

BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION AT PANCHKULA

HERC/Petition No. 8 of 2023

Date of Hearing : 13.03.2024
Date of Order : 20.03.2024

In the Matter of

Petition seeking removal of certain difficulties that have arisen in implementation of the Haryana Electricity Regulatory Commission Tariff Order dated 21.03.2022 in Case No. HERC/Petition No. 52 of 2021.

Petitioner

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

Respondents

1. Haryana Power Purchase Centre, Panchkula (HPPC)
2. HAREDA

Present on behalf of the Petitioner

1. Shri Buddy Rangnathan, Advocate for M/s. Star Wire (India) Vidyut Pvt. Ltd.
2. Shri Raukan Jain, Advocate for M/s. Star Wire (India) Vidyut Pvt. Ltd.

Present on behalf of the Respondents

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 removal of difficulties arising out of the Commission's generic tariff order dated 21.03.2022 regarding fuel cost and fuel mix.
2. **Petitioner's submissions: -**
 - 2.1 That the Commission, in its orders dated 27.01.2021 (HERC/PRO-50 of 2020 and HERC/PRO-51 of 2020, in the matters of M/s GEMCO and M/s Starwire) and 03.03.2021 (HERC/PRO-47 of 2020, in the matter of M/s Sri Jyoti), decided as under:-
"The Commission is in the process of issuing RE Regulations, for the control period from FY 2021-22 to FY 2024-25. Accordingly, the tariff shall be charged by the Petitioner, for the energy supplied, during the control period from FY 2021-22 to FY 2024-25, in accordance with the provisions contained in these Regulations including dispensation on 'fuel cost' for the projects already commissioned prior to the FY 2021-

22. Till then the fuel cost shall be frozen at the FY 2020-21 levels as per HERC Order dated 9.10.2015 for the projects commissioned in the FY 2013-14. It is added that, hence forth, the Commission shall determine ‘fuel cost’ on an annual basis for the RE Projects set up / to be set up in Haryana so as to ensure that fuel cost remains aligned to the prevailing market conditions.”

- 2.2 That the regulations 36 (3) of 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 {“HERC RE Regulations, 2021”}, provides as under:-

“36. Fuel Mix. –

.....

....

(3) Use of Fossil Fuel shall not be permitted. However, at least 30% of the fuel requirement shall be met from Paddy Straw by all biomass/non- fossil based cogeneration plants.”

- 2.3 That on 21.03.2022, the Hon’ble Commission issued tariff order in Case No. HERC/Petition No. 52 of 2021 determining fuel cost for renewable energy projects set up / to be set up in Haryana for the FY 2021-22 and FY 2022-23 on the basis of parameters, except fuel cost, provided in the HERC RE Regulations, 2021. At paragraph 10 of the said order, the Commission provided fuel cost of biomass on the basis of weighted average cost of biomass and paddy straw mix in the ratio of 70:30, as Rs. 3313.94/MT (Rs. 0.7x3400 + 0.3x3113.14). The Commission at para 10 of the order stated as under:-

10. In order to assist the Commission in assessing the quantum and delivered cost of paddy stubble and bagasse at the power generator’s site, in Haryana, a work order no. 502/HERC dated 18.05.2021 was issued to the MD University, Rohtak. MDU, Rohtak had submitted their final report, vide letter no. DAA-1668 dated 10.11.2021. On the basis of the report of MDU, Rohtak, the Commission proposed the cost of paddy straw as Rs. 3113.14/MT (square bale upto 25 KM) and cost of bagasse as Rs. 2,000/MT, for the FY 2021-22 and FY 2022-23 (without any escalation). Accordingly, the cost of biomass fuel determined on the basis of weighted average cost of biomass and paddy straw mix in the ratio of 70:30, works out to Rs. 3313.94/MT (Rs. 0.7x3400+0.3x3113.14).”

- 2.4 That the petitioner has challenged the constitutional validity and vires of the HERC RE Regulations, 2021 in CWP No. 1055-2022 (O&M) before the Hon’ble High Court of

Punjab & Haryana. The petitioner has further challenged the Tariff Order dated 21.03.2022 passed by the Hon'ble HERC in appellate proceedings before the Hon'ble APTEL in DFR No. 261 of 2022. The said proceedings are currently pending adjudication. However, the scope of the present petition filed by the petitioner for removal of difficulties, relief(s) sought, grounds and submissions are entirely different and without prejudice to the rights and contentions of the petitioner in the said pending proceedings.

- 2.5 That from November, 2022 onwards the petitioner did in fact procure paddy straw during the season and sought to comply with the fuel mix and fuel cost norms. However, on operating the plant on 30% paddy straw, it was found that the existing boilers are not designed to use paddy straw bales. To use bales, petitioner needs to modify the design of the boiler and additional capital is required to be invested for fuel feeding system, handling of paddy straw, ash handling & superheater coils require are to be changed. Further, the cost of the biomass fuel is also significantly higher than that determined by the Commission in the tariff order.
- 2.6 That in view of the above, the present petition has been filed seeking necessary directions from this Hon'ble Commission for removing the difficulties that have arisen in implementation of the Haryana Electricity Regulatory Commission Tariff Order dated 21.03.2022 in Case No. HERC/Petition No. 52 of 2021 vis-a-vis:-
- a. Fuel cost
 - b. Fuel Mix (use of 30% paddy straw/stubble)

The details are as under: -

2.6.1 Fuel Cost-

That in the tariff order dated 21.03.2022, the Hon'ble HERC has stated that the report submitted by MDU, Rohtak 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 square bale form. Hence, if at all, HERC ought to have provided the cost of paddy straw as Rs. 3588.73 as also recommended by the same Report submitted by MDU, Rohtak, with additional transportation cost beyond 25 kms distance.

Further, 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. 441/- per quintal 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 fuel costs norms may please be aligned by the Hon'ble Commission, atleast with the State Government's own mill approved rates.

2.6.2 Fuel Mix

It has been submitted that the Commission has provided for compulsory use of 30% paddy straw for all the biomass power plants in the State. This has forced the plants to operate with fuel other than what they have been designed for. It has been submitted that additional capital cost of approx. Rs 900-1000 lacs is required to be able to continuously utilize 30% paddy straw in petitioner's power plant. The fuel feeding system is required to be altered, new equipment for handling of paddy straw is necessitated, ash handling system needs to be modified, the superheater coils require to be changed as the melting point temperature of paddy straw ash is much lower as compared to other biomass fuels available within the vicinity of petitioner's plant and many other design changes are deemed necessary in order to comply with the compulsory use of 30% paddy straw fuel mix. Capital cost is required to be incurred on land, chipper machine, weigh bridges etc. for fuel centres to procure and process paddy straw. Further, the plant would have to be shut for approximately 60 – 90 days for the necessary modifications to be implemented. The additional capital cost incurred for making these changes ought to be allowed by the Commission as a pass through. Alternatively, in the facts and circumstances of present case, the Commission may consider exercising its inherent jurisdiction under Regulations 65, 66 and 67 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 read with Regulations 76 and 77 of 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 and pass necessary order(s)/ direction(s) reducing/ relaxing the compulsory use of paddy straw to 5-6% which is sustainable for the machinery and Plant.

2.7 That for the reason that the quantum of biomass based power generation procured by HPPC is almost 1% of their total power requirement and biomass plants are important in curbing biomass burning in farms and helps in reducing pollution, the Hon'ble Commission may pass necessary directions to remove the difficulties so that the biomass plants may survive and continue to supply uninterrupted green power in the State of Haryana.

2.8 Following Prayer has been made:-

- (a) Pass necessary order(s)/ directions(s) for removing the difficulties in respect of fuel cost and fuel mix norms specified by the Hon'ble HERC;

- (b) Pass such further order(s) as this Hon'ble Commission may deem fit in the interest of justice, equity and good conscience.

3. **Respondent's (HPPC) reply to the petition filed by M/s. SWIVPL: -**

The respondent (HPPC) who, on behalf of the two Distribution licensees, procures power from the petitioner herein has submitted as under: -

3.1 **RES SUB-JUDICE AND POSSIBILITY OF CONFLICTING DECISIONS:** The following proceedings are pending which relate to the order dated 21.03.2022, preferred by the petitioner:

- a. 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 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 HERC to continue with 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."

- b. 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.

Thus, the tariff order dated 21.03.2022 (which is in question in the present proceedings), as well as the HERC RE Regulations, 2021 (under which the tariff order in question has been passed), have been challenged by the petitioner before the Hon'ble High Court and Hon'ble Appellate Tribunal. In case any of the aforementioned proceedings are decided in the favour of the petitioner, the present proceedings would be otiose. The law does not contemplate multiple adjudications of the same dispute and contrary or inconsistent decisions on the same issues, facts and law between the

parties. There cannot be more than one adjudication of the very same dispute. In the cases where, 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 distinctly severable, only one adjudication is permissible. Therefore, in such circumstances, the doctrine of Res sub-judice is required to be applied and the present petition is liable to be dismissed given the possibility of conflicting decisions.

3.2 APPLICABILITY OF THE DOCTRINE OF ELECTION: The petitioner cannot be permitted to seek quashing of the order dated 21.03.2022 and at the same time seek 'removal of difficulty' in the implementation of the said order. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. As per the said doctrine, no party can accept and reject the same instrument. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. In the present case the validity of the order as well as the regulations have been challenged, however, by way of the present petition, the petitioner is accepting implementation of the order and is seeking removal of difficulty in implementing the same. The law does not permit a person to both approbate and reprobate. The Hon'ble APTEL has taken cognizance of the factual aspect of applicability of the doctrine of election and vide its interim order dated 13.01.2023 in DFR No. 261 of 2022, has held as under:

"This application is filed seeking leave to file the appeal against the order passed by the Haryana Electricity Regulatory Commission determining the tariff. On being pointed out that the Doctrine of Election may be attracted, Mr. Buddy A. Ranganadhan, Learned Counsel for the Appellant, requests that the proceedings be deferred by six weeks to enable the Appellant to amend the grounds and the prayer in the Writ Petition filed before the Punjab and Haryana High Court, excluding therefrom a challenge to the tariff order, passed by the Haryana Electricity Regulatory Commission, against which the present Appeal has been preferred.

Post the matter on 20.03.2023."

Reliance in this regard is placed on the judgment of the Apex Court in *National Insurance Co. Ltd. Vs. Mastan & Anr.*, [(2006) 2 SCC 641], wherein it has been held as under:

"The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from

asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

In *Nagubai Ammal and Others v. B. Shama Rao and Others* [AIR 1956 SC 593], it was stated:

"It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."

In *C. Beepathuma and others v. Velasari Shankaranarayana Kadambolihaya and others* [AIR 1965 SC 241], it was stated:

"The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland 'That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.'"

...

The same principle is stated in *White and Tudor's Leading Cases in Equity* Vol. 18th Edn. At p. 444 as follows:

"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

- 3.3 FORUM SHOPPING: The present petition is also not maintainable in view of non-compliance of Regulation 23(8) of the HERC (Conduct of Business) Regulations, 2019 as per which- *"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 the 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 someway or the other, is liable to be depreciated. 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)

- 3.4 LIMITED SCOPE OF “POWER TO REMOVE DIFFICULTIES”: The petitioner has invoked the powers of this Hon’ble Commission with respect to the ‘Removal of

Difficulties'. The regulation 76 of the HERC RE Regulations, 2021 and regulations 69 and 70 of the HERC (Conduct of Business) Regulations, 2019, are reproduced below:-
RE Regulations, 2021

*"76. **Power to remove difficulties.** – If any difficulty arises in giving effect to any of the provisions of these regulations, the Commission may, by general or special order, make such provisions, which in the opinion of the Commission are necessary or expedient to do so."*

Conduct of Business Regulations, 2019

"Power to remove difficulties

69. If any difficulty arises in giving effect to any of the provisions of these Regulations, the Commission may, by general or special order, do anything not being inconsistent with the provisions of the Act, which appears to it to be necessary or expedient for the purpose of removing the difficulty.

70. In case of any difficulty in interpretation of these Regulations the same shall be done by the Commission in accordance with the provisions of the Electricity Act, 2003. In case of any conflict between the provisions of these regulations and the provisions of the Electricity Act, 2003, the provisions of the Act shall prevail in all case."

Thus, the directions with respect to the removal of difficulty can be passed only in case any difficulty arises in 'giving effect to the provisions of these regulations' and not in case difficulty arises in the implementation any order passed by the Commission. In this regard, it is humbly submitted that the petitioner cannot be permitted to invoke the powers under the regulations which the petitioner has alleged to be *ultra-vires* the Constitution of India, in the proceedings before the Hon'ble High Court. Such contrary stand adopted by the petitioner is liable to be deprecated. Further, the petitioner may be directed to explain as to what difficulty has arisen in the implementation of the HERC (Conduct of Business) Regulations, 2019. Furthermore, be that as it may, the scope and realm of application of the 'powers to remove difficulty' is very limited. Attention in this regard is brought towards the judgment of the Hon'ble Apex Court in **Madera Upendra Sinai V. Union of India** reported at (1975) 3 SCC 765 wherein it has been settled as under:

"Now let us turn to Clause (7) of the Regulation. It will be seen that the power given by it is not uncontrolled or unfettered. It is strictly circumscribed, and its use is conditioned and restricted. The existence or arising of a "difficulty" is the sine qua non for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this Clause cannot, be invoked at all. Again, the "difficulty" contemplated by the Clause must be a difficulty arising in giving effect to the

provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the Clause only to the extent it is necessary for applying or giving effect to the Act etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.”

(Emphasis Supplied)

Reliance is also placed on the judgment of the Appellate Tribunal in *Ratnagiri Gas and Power Private Ltd. Uttar Pradesh Vs. Central Electricity Regulatory Commission & Another*, [2011 ELR (APTEL) 0532], wherein it has been observed that:

“10.3. In our opinion, **power to remove difficulties is to be exercised when there is difficulty in effecting the Regulations and not when difficulty is caused due to application of the Regulations.** Thus, the exercising of power to remove difficulties does not arise in the present case”

(Emphasis Supplied)

The petitioner is presenting the issues already agitated and settled by the Hon’ble Commission, by merely changing the ‘nomenclature’ of the petition and by terming it as a petition seeking removal of the difficulty. Throughout the present petition, the petitioner has only put forth grounds against the finding of the Hon’ble Commission and hence the present petition is more of an appeal in disguise. As such, the present petition is liable to be dismissed on the sole ground that no relief can be granted to the petitioner under the regulations relating to the removal of difficulty, since the petitioner has failed to show any difficulty in effecting the regulation, the only difficulty alleged is concerning the application of the Regulations.

- 3.5 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) and had acted in a transparent manner while passing 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.

- 3.6 That the Hon'ble Commission is not bound to follow the fuel cost determined by the Hon'ble CERC. It would be incorrect to state that the Hon'ble Commission has been adopting the fuel cost determined by the CERC. In this regard, the differences in the rate of fuel cost determined by CERC and HERC for various control periods is as under:-

	HERC	CERC
FY 2012-13	Rs. 2556/MT	Rs. 2635/MT
FY 2013-14	Rs. 2789/MT	Rs. 2823/MT
FY 2014-15	Rs. 3055/MT	Rs. 3131/MT
FY 2015-16	Rs. 3208/MT	Rs. 3346/MT
FY 2016-17	Rs. 3368/MT	Rs. 3195/MT
FY 2017-18	Rs. 3270/MT	Rs. 3270/MT
FY 2018-19	Rs. 3434/MT	Rs. 3434/MT
FY 2019-20	Rs. 3605/MT	Rs. 3605/MT
FY 2020-21	Rs. 3785/MT	Rs. 3785/MT

This Hon'ble Commission, has in its earlier orders i.e. order dated 13.08.2014 relied on state specific studies conducted by HAREDA for arriving at the fuel cost. The said order passed, while relying on the report of HAREDA, or any such State specific studies conducted by the Hon'ble Commission in the past was never challenged by the petitioner.

- 3.7 That insofar as the Fuel Mix is concerned, attention in this behalf is invited to Article 13.1. of the PPA dated 22.06.2012 clearly provides that the plant of a generator (such as the petitioner) has to be designed in a manner that it is able to use different types of non-fossil fuels. Article 13.1 of the PPA reads as under:-

"13.1 Fuel usage guidelines shall be as per HERC guidelines as amended from time to time. The current guidelines are elaborated as under:-

i. The biomass power plant shall be designed in such a way that it uses different types of non-fossil fuels available within the vicinity of the biomass power project such as crop residues, agro industrial residues, forest residues etc. and other biomass fuels as may be approved by MNRE."

(Emphasis Supplied)

Thus, as per the terms of PPA, the petitioner was required to design the generating plant for being capable of using different types of non-fossil fuels such as crop residues, agro industrial residues, forest residues etc. and other biomass fuels as may be approved by MNRE. Therefore, the petitioner's contention that the use of paddy straw as fuel for the petitioner's plant would be beyond what it has been designed for is completely false. As a matter of fact, the petitioner itself has used the paddy straw as fuel over the years in its power plant. In fact, in the months of October, 2020 to February 2021 (before passing of the impugned order), the petitioner used paddy straw

as fuel to the extent of 33% to 83%. A table showing the monthly percentage usage of paddy as fuel by the petitioner is as under:

Month	Usage of Paddy to the Total Fuel (%)
June, 2020	1.86%
July, 2020	2.76%
October, 2020	36.71%
November, 2020	45.55%
December, 2020	75.40%
January, 2021	33.53%
February, 2021	82.86%
September, 2021	16.54%
October, 2021	3.22%

Therefore, the petitioner cannot now be allowed to take inconsistent stand regarding the use of paddy straw as fuel and seek unfair gain at the cost of electricity consumers in the State of Haryana. The petitioner is already running his plant on high percentages of paddy since the year 2020, however, the petitioner has approached this Hon'ble Commission belatedly to state that its boiler is not designed to use paddy straw. As such the present petition is liable to be dismissed on the ground of misrepresentations as well as delay and laches.

4. HAREDA's (respondent no. 2) submissions to the petition filed by M/s. SWIVPL:-

- 4.1 That the instant petition is not maintainable being bad, both in terms of de-jure and de-facto, and hence deserves to be dismissed at the very outset.
- 4.2 That the instant petition is devoid of any merits and hence, needs to be dismissed at the threshold qua the answering respondent.
- 4.3 That, infact, this Hon'ble Commission was pleased to enunciate the tariff order dated 21.03.2022 for the year 2021-22 and 2022-23 while deciding petition no. 52 of 2021, for RE Projects set up/to be set up in the State of Haryana on the basis of parameters except fuel cost, provided in HERC (Terms and conditions of tariff from renewable energy Sources, Renewable Purchase Obligation and Renewable Purchase certificate) Regulations, 2021-Suo-Motu.
- 4.4 That it is conceded case of the petitioner that it has challenged the validity and vires of the ibid Regulations of 2021, framed by this Hon'ble Commission as also the petitioner has challenged the order dated 21 03.2022 before the Hon'ble APTEL. Thus, once the petitioner has challenged the ibid regulations before the Hon'ble High Court, which is pending adjudication as also has challenged the Order dated 21 03.2022 by way filing appeal before the Hon'ble APTEL, which also pending adjudication, the question of seeking any such purported relaxation of removal of difficulty does not arise at all.

- 4.5 That in fact, under the garb of seeking removal of difficulty, the petitioner is seeking a review of the order, which is not at all permissible in the eyes of law, especially once an appeal challenging the same order is pending adjudication.
- 4.6 That infact the order dated 21.03.2022 is an order in rem and not an order in persona which could be modified/changed/reviewed on the request of the petitioner, as the same shall create a bad precedence and will disturb the equality amongst the other similarly placed projects.
- 4.7 That before passing the order dated 21.03.2022, this Hon'ble Commission while following the due process of law, has considered /the comments/objections of all the stake holders, wherein, the petitioner has specifically submitted its comments and after considering the same, this Hon'ble Commission was pleased to pass the ibid order dated 21.03.2022. Thus, the petitioner in the garb of removal of difficulties cannot be permitted re-agitate the issue.
- 4.8 That though, the answering Respondent itself has been taking a stand the parameters of tariff in terms of CERC Regulations, 2020 are justified and it would have been suitable in case the same would have been adopted by this Hon'ble Commission while enunciating the tariff regulations for the State of Haryana, however, without commenting upon the issue with regard to the applicability of tariff, the answering respondent has made the submissions, inter-alia demonstrating that the petitioner by filing the present petition has misused the process of law.
5. **Petitioner's (M/s. SWIVPL) rejoinder: -**
- 5.1 That the scope of appeal under Section 111 of the Electricity Act, 2003 is entirely different from that of an original petition before the State Commission. The appeal before the Hon'ble APTEL is preferred under Section 111 being appellate jurisdiction. The 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 in case number HERC/Petition No. 52 of 2021 passed by this Hon'ble Commission, however, the present petition is filed seeking necessary directions from this Hon'ble Commission for removal of difficulty that has arisen during the course of the implementation of the Tariff Order and the Tariff Order dated 21.03.2022 has not at all been challenged in this petition. In point of fact difficulties that have arisen post the Tariff Order cannot at all be raised by the Petitioner in the Appeal pending against the Tariff Order. Those are post Tariff Order events which would be beyond the realm of an appeal against the Tariff Order.
- 5.2 That this Hon'ble Commission vide Notification dated 11.01.2021, notified the Regulation No. HERC/10/2005/4th Amendment/2021 which is the HERC (Fee)

Regulations, 2005, 4th Amendment Regulations, 2021 ("4th Amendment Regulations"). As per point no. 2 of the "Notes" appended at the bottom of the "Schedule of Fee", it is stated that:-

"Petition under the clause of removal of difficulty is not an application for review of Order. Such cases will be covered in "20. Fee for any Application / Petition not covered above"

Hence, it is abundantly clear that removal of difficulty petition is not an application for review.

- 5.3 That 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 ATEL 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. Moreover, the scope of appeal is different than that of a petition seeking relaxation. Hence, there is nil chance of any so called conflict between judgement of APTEL and this Hon'ble Commission's order.
- 5.4 That, the Civil Writ Petition bearing CWP No. 10555 of 2022 titled - Star Wire (India) Vidyut Private Ltd. and another Vs. HERC is filed by the petitioner before the Hon'ble Punjab and Haryana High Court, challenging the vires of the HERC RE Regulations, 2021 notified by the Hon'ble Commission on 27.04.2021. Hence, admittedly, the writ petition is filed against the HERC RE Regulations, 2021 and not against the Tariff Order. The petitioner has also, in order to provide greater clarity, filed an application for amendment before the High Court, to avoid any possible ambiguity that the petitioner may even be seen to be challenging the tariff order before the Hon'ble High Court. Whereas the present petition is filed seeking necessary directions from this Hon'ble Commission for removal of difficulty in implementing the Tariff Order dated 21.03.2022. The cause of action i.e. challenge vires of the regulations vis-à-vis petition seeking removal of difficulty is entirely different. While it may be true that if at all the petitioner succeeds before the Hon'ble High Court, the Tariff Order dated 21.03.2022 which is issued under the HERC RE Regulations, 2021, may itself not survive. In turn, the present petition may abate. However, any abatement of the present petition may occur by operation of law and there is no such absurdity. It is a regular occurrence that the decision rendered by a higher Court would impact the proceedings before a lower Court, which could result in abatement of proceedings before the lower Court.
- 5.5 That there is no approbation and reprobation by the petitioner. The petitioner has also not taken any inconsistent pleas. The principle of election is, in substance, that he who accepts a benefit under an instrument must adopt the whole of it, conform with all its

provisions and renounce every right inconsistent with them. In the present petition seeking removal of difficulty, it has been pointed out that:-

“From around November, 2022 onwards the paddy procurement season began and the Petitioner did in fact procure paddy straw during the season and sought to comply with the fuel mix and fuel cost norms. However, on operating the plant on 30% paddy straw, it was found that the existing boilers are not designed to use paddy straw bales. To use bales, petitioner needs to modify the design of the boiler and additional capital expenditure is required to be invested for fuel feeding system, handling of paddy straw, ash handling & superheater coils require to be changed. It is further submitted that the cost of the biomass fuel is also drastically higher than that determined by the Commission in the tariff order.”

Placing of all facts and circumstances before the ‘Regulator’, including the difficulties that have arisen while implementing the Tariff Order dated 21.03.2022, cannot be construed as acceptance of the Tariff Order dated 21.03.2022. It is well settled that the implementation of an Order under challenge does not detract from the statutory right of appeal against such Order. In fact the law is that unless and until such Order were stayed, it needs to be implemented pending appeal. Hence, the mere fact that the Order has been implemented is only in keeping with the settled legal principles that an Order needs to be obeyed unless stayed or set aside by a competent court. Therefore, merely because petitioner has challenged the Tariff Order dated 21.03.2022 before the Hon’ble APTEL, it does not mean that the Petitioner is not bound to comply with the Tariff Order dated 21.03.2022. There is no stay granted by the Hon’ble APTEL. Hence, in these circumstances, the petitioner is legally obliged to comply with the Tariff Order dated 21.03.2022 but later on, in November, 2022, when paddy procurement season began, the difficulties were noticed, which have been brought to the knowledge of the Hon’ble Commission. The petitioner has not accepted any benefit under the Tariff Order dated 21.03.2022, much less on the merits of the appeal, nor has it waived off its right to pursue remedy of appeal. In these circumstances, the doctrine of election has no applicability as wrongly pleaded by the Respondent No. 1 HPPC. Reference in this regard may be had to the Majority Judgment of the Constitution Bench of the Hon’ble Supreme Court in Bhau Ram Vs Baij Nath Singh & Ors [1962] 1 SCR 358 paras 4, 5, 9, 10 and 12.

- 5.6 That the present petition has been filed under Regulations 65, 66 and 67 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019. The relevant extract of the regulations, is reproduced as under:-

“Saving of inherent power of the Commission

65 Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.

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.

67 Nothing in these Regulations shall, expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the applicable legal framework for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.”

The petitioner has submitted that from the above, it is clear that the Hon'ble Commission may exercise its inherent powers. The RE Regulations, 2021 cannot limit the exercise of inherent powers. There are special circumstances existing for exercise of inherent powers by the Hon'ble Commission.

Further, Regulation 76 of the HERC RE Regulations, 2021 empowers the Hon'ble Commission to pass orders or make provisions, which in the opinion of the Commission are necessary or expedient to do so. The difficulties pointed out by the petitioner have been noticed only after passing of the Tariff Order dated 21.03.2022. Hence, Hon'ble Commission has the necessary jurisdiction to pass orders or make provisions for removing these difficulties as prayed by the petitioner.

- 5.7 That the case laws relied upon by the Respondent HPPC are clearly distinguishable to the facts and circumstances of the present case since the clause under consideration in those cases was completely differently worded as compared to the provisions under which the present petition has been filed. Moreover, the Regulations 65, 66 and 67 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 have not at all been dealt with by the said judgements.
- 5.8 That the Respondent No. 1 HPPC has failed to respond to the submissions of the petitioner with respect to the Letter dated 01.12.2022 of Hafed Sugar Mill Assandh. 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. 4410/- per metric tonne 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 fuel costs norms may please be aligned by the Hon'ble Commission, atleast with the State Government's own mill approved rates.

- 5.9 CERC has published biomass fuel cost for the State of Haryana which is at Rs. 3975 per MT (after applying escalation of 5% on fuel cost of Rs 3786/MT published for FY 2020-21) for the FY 2021-22 and thereafter an escalation of 5% is applicable for the subsequent years. The HERC itself in several orders has mentioned that it has been largely following CERC's norms with regard to fuel cost.
- 5.10 The respondent No. 1 HPPC has relied upon Clause 13.1 of the PPA to contend that petitioner had to design the generating plant and setup the plant for being capable of using different types of non-fossil fuels such as crop residues, agro industrial residues, forest residues etc. and other biomass fuels as may be approved by MNRE. However, the respondent HPPC has completely omitted the words "available within the vicinity of the biomass power project" which are mentioned in Clause 13.1 of the PPA. HPPC has not at all dealt with the submission of the petitioner 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. Hence, if at all, HERC ought to have provided the cost of paddy straw as Rs. 3588.73 as also recommended by the same Report submitted by MDU, Rohtak, with additional transportation cost beyond 25 kms distance.
- 5.11 Regarding use of paddy straw by the petitioner during the months of October, 2020 to February 2021 (before passing of the Tariff Order dated 21.03.2022) to the extent of 33% to 83%, the petitioner has submitted that they in fact, tried to comply with the regulations of the Ld. HERC for compulsory use of paddy straw and had also utilised approximately 22% paddy straw in its plant on an annual fuel consumption basis, but faced immense difficulty and would have to incur huge capital costs to be able to fire 30% paddy straw as per the requirements of the Regulations, which are described below:-
- i. Capital cost for fuel centers to procure and process paddy straw. Land in paddy growing areas, Chipper machine, weigh bridges.
 - ii. Provision for transportation of fuel. Very high cost and with increase in prices of diesel, the cost is increasing with each passing day.
 - iii. Cost pass through allowed to coal fired power plants which have resulted in steep increase in prices of paddy straw and biomass fuel.
 - iv. Entirely new system for feeding of paddy straw into the boiler as the characteristics of paddy fuel is very different from other biomass fuels.
 - v. Modification of ESP along with installation of new field in case paddy fuel is fired.

6. **Petitioner's (M/s. SWIVPL) rejoinder to HAREDA's objections: -**

6.1 The petitioner herein has submitted that the respondent No. 2 (HAREDA) in its reply has admitted as under:-

“..the answering respondent itself has been taking a stand the parameters of tariff in terms of CERC Regulations, 2020 are justified and it would have been suitable in case the same would have been adopted by this Hon'ble Commission while enunciating the tariff regulations for the State of Haryana, however without commenting upon the issue with regard to the applicability of tariff, the Answering Respondent has made the above mentioned submissions....”.

6.2 That, in view of the submissions made by Respondent No. 2 (HAREDA) along, the present petition deserves to be allowed by this Hon'ble Commission. Respondent No. 2 (HAREDA), in its reply has submitted that it is of the view that the parameters of tariff in terms of CERC Regulations, 2020 are justified, and it would have been suitable in case the same would have been adopted by this Hon'ble Commission while enunciating the tariff regulations for the State of Haryana. Thus, the state nodal agency for promotion and development of renewable energy in the State of Haryana, stand to reason that the present parameters are not supported by it.

7. During the hearing held on 09.08.2023, the counsel appearing for the Respondent No. 1 (HPPC) brought to the notice of the Commission, a letter from M/s. The Meham Cooperative Sugar Mills Ltd. to the petitioner (M/s. SWIVPL) indicating price of the bagasse as Rs. 180/Qntl., as against the price of Rs. 441/- per quintal plus taxes and the loading/ unloading and transportation charges, mentioned by the petitioner (M/s. SWIVPL) in its petition. Further, the HPPC submitted the month-wise detail of fuel procured and consumed by the petitioner (M/s. SWIVPL), showing that the petitioner (M/s. SWIVPL) has actually consumed a minimal quantum of bagasse and paddy straw.

8. **M/s. SWIVPL (petitioner) filed an additional affidavit, in response to the HPPC's submission during the hearing held on 09.08.2023. The petitioner has submitted as under: -**

8.1 That the present petition is filed for removing certain difficulties arising during implementation of the Order dated 21.03.2022 for FY 2022-23. On the other hand, the letter dated 06.10.2021 from Meham Coop. Sugar Mills Ltd. addressed to the petitioner and sought to be relied upon by HPPC, pertains to FY 2021-22. Hence, the said letter dated 06.10.2021 pertaining to FY 2021-22 is not relevant to the present proceedings relating to FY 2022-23.

- 8.2 That the letter dated 06.10.2021 from Meham Coop. Sugar Mills Ltd. indicates the price of Rs. 1800/MT + GST for Bagasse. However, the loading/unloading, transportation, handling charges etc. have not been factored into this price.
- 8.3 That the average GCV assumed under the Tariff Order dated 21.03.2022 i.e. 3100/kCal is 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. 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.
- 8.4 That during the FY 2021-22, the petitioner could only procure 3.97% of its total fuel consumption from Bagasse, due to huge mismatch between the cost approved by the Hon'ble Commission and the prevailing market rates, that too at a net rate of Rs. 5070.53/MT (including the handling costs), which is more than twice the cost approved by the Hon'ble Commission for FY 2021-22 for Bagasse i.e. Rs. 2,000/MT.
- 8.5 That in the 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).
- 8.6 That in the FY 2022-23, the petitioner could only manage to procure 0.29% of its total fuel consumption from Paddy, that too at a net rate of Rs. 6434.36/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. 3113.14/MT.
- 8.7 That the actual handling costs of biomass fuel for FY 2021-22 & FY 2022-23 is Rs. 332.62 per MT and Rs. 343.20 per MT, respectively.
- 8.8 That HPPC has sought to rely on the fuel procurement and consumption statements of the petitioner during FY 2022-23. The same is not disputed by the petitioner and, in fact, also relied upon by the petitioner to contend that it has consumed only 1.20% of its total fuel consumption from Bagasse, while only 0.29% of its total fuel consumption from paddy during FY 2022-23. The petitioner has itself submitted that around November, 2022 onwards the paddy procurement season began and the petitioner did in fact procure paddy straw during the season (November, 2022 to February, 2023) in order to comply with the fuel mix and fuel cost norms. However, on operating the plant

on 30% paddy straw, it was found that the existing boilers are not designed to use paddy straw bales. It is further submitted that the cost of the biomass fuel is also drastically higher than that determined by the Commission in the tariff order.

Proceedings in the Case

9. In order to afford an opportunity to the parties present their case and respective arguments on the merits of the case for removal of difficulty, the Commission in order to take the process forward, considered it appropriate to hear the matter.
10. The case was initially heard on 01.03.2023, wherein Ms. Sonia Madan, the learned counsel for the respondent no. 1 (HPPC), as well as Mr. Aditya Grover, the learned counsel for the respondent no. 2 (HAREDA), vehemently argued that the present petition is not maintainable and ought to be rejected on various legal doctrines such as 'Res Sub-judice', 'Doctrine of Election' and 'Forum Shopping', elaborated in their reply. Upon hearing the preliminary submissions of the parties, the Commission, in its interim order dated 02.03.2023, ordered that before going into the merits of the case, its maintainability, as averred by the respondents, has to be established.

Commission's Order

11. The petition preferred by M/s. Starwire was called for hearing on maintainability on 13.03.2024. The Commission heard the arguments of the parties at length as well as perused the written submissions and documents placed on record by them.
12. The Commission observes that the present petition has been filed invoking the powers of the Commission to remove difficulties arising in implementation of the generic tariff order dated 21.03.2022 vis-à-vis 'fuel cost' and 'fuel mix'. Fuel cost in the context of cost of procurement and use of biomass mix for the purpose of power generation as determined and made applicable by the Commission. While 'fuel mix' in the context that the biomass/cogeneration power generators who are statutorily bound to use paddy straw/stubble to the extent of a minimum 30% on an annual basis for power generation.
13. It was averred by the respondent HPPC that technical arguments regarding boiler design, fuel feeding system etc. do not stand the scrutiny of the PPA / DPR which was germane to implementation of such project. Admittedly, in the months of October, 2020 to February 2021 (before passing of the impugned order), the petitioner (M/s. SWIVPL) did use paddy straw as fuel to the extent of about 33% to 83%, as evident from the table below: -

Month	Usage of Paddy to the Total Fuel (%)
June, 2020	1.86%
July, 2020	2.76%
October, 2020	36.71%

November, 2020	45.55%
December, 2020	75.40%
January, 2021	33.53%
February, 2021	82.86%
September, 2021	16.54%
October, 2021	3.22%

14. The petitioner (M/s. SWIVPL) did use paddy straw stubble in the biomass mix of fuel ranging from 1.86% to as high as 82.86% in the month of February, 2021 depending on the availability of paddy straw/stubble and not technical constraint as such. Accordingly, the petitioner (M/s. SWIVPL) can not take a plea, at this stage, that the boiler installed in its power plant, is not designed to use paddy straw.
15. The Commission has perused the letter dated 06.10.2021 from Meham Coop. Sugar Mills Ltd. addressed to the petitioner (M/s. SWIVPL), which mention the price of bagasse as Rs. 180/- per quintal as against the price of Rs. 441/- per quintal plus taxes and the loading/ unloading and transportation charges submitted by the petitioner (M/s. SWIVPL). The averments of the petitioner (M/s. SWIVPL) that the price of bagasse appearing in the letter dated 06.10.2021, pertains to the FY 2021-22 whereas the present proceedings relates to the FY 2022-23 and that the loading/unloading, transportation, handling charges etc. have not been factored into this price, are unfounded as the price of bagasse of Rs. 441/- per quintal mentioned by the petitioner, in its petition, is also exclusive of loading/unloading, transportation, handling charges etc. Prima facie, the general rise in price level for a sugar mill by-product is not sufficient to justify price rise from Rs. 180/- per quintal in the FY 2021-22 to Rs. 441/- per quintal in the FY 2022-23. Merely submitting tabular statements or submitting certain selective bills showing exorbitant cost of purchase of fuel, without corroborating the same with the audited balance sheets and annual bills (fuel purchased during paddy season might have averaged the fuel cost on annual basis), does not make any ground for invoking the powers of the Commission for 'Removal of Difficulties'. Similarly, arguing on a test report produced on the basis of a test conducted without any authenticated sample or lab approved by petitioner as well as the respondents, does not substantiate the claim of the petitioner.
16. Notwithstanding the above discussions, the Commission has considered it appropriate to peruse the submissions and relief sought by the petitioner (M/s. SWIVPL) in the appeals filed before Hon'ble Punjab and Haryana High Court and Hon'ble Appellate Tribunal for Electricity (APTEL), in order to examine the issues involved and their duplicity, if any. The prayer of the petitioner (M/s. SWIVPL) in the appeal filed before

the Hon'ble Punjab and Haryana High Court (CWP No. 10555 of 2022), is reproduced below:-

"In the facts and circumstances mentioned herein above, it is respectfully prayed that:-

- (a) This Hon'ble Court may kindly be pleased to pass any appropriate writ, order, or direction including a Writ in the nature of Certiorari to quash and set aside the impugned provisions of the HERC RE Regulations, 2021 (Annexure P-1) to the extent stated in para 25 of the Writ Petition;*
- (b) This Hon'ble Court may kindly be pleased to pass any appropriate Writ, order, or direction including a Writ in the nature of Mandamus to direct the Respondent HERC to adopt the norms of fuel cost as determined by CERC in their entirety, as has also been done in the past for determination of fuel cost for the existing projects;*
- (c) Alternatively, it is prayed that a writ of mandamus be issued directing the HERC to carry out extensive and independent market-based studies based on actual ground realities, as directed by the APTEL vide its Judgement dated 23.03.2015 in O.P. No. 3 of 2012, after giving all the stakeholders an opportunity of being heard on the report, for determination of the variable cost of existing biomass projects on an annual basis;*
- (d) It is further prayed that this Hon'ble Court may be pleased to stay the implementation of the Impugned Regulations till the disposal of the present Writ Petition; and*
- (e) Furthermore, it is prayed that this Hon'ble Court may also be pleased to stay all further steps and proceedings including the proceedings under the tariff order issued by the HERC on 21.03.2022 for determination of fuel cost under the impugned HERC RE Regulations, 2021;*
- (f) It is further prayed that in the interregnum, this Hon'ble Court may be pleased to direct the HERC to continue the earlier fuel costs determined as prevailing under the HERC RE Regulations, 2015 applicable in the Petitioners case, pending the final decision of this Hon'ble Court; and*
- (g) Pass such other order(s) and provide such other relief(s) as this Hon'ble Court may deem just and expedient in favor of the Petitioner.*
- (h) Any other relief or relief(s), which this Hon'ble Court may deem fit and proper in view of the facts and circumstances of the case, may also be granted.*
- (i) Service of advance notices upon the Respondent be dispensed with.*
- (j) Filing of certified/true typed/legible copies of Annexure be dispensed with."*

Para 25 of the writ petition mentioned in the prayer clause is reproduced hereunder: -

"The present writ petition is being preferred under Articles 226/227 of the Constitution of India, inter alia, seeking appropriate Writ, order, or direction including a Writ in the nature of Certiorari to quash and set aside -

- (i) Impugned proviso to Regulation 9(1) of the impugned HERC RE Regulations, 2021 (Annexure P-1) to the extent that the fuel cost component determined on annual basis under the regulations shall also apply prospectively to the projects*

commissioned during the previous Control Periods, in the absence of independent State specific study based on current market trends:

- (ii) Impugned Regulation 38 of the impugned HERC RE Regulations, 2021 to the extent that it provides an unfair and unrealistic Biomass fuel price during first year of the Control Period as Rs. 3000 /MT with arbitrary escalation at the rate of 2.93% per annum, without any independent State specific study based on current market trends;*
- (iii) Impugned Regulation 36(3) of the impugned HERC RE Regulations, 2021 relating to Fuel Mix to the extent that it fails to take into account the additional Capital Cost that would be involved for changing the design of the existing plants in order to comply with the revised Fuel Mix and SHR norms as also the additional transportation cost of approx. Rs. 1570/MT;*
- (iv) Impugned Regulation 34 of the impugned HERC RE Regulations, 2021 to the extent that it provides an arbitrary and unfair SHR of 4200 kcal / kWh (travelling grate with water cooled condenser) for the projects commissioned during the previous Control Periods as it fails to take into account the additional Capital Cost that would be involved for changing the design of the existing plants in order to comply with the revised SHR norms;*
- (v) Impugned Regulation 37 of the impugned HERC RE Regulations, 2021 to the extent that it provides the arbitrary and unrealistic GCV of 3100 (kcal/kg), without considering the actual GCV of paddy straw which is much lower than the average GCV of 3100 kcal/kg of biomass fuel; inter alia on the following grounds.”*

The Commission has also observed that the petitioner (M/s. SWIVPL), in pursuant to the interim order dated 13.01.2023 passed by Hon'ble APTEL, has amended the petition by withdrawing prayer no. (d) from the prayer clause reproduced above, vide interim order of Hon'ble Punjab and Haryana High Court dated 24.05.2023.

The prayer of the petitioner (M/s. SWIVPL) in the statutory appeal filed before the Hon'ble Appellate Tribunal for Electricity (DFR No. 261 of 2022), is reproduced below:-

“21. Relief sought:

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

- (a) Quash and aside the Tariff Order dated 21.03.2022 in Case No. 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 year of commissioning of the plant; Alternatively, HERC may be directed to carry out extensive market based studies 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 due opportunity to all the stakeholders to submit their views;*
- (d) *Pass such further order / orders / directions which the Hon'ble Tribunal may deem fit in the interest of justice, equity and go conscience."*

Having perused the submissions and relief sought by the petitioner (M/s. SWIVPL) before the Hon'ble APTEL and the High Court, as reproduced above, the Commission has juxtaposed the same against the relief sought in the present matter bought before this Commission.

The prayer of the petitioner (M/s. SWIVPL) in the present petition, is reproduced below:-

"8. Relief (s) sought: -

In these premises, the Petitioner respectfully prays that the Hon'ble Commission may be pleased to:-

- (a) *Pass necessary order(s)/ directions(s) for removing the difficulties in respect of fuel cost and fuel mix norms specified by the Hon'ble HERC;*
- (b) *Pass such further order(s) as this Hon'ble Commission may deem fit in the interest of justice, equity and good conscience."*

Similarly, the prayer of the petitioner (M/s. GEMCO) in the present petition, is reproduced below:-

"PRAYER:

It is, therefore, most respectfully prayed, that this Hon'ble Commission may be pleased to:

- a) *Pass necessary orders/directions for removing of the difficulties in respect to the Fuel cost and Fuel Mix Norms, as specified by this Hon'ble Commission*
- b) *Reassess/redetermine the Fuel cost considering the various factors indicated in the petition and issue a supplementary Tariff order in respect of petitioner with a direction to release the revised Tariff to the petitioner from the date of the order till the date of implementation.*

- c) *Pass any other orders/directions, as this Hon'ble Commission deems fit, in the facts and circumstances of the present matter, in the interest of Justice, Equity and Good Conscience."*

The prayers made by the petitioner (M/s. SWIVPL) before various authorities, is tabulated hereunder:-

Hon'ble Punjab and Haryana High Court	Hon'ble Appellate Tribunal for Electricity	Haryana Electricity Regulatory Commission (SWIVPL)
<p>i) To quash and set aside the impugned provisions of the HERC RE Regulations, 2021.</p> <p>ii) To adopt the norms of fuel cost as determined by CERC in their entirety or to carry out extensive and independent market-based studies.</p> <p>iii) To quash and set aside Regulation 36(3) of the impugned HERC RE Regulations, 2021 relating to Fuel Mix.</p> <p>iv) To quash and set aside Regulation 34 of the impugned HERC RE Regulations, 2021 to the extent that it provides an arbitrary and unfair SHR of 4200 kcal / kWh (travelling grate with water cooled condenser).</p> <p>v) To quash and set aside Regulation 37 of the impugned HERC RE Regulations, 2021 to the extent that it provides the arbitrary and unrealistic GCV of 3100 (kcal/kg).</p>	<p>i) To quash and set aside the Tariff Order dated 21.03.2022 in Case No. HERC/Petition No. 52 of 2021 passed by the Ld. Haryana Commission.</p> <p>ii) Direct the HERC to adopt the norms of fuel cost as determined by the Ld. CERC or to carry out extensive market based studies.</p> <p>iii) Direct the HERC to continue the norms with respect to fuel mix, fuel cost escalation, SHR and GCV as per year of commissioning of the plant.</p>	<p>i) Pass necessary orders/directions for removing of the difficulties in respect to the Fuel cost and Fuel Mix Norms.</p>

17. The Commission observes that the petitioner (M/s. SWIVPL) has filed an appeal before the Hon'ble APTEL, seeking to set aside the impugned tariff order dated 21.03.2022 and to adopt the norms of fuel cost as determined by the CERC/conduct a study for determination of fuel cost as well as directions against this Commission to continue the norms with respect to fuel mix, fuel cost escalation, SHR and GCV as per the year of commissioning of the plant. The petitioner (M/s. SWIVPL) has also filed a Civil Writ Petition before the Hon'ble Punjab and Haryana High Court, wherein the vires of the HERC RE Regulations, 2021 notified on 27.04.2021, have been challenged, which forms the basis of impugned tariff order dated 21.03.2022. It is in this context that the learned counsels for both the respondents (HPPC and HAREDA) have argued that the present petition (s) are not maintainable as similar issues are already pending adjudication before higher court/Tribunal and that the law does not contemplate multiple adjudications of the same dispute. It has been further argued that in the cases where, 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 distinctly severable, only one adjudication is permissible. Therefore, in such circumstances, the '*doctrine of Res sub-judice*' ought to be applied and the present petition is liable to be dismissed given the possibility of conflicting decisions. Further, the petitioner cannot be permitted to seek quashing of the order dated 21.03.2022 in one forum and seek 'removal of difficulty' in the implementation of the same order in another forum.

The Commission, after due deliberations, observes that the impugned tariff order dated 21.03.2022 as well as the HERC RE Regulations, 2021 (under which the tariff order in question was passed), have already been challenged in higher Court / Tribunal of competent jurisdiction. In case the issues raised in the present petition (s) are decided in favour of the petitioner (s), other issues raised in the appeals pending in the Hon'ble APTEL and Hon'ble High Court, challenging the impugned tariff order dated 21.03.2022 as well as the virus of the HERC RE Regulations, 2021, shall still prevail. On the other hand, in case the issues raised in the present petition are decided in favour of the respondent (s), they may be aggrieved, which may lead to the multiplicity of appeals. Hence, due to such possibilities, forum shopping is considered as disreputable practice and frowned by the courts. Needless to add that the relief sought by the petitioner in the present matter, under the garb of 'removal of difficulty', is squarely covered in the writ/appeal pending before the superior courts, as is evident from the table reproduced earlier in this order.

In view of the above, it is concluded that the higher court/Tribunal are already seized of the matter. Lifting the veil, of the present petition for 'removal of difficulty', it is not difficult for anybody to see that in ultimate analysis an effort has been made to dispense with an important part of HERC RE Regulations providing for use of paddy straw/stubble in larger public interest, for which a judicial review preferred by the petitioner is already pending adjudication. Further, the issue of 'fuel cost' is also under statutory appeal. It is to be noted that the parameters approved / allowed by this Commission, vide its order dated 27.04.2021, after following the due process was incorporated in the regulations and the said regulations were notified in the Haryana Government gazette. The matter did not stop here, the petitioner (M/s. SWIVPL) moved a petition in this Commission seeking relief under the same order / regulations that have been assailed by him in two different forums. In effect, the issues, with some changes in the manner in which they have been agitated before two statutory bodies viz. HERC and Hon'ble APTEL and a judicial body i.e. the Hon'ble High Court, is an avoidable abuse of the process of law.

18. In terms of the above discussion, the Commission holds that the present petition is liable to be dismissed on maintainability. Accordingly, the present petition is dismissed.

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