition is nothing but an appeal in disguise and is liable to be dismissed on account of indulgence of the petitioner in the practice of forum shopping and so as to get relief in any which way possible.

3.19 That it has been alleged that MDU, Rohtak neither visited the generator's site nor sought any information in order to assess the quantum and delivered cost of paddy stubble and bagasse. In this regard, HPPC submitted that the veracity/ correctness of report submitted by MDU Rohtak already stands challenged by the petitioner before separate forums. The petitioner cannot be permitted to re-agitate the same in another round of litigation. The arguments raised by way of the corresponding para cannot be looked into in view of the applicability of doctrine of res sub-judice. Even otherwise, the petitioner has failed to substantiate any incorrectness in the report of MDU. The sole case of the Petitioner is that the fuel cost is lesser than the market rate. In order to substantiate the same, the prime evidence in the shape of fuel invoices for past years along with audited financial statements, which is in the sole possession of the petitioner ought to have been brought on record. The vague and unsubstantiated averments cannot be a ground to challenge the study undertaken by an expert body based on actual survey.

3.20 That an attempt has been made to negate the report solely on the basis of one single letter dated 01.12.2022 of Hafed Sugar Mill Assandh. In this regard, Whereas, the Sugar Mills cogeneration power plants are primarily envisaged for generation of power from the bagasse produced at its site by crushing of the sugarcane and not for sale of bagasse. Most of the bagasse produced at the site of Sugar Mills is available free of cost and is used for generation of power and only the left over/excess bagasse is sold by Sugar Mills in the market. Therefore, the cost of the left over/excess bagasse sold in market cannot be compared with the bagasse used by Sugar Mills for power generation (which is available free of cost). The cost of the bagasse sold in the market cannot form basis for recovery of the fuel cost through tariff for the bagasse used for generation of power. In this regard, the relevant extract of the Report of MDU, Rohtak wherein assessment regarding cost of bagasse used for power generation is referred is reproduced as under:-

*".....Most of the bagasse generated in the sugarmills is consumed within the mills and not much bagasse is left after the end of the crushing season. Some quantity of bagasse is kept in reserve by the sugarmills for starting of next year's operations and trial runnings. However, excess of bagasse may be sold to outsiders at a rate prevailing*

*in market for the quality of bagasse available; which was found to be Rs 2000 to 2300 per MT during the year 2020-21.”*

- 3.21 That since the matter directly in issue is pending adjudication before the superior Courts i.e. the Hon’ble Punjab and Haryana High Court as well as Hon’ble APTEL, the present petition cannot proceed further in view of the principle of res sub-judice and also in view of the possibility of inconsistent/ conflicting decisions which may be passed by separate forums.

**4. The review applicant’s (M/s. SWIVPL) rejoinder:-**

- 4.1 That the respondent (HPPC) has not acknowledged the application for condonation of delay filed by the petitioner explaining the reasons as to why the review petition could not be filed with the specified time.

- 4.2 That Regulation 38 of the HERC RE Regulations, 2021, provides as under: -  
“38. Fuel Cost. – Biomass fuel price during first year of the Control Period shall be Rs. 3000 /MT and **shall be escalated at the rate of 2.93% per annum for arriving at the levelized tariff** for the entire useful life of the project.

.....”

The tariff of the petitioner has not been determined by the Ld. HERC on levelized basis, hence, the escalation factor of 2.93% specified for arriving at levelized tariff for the entire useful life of the project cannot be made applicable to the Petitioner.

The Ld. HERC has erroneously stated in the *ex-parte* Tariff Order dated 28.07.2023 that the Fuel Cost for FY 2023-24 is purportedly determined based on the cost of fuel for the FY 2022-23, escalated by 2.93% per annum, “*as provided in the regulations in vogue*”. However, this reason is prima facie erroneous because the Fuel Cost for 2022-23 itself was not determined by the Commission on the basis of the extant regulations, but on the basis of MDU Rohtak Report dated 10.01.2021. The Tariff Order dated 21.03.2022 for FY 2022-23 even in its heading clearly states that, “*Determination of fuel cost for renewable energy projects set up / to be set up in Haryana viz. Biomass, Paddy Stubble, Biogas, Biomass Gasifier & Bagasse / Non-bagasse (cogeneration) on the basis of parameters, **except fuel cost**, provided in the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2021- Suo Motu.*” Hence, the reason given by the Ld. HERC is palpably wrong and warrants review. This further vindicates the petitioner’s submission that the escalation factor of 2.93% cannot be made applicable to the Petitioner.

- 4.3 That the petitioner has fully disclosed all the past and pending cases involving different causes of action in para 8 of the review petition. Hence, petitioner has approached this Hon'ble Commission with clean hands.

The scope of appeal under Section 111 of the Electricity Act, 2003 is entirely different from that of a review petition before the State Commission. The appeal before the Hon'ble APTEL is preferred under Section 111 being appellate jurisdiction. While it is admitted that Petitioner has filed an appeal bearing DFR No. 261 of 2022 titled - *Star Wire (India) Vidyut Private Limited Vs. HERC & Ors.* before the Hon'ble APTEL against the Tariff Order dated 21.03.2022 for the FY 2022-23 in case number HERC/Petition No. 52 of 2021 passed by this Hon'ble Commission, however, the present review petition is filed seeking review of the ex-parte Tariff Order dated 28.07.2023 in Case No. HERC / Petition No. 40 of 2023 Suo Motu, inter-alia determining the Fuel Cost for renewable energy projects set up / to be set up in the State of Haryana for the FY 2023-24 and the Tariff Order dated 21.03.2022 has not at all been challenged in this petition. Hence, the cause of action as well as the financial year are separate. Merely because the petitioner has challenged in appeal a tariff order for a particular year, it does not mean that it is disentitled to file a review petition on a fresh cause of action which arose for a subsequent financial year and which has not been assailed before the Appellate Court.

Further, there can never be any conflict between a decision rendered by this Hon'ble Commission and that given by Hon'ble APTEL. The judgement of Hon'ble APTEL will undoubtedly prevail over the order passed by this Hon'ble Commission. The '*doctrine of stare decisis*' which applies to the proceedings under the Electricity Act, 2003 would obviate any alleged conflict.

- 4.4 That under regulation 22(1) of HERC Conduct of Business Regulations, the Commission may initiate proceedings suo motu under Section 86 and Section 181 of the Act, or on a petition or application filed by any person having an interest in the subject matter of the proceedings. However, under Regulation 22(2), "*The Commission **shall issue a notice** initiating the Proceedings, and may give such orders and directions as it thinks fit for service of the notice on affected parties for the filing of replies and rejoinder in opposition or in support of the petition and for other matters relating to the conduct of the Proceedings*". Whereas, in the present case, neither any public hearing was held nor any notice issued by the Commission regarding initiation of *suo motu* proceedings, so as to provide the affected parties, including the petitioner herein, an opportunity to submit their views, which is in violation of the above provisions and constitutes an error apparent on the face of the record. There are no exceptions

provided under Section 64(3) of the Act to dispense with the public consultation process which is aimed to facilitate transparency in decision-making in terms of Section 86(3). Hence, the *ex-parte* Tariff Order dated 28.07.2023 is liable to be reviewed.

- 4.5 That the earlier state specific study conducted by the State Nodal set up by the State Government to implement and promote the policies relating to renewable energy i.e. Haryana Renewable Energy Development Authority [“HAREDA”], that too in the year 2006, has nothing to do with the MDU Rohtak Report dated 10.11.2021. In any event, as has also been admitted by the HPPC, the said MDU Rohtak Report was never made available in the public domain and is therefore not a public document. No opportunity to rebut the contents of the said alleged report was given to the stakeholders, till date. Even assuming the MDU Rohtak Report to be genuine (which is in respect of cost of paddy stubble only), it is unjustified to place reliance on the said Report for fixing the cost of remaining 70% biomass fuel price other than paddy stubble, in the absence of any market based fuel study/ research conducted in the State.
- 4.6 That as per clause 13.1 (iv) of the PPA executed between the parties, the petitioner is already providing the fuel usage and procurement statements duly certified by Chartered Accountant to HPPC, on monthly basis, which also corroborate the actual fuel costs of the petitioner. HPPC cannot be allowed to dispute the fuel costs and usage statements which were never disputed earlier. Accordingly, the submission of HPPC that the actual costs have not been produced are liable to be rejected by the Ld. Commission.
- 4.7 That Section 64 is the only provision under the Electricity Act which specifies the Procedure for issuing a tariff order. Merely because the Hon’ble Commission initiated the tariff proceedings *suo motu* without an application made by either the generating company or the licensee for determination of tariff, it does not tantamount to over-riding the procedure specified under Section 64 for issuing a tariff order. Moreover, the submission of HPPC that the Ld. HERC could dispense with the requirement of notice by exercising its inherent powers under the HERC RE Regulations, deserves rejection for the simple reason that the regulations framed by the Commission cannot override the specific provisions of the Electricity Act, 2003.

### **Proceedings in the Case**

5. The case was heard on 13.03.2024 in the courtroom of the Commission. The petitioner would argue that the very basis of arriving at the fuel cost was the MDU report and the said report was not available in the public domain for discussions and deliberations. Further, the fuel price escalation factor considered by the Commission was also

questioned. Per-contra the counsel for the respondent i.e. HPPC vehemently argued that the review petition filed is time barred and ought to be rejected as such. She further argued that the issues raised under the garb of 'review' is pending adjudication in Hon'ble Punjab and Haryana High Court and Hon'ble Appellate Tribunal for Electricity (APTEL). The details have been presented earlier in this order. Consequently, the matter is sub-judice.

### **Commission's Order**

6. The Commission heard the arguments of the parties at length as well as perused the written submissions and documents placed on record by the them.
7. At the outset, the Commission condons the delay in filing of the present review petition. The delay of 35 days, as per the application seeking condonation occurred due to procedural aspects, which is not grave. Having condoned the delay and before going into the merits of the issues raised under review, the Commission has considered it appropriate to settle the issue of maintainability of the present review petition filed against the Commission's impugned order dated 28.07.2023, The case laws cited by the respondent (HPPC), spells out the scope of a review petition i.e. it is much more restricted and in order to be maintainable, the conditions precedent laid down for the purpose under Order 47 Rule 1 of Code of Civil Procedure 1908 must be satisfied (Kamlesh Verma v. Mayawati and others [(2013) 8 SCC 320]). The summary of principles set by the Apex court are reproduced hereunder: -

#### ***"When the review will be maintainable:***

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
- (ii) Mistake or error apparent on the face of the record;*
- (iii) Any other sufficient reason.*

#### ***When the review will not be maintainable:***

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
- (ii) Minor mistakes of inconsequential import.*
- (iii) Review proceedings cannot be equated with the original hearing of the case.*
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.*
- (vi) The mere possibility of two views on the subject cannot be a ground for review.*

- (vii) *The error apparent on the face of the record should not be an error which has to be fished out and searched.*
- (viii) *The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
- (ix) *Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated."*

HPPC has also cited the decision by Hon'ble Supreme Court in case of Jain Studios Limited through its President vs. Shin Satellite Public Co. Ltd. [2006(3) RCR (Civil) 601], where it was held that *"the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted."*

HPPC has submitted that the conditions precedent laid down for the purpose of entertaining review application under Order 47 Rule 1 of Code of Civil Procedure 1908 as well the ratio decided by the Hon'ble Supreme Court in its various judgements giving guidelines for exercise of the power of review, were analyzed in detail by Hon'ble APTEL in its judgement dated 17.04.2013 (Review Petition no. 12 of 2012 in Appeal No. 17 of 2012). The operative part of the ibid judgement is as under:-

"46 To sum Up

- (a) *This is not a case where there is an apparent error on the face of the record. The grounds urged by the learned counsel for the Review Petitioner would relate to the merits of the matter on the basis of the alleged erroneous conclusions. This would be the province of the court of appeal. If the decision by this Tribunal is not correct, then the same cannot be corrected by this Tribunal in this Review Petition.*
- (b) *The Review Petitioner has simply sought in the Review Petition for a fresh decision of the case on rehearing the entire matter. This is not permissible under the Review jurisdiction. The so called erroneous decision cannot be characterised as an apparent error on the face of the record. Without indicating even remotely any apparent error, the Review Petitioner cannot be allowed to re-agitate the entire matter on merits.*
- (c) *The Review Petitioner is unable to make a distinction between an Appeal and Review Petition. The issues raised by the Appellant/Review petitioner in this Review petition have already been dealt with and decided in our judgment. So, raising the same issues, which have already been decided, cannot be raised in the*



*Review Petition as the same could be raised only in an Appeal since the scope of the Review Petition is very limited.*

.....  
“48. In this case also, as observed earlier, we are constrained to refer to the conduct of the Appellant which is highly reprehensible. As such, in this case also, we feel that some cost has to be imposed on the Review Petitioner.”

HPPC has further averred that in the present review petition, the petitioner has not pointed out any errors apparent on the face of record or discovery of new and important matter of evidence, as the grounds for entertaining the review application, which have been enshrined in the Order 47 Rule 1 of Code of Civil Procedure 1908. The review petitioner is primarily aggrieved by the methodology of determination of fuel cost and is not aggrieved by the escalation factor applied in the impugned order. The petitioner in the present case has gone ahead to re-argue the complete matter from scratch starting from the FY 2022-23, for which various appeals have been filed before various authorities including this Hon'ble Commission. The present case is, therefore, liable to be dismissed outrightly.

Per-contra, the petitioner has vehemently argued that there are errors apparent on the face of the record. The petitioner has submitted that the impugned ex-parte order dated 28.07.2023 was passed in violation of the procedure specified under Regulations 20 & 22 of the HERC (Conduct of Business) Regulations in vogue as well as Section 64(3) of the Electricity Act, 2003, which provides for a public consultation process before the issue of a tariff order. Further, the impugned order dated 28.07.2023 has wrongly recorded that the Fuel Cost for FY 2023-24 is determined based on the cost of fuel for the FY 2022-23, escalated by 2.93% per annum, “as provided in the regulations in vogue”. Whereas, the Fuel Cost for 2022-23 itself was not determined by the Commission on the basis of the extant regulations, but on the basis of MDU Rohtak Report dated 10.01.2021. The petitioner has further cited a judgement dated 22.08.2014 passed by Hon'ble Appellate Tribunal for Electricity (APTEL) in the matter of M/s. Tata Motors Limited vs Maharashtra Electricity Regulatory Commission & ors. (Appeal No. 295 of 2013), wherein it was held that the State Commission should have followed the mandatory procedures contemplated u/s 64 and 86 (3) of the Electricity Act, 2003 by issuing public notice and giving opportunity to the consumers to raise objections/suggestions on the retail supply of tariff proposed.

In order to examine the averments of the petitioner, the Commission perused the impugned suo-motu order dated 28.07.2023 (petition no. 40 of 2023). The Commission in its impugned order dated 28.07.2023 had ordered as under: -

*“5. Further, Regulation 38 of the HERC RE Regulations, 2021, in vogue, provides as under:-*

*“**Fuel Cost.** – Biomass fuel price during first year of the Control Period shall be Rs. 3000 /MT and shall be escalated at the rate of 2.93% per annum for arriving at the levelised tariff for the entire useful life of the project.”*

*6. Subsequently, the Commission, vide its order dated 21.03.2022, had determined the cost of biomass mix fuel as Rs. 3313.94/MT and cost of paddy straw as Rs. 3113.14/MT, for the FY 2022-23, based on the report of MDU, Rohtak dated October, 2021.*

*7. The Commission observes that since the cost of fuel has already been determined, for the FY 2022-23, as per the HERC RE Regulations, 2021 in vogue and extensive study by MDU, Rohtak, the same needs to be escalated by 2.93% per annum to arrive at the cost of fuel for the FY 2023-24.*

*8. The Commission further observes that the cost of fuel for the FY 2023-24, has not been determined afresh. Rather the same is determined based on the cost of fuel for the FY 2022-23, escalated by 2.93% per annum, as provided in the regulations in vogue. Therefore, the suggestions and objection from public are not required to be considered. Further, the matter does not warrant a public hearing.”*

It is evident from the above that the Commission was aware of the provisions of Section 64 of the Electricity Act, 2003 as well as Regulations 20, 22 and 66 of the HERC (Conduct of Business) Regulations, 2019. Accordingly, the Commission has addressed the issue of requirement of holding a public hearing or inviting suggestions and objections from public, by deciding that *“the cost of fuel for the FY 2023-24, has not been determined afresh. Rather the same is determined based on the cost of fuel for the FY 2022-23, escalated by 2.93% per annum, as provided in the regulations in vogue. Therefore, the suggestions and objection from public are not required to be considered. Further, the matter does not warrant a public hearing.”*

The Commission has carefully examined the provisions of Section 64 of the Electricity Act, 2003, reproduced hereunder: -

*“64. Procedure for tariff order (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

*(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.*

*(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-*

*(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;*

*(b) .....”*

It is evident from the bare perusal of the above that provisions of Section 64 are applicable upon the application for determination of tariff under Section 62 by a generating company or a licensee and are not applicable in suo-motu order for determination of generic tariff which is based upon the fuel cost determined for the FY 2022-23 and is further escalated by the escalation factor provided in the HERC RE Regulations, 2021, in vogue.

The Commission observes that Regulation 66 of the HERC (Conduct of Business) Regulations, 2019, provides as under: -

*“Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act a procedure at variance with any of the provisions of these Regulations if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.”*

The judgement dated 22.08.2014 passed by Hon'ble APTEL, cited by the review petitioner is not applicable in the present case, as the facts and circumstances leading to the passing of the cited judgement of Hon'ble APTEL and the impugned order, is entirely different. In the cited judgement, supplemental charges were levied on the petition filed by a distribution licensee (Maharashtra State Electricity Distribution Company Limited), which lead to revision in the retain supply tariff. Whereas, in the present case the fuel cost for the FY 2022-23 was already determined based on an extensive study. Accordingly, fuel cost for the next financial year i.e. FY 2022-23 was determined after applying the escalation factor.

In compliance of the provisions of Regulation 66 (supra), ample reasoning for not inviting the suggestions and objection from public, has been given in the impugned order. The fuel cost for the FY 2022-23 was determined based on an extensive study. The Commission is of the considered view that getting the same study done for the next financial year, would not have yielded a different result and instead it would be appropriate to escalate the fuel cost determined for the FY 2022-23 by the inflation factor determined in the regulations in vogue. It may be noted that MDU Rohtak is a reputed public institution of higher learning and research. Hence, a study conducted by them ought to be given due weightage. As the said study included collection, analysis and interpretation of primary data based on a scientifically drawn sample, hence, little purpose would have been served by subjecting it to public hearing. Moreover, the recommended cost has been made part of the draft for consultation.

Therefore, there is no error apparent on record of the impugned order, warranting this Commission to exercise its review jurisdiction.

8. In view of the above discussions, the Commission is of the considered view that in the garb of invoking review jurisdiction of this Commission, the petitioner is seeking re-consideration of the fuel cost for the earlier financial years, for which it has filed various appeals before various authorities viz. Hon'ble APTEL, Hon'ble Punjab and Haryana High Court and this Commission (Petition No. 8 of 2023). The Regulations/Statutes and Case Laws encompass the scope of Review Jurisdiction in very narrow confines. The Commission, upon perusal of the records available and averments made by the parties, is of the considered view that it was the conscious decision of the Commission while passing the impugned Order dated 28.07.2023 to apply the escalation factor provided in the HERC RE Regulations, 2021 to the fuel cost determined for the FY 2022-23, while determining the fuel cost for the FY 2023-24. Hence, it is not open for the petitioner to re-agitate the issues without identifying errors apparent or bringing to the table new facts and figures that were not available at the time of passing of the impugned order. A manifest illegality must be shown to exist or a patent error must be shown in an order to review a judgement. No such grounds or patent error have been shown by the review petitioner. The bar against re-consideration of its own decision is a settled principle in adjudicatory jurisprudence. Once a case has been finally heard and adjudicated upon by the authority concerned, the resultant adjudication can be re-opened for consideration only in appellate jurisdiction.

In terms of the above discussions, the present petition seeing review of the Commission's order dated 28.07.2023, is dismissed after testing it on the anvil of the scope of review jurisdiction of this Commission.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 20.03.2024.

Date: 20.03.2024  
Place: Panchkula

(Mukesh Garg)  
Member

(Naresh Sardana)  
Member

(Nand Lal Sharma)  
Chairman