

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

**case no. HERC/RA 9 of 2020
HERC/RA 10 of 2020
HERC/RA 11 of 2020**

**Date of Hearing : 11.08.2021
Date of Order : 13.09.2021**

IN THE MATTER OF:

case no. HERC/RA-9 of 2020

Petition under Section 94 (1) (c) of the Act, 2003 (Electricity Act), read along with Regulation 57, 58, 65 and 66 of Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 (HERC 2019 Regulations) seeking review and modification of orders dated 30.05.2017 in case no. HERC/PRO-15 of 2017, passed by this Hon'ble Commission while determining transmission charges for the short-term open access consumers for the FY 2017-2018

and

case no. HERC/RA-10 of 2020

Petition under Section 94 (1) (c) of the Act, 2003 (Electricity Act), read along with Regulation 57, 58, 65 and 66 of Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 (HERC 2019 Regulations) seeking review and modification of order dated 31.10.2018 in case no. HERC/PRO-08 of 2018 by this Hon'ble Commission while determining transmission charges for the short-term open access consumers for the FY 2018-2019.

and

case no. HERC/RA-11 of 2020

Petition under Section 94 (1) (c) of the Act, 2003 (Electricity Act), read along with Regulation 57, 58, 65 and 66 of Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 (HERC 2019 Regulations) seeking review and modification of order dated 07.03.2019 in case no. HERC/PRO-60 of 2018 by this Hon'ble Commission while determining transmission charges for the short-term open access consumers for the FY 2019-2020.

Petitioner

Haryana Vidyut Prasaran Nigam Limited (HVPNL)

Present on behalf of Petitioner

Shri Raheel Kohli, Advocate, HVPNL

Quorum

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

**Chairman
Member
Member**

ORDER

Brief background of the Case

1. The Commission, on a petition filed each year by the transmission licensee (also responsible for SLDC), passes an order determining transmission tariff, SLDC charges as well as Short-Term Open Access Charges to be recovered from the beneficiaries. The tariff and charges are determined in line with the provisions of the HERC Multi Year Tariff Regulations in vogue. Accordingly, the Commission had passed order(s) determining the above-mentioned tariff and charges for the financial years 2017-18, 2018-19 and 2019-20; vide separate orders. The case no. HERC/RA 9 of 2020, HERC/RA 10 of 2020 and HERC/RA 11 of 2020 are identical petitions filed by HVPNL seeking review and modification of tariff order on the issue of determination of Short-Term Open Access Charges (STOAC). Hence, the Commission has considered it appropriate to hear them together and dispose of vide the present common order.

2. Condonation of delay

The petitioner has sought condonation of delay in filing the present review petitions i.e. 990 days (RA-9), 445 days (RA-10) and 295 days (RA-11). While seeking condonation of delay it has been submitted that at the time of passing of the impugned orders, the issue of determination of STOA (whether to be determined based on the energy drawl/energy wheeled by the petitioner or based on energy sales by distribution licensee) was pending adjudication before the Hon'ble APTEL, wherein, the Commission's order dated 31.06.2016, on a similar issue, was appealed against.

3. RA 9 of 2020 - submissions of the petitioner.

- 1) It has been submitted that the following vital facts merits attention and consideration of the Commission for adjudication of the present petition.
 - i. That the petitioner, on 26.11.2015, filed its true-up petition for the Aggregate Revenue Requirement (ARR) for Transmission Business and State Load Dispatch Centre (SLDC) charges for FY 2014-15, Annual (Mid-Year) Performance Review for the FY 2015-16 and determination of Transmission Tariff and SLDC Charges for the FY 2016-17.
 - ii. That the petitioner published its petition to invite comments from all the stakeholders/general public in accordance with the provisions of Section 64 of the Act. During the course of public hearing on 15.02.2016, the petitioner made its submission. The Commission vide order dated 31.03.2016 passed a tariff order in case no. HERC/PRO -31 of 2015. It is respectfully submitted that the Commission did not consider certain elements of True-up of ARR for Transmission Business and SLDC for the FY 2014-15, Annual (Mid-Year) Performance Review for FY 2015-16 and Determination of Transmission Tariff for the FY 2016-17.
 - iii. In view of the above, the petitioner moved a review petition being case no. HERC/RA-2 of 2016 before the Commission on 17.05.2016 seeking review of the order dated 31.03.2016 on the aspect of truing up elements for FY 2014-15, Annual (Mid-Year) Performance Review for FY

2015-16 and Determination of Transmission Tariff and SLDC Charges for the FY 2016-17. The Commission heard the matter on 31.08.2016 and had partly allowed the review petition vide order dated 08.11.2016. However, it is respectfully submitted that, the Commission determined Short Term Open Access charges (“STOA Charges”) based on the energy drawl/energy wheeled by the transmission licensee instead of energy sales by distribution licensees as prescribed by MYT Regulations.

- iv. Aggrieved by the wrongful determination of STOA charges, the petitioner challenged orders dated 31.03.2016 and 08.11.2016 before the Appellate Tribunal for Electricity (Tribunal) by preferring an appeal numbered appeal no. 214 of 2017 (Appeal).
- v. While the appeal was pending adjudication, on 30.01.2017 the petitioner filed its true-up petition for the FY 2015-2016, Annual (Mid-Year) Performance Review for FY 2016-2017 and Transmission Tariff and SLDC Charges for FY 2017-2018. The STOA Chagres were proposed by the petitioner for the FY 2017-2018 based on the energy sales by distribution licensees.
- vi. Pursuant thereto, after conducting the hearing, the Commission passed the impugned order and disallowed the petitioner’s claim relating to certain issue including STOA Charges. It is respectfully submitted that the Commission disallowed STOA charges as proposed by the petitioner and determined the same in contravention of the MYT Regulations. It is pertinent to mention that the Commission by placing reliance on an order dated 31.03.2016 in case no. HERC/Pro-31 of 2015 determined STOA Charges for the FY 2017-2018 based on the energy drawl/energy wheeled by the petitioner instead of energy sales by distribution licensee. For ease of reference the relevant findings of the Commission in the impugned order are reproduced below:

“The Commission, based on the approved ARR for FY 2017-18 for the transmission business, determines the transmission charges to be paid by Short Term Open Access consumers based on the methodology approved by the Commission vide its order dated 31.03.2016 based on the energy drawn through the transmission system for the FY 2015-16. Accordingly, the transmission cost for the calculation of short-term open access charges is under:-

Transmission Cost for Short Term Open Access consumers for FY 2017-18 (Rs. Millions)

Transmission Charges from STOA consumers		(in Millions)
	HVPNL Proposal	HERC Approval
Aggregate Revenue Requirement for FY 2017-18 including FY 2015-16 true-up	18591	16273.87
Transmission Share of SLDC charges (8% of 107.28 million)		8.58
Unitary Charges for JKTPL	534	516.0
Total Transmission Charges	19125	16798.45
Transmission Tariff for Short Term Open Access customers based on energy drawn by the Discoms in the FY 2015-16 of 46591 MUs (Rs / kWh)	0.536	0.36

...
...”

- vii. As the issue of determination of STOA charges was sub-judice before the Hon’ble Tribunal the petitioner, based on the legal advice, thought it appropriate not to seek review of the impugned order, at that time, in relation to STOA charges.

- viii. On 28.08.2019, the Hon'ble Tribunal was pleased to allow the appeal and held that the STOA charges for FY 2016-17 has been erroneously computed based on the energy drawl by the transmission licensee instead of energy sales by distribution licensees. Further, a direction was issued to the Commission to redetermine the STOA charges as per MYT Regulations and not otherwise. For ease of reference the relevant findings of APTEL is reproduced below:

"8.3) It is relevant to note from the findings of the State Commission that it has acknowledged the shift in methodology for computation of STOA charges for the year 2016-17 and has supported the same with rationale. It is, however, noticed that the reasoning given by the State Commission goes contrary to the provisions of the MYT Regulations regarding computation of STOA charges. In the host of judgments of the Hon'ble Supreme Court as well as this Tribunal, it has been categorically held that when a Regulation is made under section 178, then in that event, framing of terms and conditions for determination of tariff has to be in consonance with the Regulations. In other words, when Regulations have been framed by the Commission for tariff determination, the tariff would have to be determined strictly in accordance with the Regulations and not de hors the same. It is evident from the impugned order that the State Commission has determined the STOA charges for FY 2016-17 in contravention of its own MYT Regulations.

8.4) In view of these facts, we are of the opinion that the State Commission ought to have determined the STOA charges for the year in question as per its MYT Regulations and not otherwise.".....

"The impugned order dated 08.11.2016 passed by the Haryana Electricity Regulatory Commission in Review Petition, being case no. HERC/RA-2 of 2016 as merged in the order dated 31.03.2016 in case no. HERC/PRO -31 of 2015, is hereby set aside to the extent challenged in the appeal by the Appellant.

The matter stands remitted back to the State Commission with a direction to re-determine the STOA charges in accordance with law within a period of three months from the date of this judgment and order."

- ix. Consequently, in light of the order dated 28.08.2019 passed by the Hon'ble Tribunal, the Commission vide order dated 22.10.2019 and corrigendum dated 20.11.2019 was pleased to redetermine the STOA Charges for Short Term Open Access based on energy sales, in conformity with MYT Regulations and accordingly order dated 31.03.2016 in case no. HERC/PRO -31 of 2015 stands modified.
- x. In light of the above, the petitioner has filed the present review petition seeking redetermination of STOA charges for the FY2017-2018 based on energy sales by distribution licensee. In this regard and for the convenience of the Commission, Table-A containing STOA charges for the FY2017-2018 (calculated based on energy sales by distribution licensee) is produced below:

The transmission charges for the short-term open access consumers for the FY 2017-18 are proposed as under:

Particulars (Rs. In Millions)	Approved as per TO dated 30 th May, 2017	Proposed as per TO dated 30 th May, 2017
Aggregate Revenue Requirement for the FY 2017-18 including FY 2015-16 true-up	16273.87	16273.87
Transmission Share of SLDC charges (8% of 107.28)	8.58	8.58

million)		
Unitary Charges for JKTPPL	516.0	516.0
Total Transmission Charges	16798.45	16798.45
Transmission Tariff for Short Term Open Access customers based on energy drawn by the Discoms in the FY 2015-16 of 46591 MUs and 10% escalation (Rs / kWh)	0.36	---
Transmission Tariff for Short Term Open Access customers based on approved energy sales for the Discoms (previous year i.e. in the FY 2016-17) of 35981.05 MUs (Rs / kWh) as per HERC order dated 1 st Aug 2016 (Rounded off)	--	0.47

2) Grounds for Review: The present review is preferred on the following grounds which are taken without prejudice to each other.

3.1 That while passing the impugned order, Commission determined STOA charges without adhering to the determination procedure prescribed under the MYT Regulations. It is pertinent to mention that Commission, by placing reliance on an order dated 31.03.2016 in case no. HERC/Pro-31 of 2015, determined STOA Charges for the FY 2017-2018 based on the energy draw/energy wheeled by the petitioner instead of energy sales by distribution licensee. Therefore, failure to adhere to the said procedure is an error apparent on the face of the record, which deserves to be rectified by the by redetermining STOA charges for the FY2017-2018 based on energy sales by distribution licensee. The same principle is upheld by the Hon'ble Tribunal in case titled Tamil Nadu Electricity Board Vs. Tamil Nadu Electricity Regulatory Commission numbered appeal no. 51 of 2008 decided on 02.04.2009. For ease of reference, findings of the Hon'ble Tribunal is reproduced below:

"11) In our opinion, the failure to adhere to the procedure for passing a tariff order is an error apparent and can be set aside in review. Secondly, as mentioned above, sufficient opportunity to represent its case was not given to the appellant. This has resulted in failure of justice to the extent the principal order dated 20th March, '06 has ignored all revenue implications for the appellant. The impugned order can therefore, be said to be suffering from apparent error. In any case, this lapse can be covered by a third ground for review namely 'any other sufficient reason'. In the case of Board of Control for Cricket in India And Another Vs. Netaji Cricket Club And Others in case No. (2005) 4 SCC 741, the Supreme Court, inter alia, observed the following:

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit".

12) In this judgment, the Supreme Court also said that justice is a virtue that transcends all barriers and rules or procedures or technicalities of law cannot stand in the way of administration of justice. The Supreme Court observed if the court finds that an error pointed out was such that an earlier judgment would not have been passed but for erroneous assumptions and that its perpetration would result in miscarriage of justice, it can be rectified by the court under its power of review."

3.2 That the Commission is an independent statutory body having full power to frame its own regulations specifying terms and conditions for determination of tariff. However, once such

regulations are notified, the Hon'ble Commission shall necessarily determine tariff in accordance with its own regulations. The same principle is upheld by the Hon'ble Tribunal in case titled Haryana Vidyut Prasaran Nigam Limited Vs. Haryana Electricity Regulatory Commission numbered appeal no. 102 of 2011 decided on 18.04.2012. For ease of reference, finding of APTEL is reproduced below:

"46. In this Case the Commission's decision to allow RoE @ 10% lacks transparency. In case the Commission had decided to allow RoE at less/higher rate than 14%, it should have declared beforehand and sought comments on the same. In this case the Commission's decision to allow ROE @ 10% is contrary to the Regulations, and we must direct the Commission to allow Return on Equity @ 14% in accordance with Tariff regulations 2008. Once the Regulations have been framed the Commission has to act in accordance therewith."

However, it is submitted that, while passing the impugned order the Commission determined STOA charges based on the energy drawl by the transmission licensee, which is contrary to the methodology provided in the MYT Regulations. Therefore, the same amounts to an error which is apparent on the face of record, which deserves to be rectified by the Commission by redetermining STOA charges for the FY 2017-2018 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee.

- 3.3 It has been submitted that the Commission is bound by its own regulation and ought to have followed methodology for determination of STOA Charges as prescribed in the MYT Regulation. However, while passing the impugned order, the Commission failed to appreciate the said principle. Therefore, the same amounts to an error which is apparent on the face of record, which deserves to be rectified by the Commission by redetermining STOA charges for the FY2017-2018 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee. It is pertinent to mention that the said principle is upheld by the Hon'ble Supreme Court of India in the constitutional bench decision of PTC India Limited Vs. Central Electricity Regulatory Commission (2010)4 SCC 603. The Hon'ble Court has held that the State Electricity Regulatory Commission is bound by the statutory regulations. For ease of reference, the relevant finding of the Supreme Court of India is reproduced below:

"54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in interstate trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it

could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation. conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178.”

- 3.4 That the impugned order was passed by the Commission by placing reliance on the methodology adopted in order dated 31.03.2016 in case no. HERC/PRO -31 of 2015, which has been set aside by the Hon’ble Tribunal vide order dated 28.08.2019. Pursuant thereto, and in order to rectify the error highlighted by the Hon’ble Tribunal, the Commission vide consequential order dated 22.10.2019 and corrigendum dated 20.11.2019 modified order dated 31.03.2016 by redetermining STOA Charges for FY 2016-2017 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee. Therefore, passing of the said consequential orders and occurrence of subsequent events post passing of the impugned order, as stated above, is a substantial ground for seeking review and modification of the impugned order. This principle has been upheld by the Hon’ble Supreme Court of India in case titled Board of Control for Cricket, India and Ors. Vs. Netaji Cricket Club and Ors. (2005) 4SCC741. For ease of reference the relevant finding of the Supreme Court of India is reproduced below:

“93. It is also not correct to contend that the court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event. In a case of this nature when the court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned senior counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on 29th September, 2004, the subsequent event may be taken into consideration by the court for the purpose of rectifying its own mistake.”

It is submitted that the Commission may be pleased to review and modify the impugned order in light of the consequential orders, which were passed in order to rectify the error as highlighted in the order dated 28.08.2019 passed by the Hon'ble Tribunal.

3) Submission on Condonation of Delay

It has been submitted that there is a delay of 990 days in filing the present petition and the said delay is neither intentional nor deliberate. The submissions on delay are taken without prejudice to each other and are as under:

- (I) At the time of passing of the impugned order, the issue of determination of STOA (whether to be determined based on the energy drawl/energy wheeled by the petitioner or based on energy sales by distribution licensee) was pending adjudication before the Hon'ble Tribunal, wherein order dated 31.06.2016 was challenged. The petitioner, based on the legal advice, thought it appropriate to wait for the outcome of the appeal and therefore, at that time review of the impugned order was not sought in relation to STOA charges. Further, the petitioner was of the firm belief that, once the Hon'ble Tribunal would resolve the controversy qua determination of STOA Charges in favour of the petitioner, the Commission would be passing consequential order thereby modifying order dated 31.06.2016 and subsequently, the petitioner, would seek review of the impugned order and accordingly the consequential order would be made applicable to the impugned order.
- (II) On 28.08.2019, the Hon'ble Tribunal passed order in the Appeal. Consequently, in compliance of the direction issued by the Hon'ble Tribunal, the Commission passed the consequential orders dated 22.10.2019 and 20.11.2019 (which were received by the petitioner on 31.10.2019 and 03.12.2019, respectively) thereby modifying order dated 31.06.2016.
- (III) On receipt of the consequential orders, the impact of same was analysed by the concerned departments and necessary approvals were sought to file the present petition. Pursuant thereto, the petitioner commenced the process of collating necessary data for the FY 2017-2018 for the purpose of preparing the present petition and coordinated with the concerned officials. While, the petitioner was engaged in the said process, there was an outbreak of COVID-19 and consequently, lockdown was declared by the Government and the said process was significantly impacted. After the necessary data was collated, the issue was discussed with the petitioner's advocate. Thereafter, pursuant to discussions between the petitioner and its advocate, the draft of review petition was prepared. Thereafter, the draft of the review to be filed before the Commission was finalised and approved by the petitioner and filed before the Commission.
- (IV) It is respectfully submitted that the petitioner was pursuing the above stated course of action with a bona fide belief and therefore the Commission may be pleased to condone the delay of 990 days in filing the present petition for the reason stated herein. The similar view has been upheld by the Hon'ble Tribunal in case titled Damodar Valley Corporation Vs. West Bengal Electricity Regulatory Commission numbered IA No. 1553 of 2018 in DFR No. 3178 of 2018 decided on 31.01.2019, wherein the delay of 1143 days was condoned. For ease of reference, the relevant findings of the APTEL are reproduced below:

"On perusal of the first affidavit and the additional affidavit filed in support of condonation of delay application, it indicates that there was no intentional withholding of any facts by the Appellant. On the other hand, pendency of the Review Petition for the last three years is not denied. The reason for the delay in filing the present appeal is

explained by the Appellant stating that they were pursuing the review petition with all endeavour and were hoping an early disposal of the said petition. They further believed that in Review Petition they would get the controversy resolved. Therefore, till the Review Petition came to be rejected, there was no occasion for the Appellant to think, analyse the situation and file the appeal. Merely because the other set of parties have filed appeals challenging the order dated 25.05.2015, it does not mean that all other parties to the same proceedings need to file appeal. It depends on the advice (legal) they receive and probably they believed that Review Petition would be the proper solution instead of appeal, in that view of the matter, we are of the opinion that the Appellant has placed sufficient material and the explanation as to why the delay of 1143 days is caused. We accept the said explanation and condone the delay of 1143 days in filing the appeal.

- (V) It is respectfully submitted that the Commission may be pleased to condone the delay, as the petitioner has a good case and the same is *inter alia* covered by the order dated 28.08.2019 passed by APTEL and consequential orders 22.10.2019 and 20.11.2019 passed by the Commission.
- 4) In view of the aforesaid, it is submitted that the Commission may be pleased to allow this petition as prayed. In addition, it is respectfully submitted that this is an appropriate case, wherein the Commission may be pleased to exercise its inherent power by allowing the present petition in the interest of justice.
- 5) That no appeal has been preferred against the order under review. Further, the petitioner undertakes to duly inform the Commission, in case it approaches the appellate forum for requisite direction, during the pendency of this petition.
- 6) Prayer: The petitioner prayed as under:
- (A) Review, reconsider, modify and/or clarify the orders dated 30.05.2017 in case no. HERC/PRO-15 of 2017, in terms of the submissions made above;
- (B) Condone the delay in filling the present petition in terms of the submissions made above;
- (C) Pass any such other order/s and/or direction/s, which the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case

4. **RA 10 of 2020:** The facts of the petition are as under:

- 1) The present petition has been filed under Section 94 (1) (c) of the Act, 2003 (Electricity Act), read along with Regulation 57, 58, 65 and 66 of Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 (HERC 2019 Regulations) seeking review and modification of orders dated 31.10.2018 in case no. HERC/PRO-08 of 2018 ("impugned order") passed by the Commission while determining transmission charges for the Short Term Open Access consumer for the FY 2018-2019. There is an inadvertent delay in filling the present petition and the same has been duly explained at paragraph 4 of this petition.
- 2) It has been submitted that the following vital facts merits attention and consideration of the Commission for adjudication of the present petition.
- A. For determination of tariff for the Transmission licensees in the State of Haryana, the Commission has framed Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail Supply under Multi Year Tariff Framework) Regulations, 2012 (MYT Regulations). In accordance with the above MYT Regulations, the petitioner is required to file each year an Annual Performance Review Petition for true-up of past year and review of estimates for the current year and determination of Transmission Tariff and STOA charges for the ensuing year as per the MYT Regulations for the control period, in accordance with Regulation 11 of the MYT Regulations.

- B. That the petitioner, on 26.11.2015, filed its true-up petition for the Aggregate Revenue Requirement (ARR) for Transmission Business and State Load Dispatch Centre (SLDC) charges for FY 2014-15, Annual (Mid-Year) Performance Review for the FY 2015-16 and determination of Transmission Tariff and SLDC Charges for the FY 2016-17.
- C. The petitioner published its petition to invite comments from all the stakeholders/general public in accordance with the provisions of Section 64 of the Act. During the course of public hearing on 15.02.2016, the petitioner made its submission. The Commission vide order dated 31.03.2016 passed a tariff order in case no. HERC/PRO -31 of 2015. It is respectfully submitted that the Commission did not consider certain elements of True-up of ARR for Transmission Business and SLDC for the FY 2014-15, Annual (Mid-Year) Performance Review for FY 2015-16 and Determination of Transmission Tariff for the FY 2016-17.
- D. In view of the above, the petitioner moved a review petition bearing case no. HERC/RA-2 of 2016 before the Commission on 17.05.2016 seeking review of the order dated 31.03.2016 on the aspect of truing up elements for FY 2014-15, Annual (Mid-Year) Performance Review for FY 2015-16 and Determination of Transmission Tariff and SLDC Charges for the FY 2016-17. The Commission heard the matter on 31.08.2016 and has partly allowed the review petition vide order dated 08.11.2016. However, it is respectfully submitted that the Commission has estimated Short Term Open Access charges (STOA Charges) based on the energy drawl/energy wheeled by the transmission licensee instead of energy sales by distribution licensees.
- E. Aggrieved by the wrongful determination of STOA charges, the petitioner challenged orders dated 31.03.2016 and 08.11.2016 before the Appellate Tribunal for Electricity (APTEL) by preferring an appeal numbered appeal no. 214 of 2017 (Appeal).
- F. While the appeal was pending adjudication, on 29.01.2018 the petitioner filed its true-up petition for the FY 2016-2017, Annual (Mid-Year) Performance Review for FY 2017-2018 and Transmission Tariff and SLDC Charges for FY 2018-2019. The STOA Chagres were proposed by the petitioner for the FY 2018-2019 based on the energy sales by distribution licensees.
- G. Pursuant thereto, after conducting the hearing, the Commission passed the impugned order and disallowed the petitioner's claim relating to certain issue including STOA Charges. It is respectfully submitted that the Commission disallowed STOA charges as proposed by the petitioner and determined the same in contravention of the MYT Regulations. It is pertinent to mention that the Commission, by placing reliance on an order dated 31.03.2016 in case no. HERC/Pro-31 of 2015, determined STOA Charges for the FY 2017-2018 based on the energy drawl/energy wheeled by the petitioner instead of energy sales by distribution licensee. For ease of reference the relevant findings of the Commission in the impugned order are reproduced below:

“The Commission, based on the approved ARR for FY 2018-19 for the transmission business, determines the transmission charges to be paid by Short Term Open Access consumers based on the methodology approved by the Commission vide its order dated 31.03.2016 based on the energy drawn through the transmission system for the year. Accordingly, the transmission cost for the calculation of short-term open access charges is under:-

Transmission Cost for Short Term Open Access consumers for FY 2018-19 (Rs. Millions)

<i>Transmission Charges from STOA consumers</i>		<i>(in Millions)</i>
<i>Particulars</i>	<i>HVPNL Proposal FY</i>	<i>HERC</i>

	2018-19	Approval FY 2018-19
Transmission Cost for FY 2018-19(Rs. Million)	18591	17635
Unitary Charges (Rs. Million)	529.2	516.204
Total cost to be recovered from the Short-Term OA Consumers		18152
Projected Sales for the FY 2018 – 19 for the distribution Licensee (MU) (based on the submissions made by UHBVNL & DHBVN in their ARR Petition for FY 17-18)	37115	
Energy proposed to be drawn through the transmission system based on the ARR fillings for the FY 2018-19		50,871
Transmission Tariff for Short Term Open Access customers based on energy drawn by the Discoms in the FY 2015-16 of 46591 MUs (Rs / kWh)	0.515	0.36

- H. As the issue of determination of STOA charges was sub-judice before the Hon'ble Tribunal the petitioner, based on the legal advice, thought it appropriate not to seek review of the impugned order, at that time, in relation to STOA charges, though review petition was filed regarding other issues.
- I. On 28.08.2019, the Hon'ble Tribunal was pleased to allow the appeal and held that the STOA charges for FY 2016-17 has been erroneously computed based on the energy drawl by the transmission licensee instead of energy sales by distribution licensees. Further, a direction was issued to the Commission to redetermine the STOA charges as per MYT Regulations and not otherwise. For ease of reference the relevant findings of APTEL is reproduced below:

“8.3) It is relevant to note from the findings of the State Commission that it has acknowledged the shift in methodology for computation of STOA charges for the year 2016-17 and has supported the same with rationale. It is, however, noticed that the reasoning given by the State Commission goes contrary to the provisions of the MYT Regulations regarding computation of STOA charges. In the host of judgments of the Hon'ble Supreme Court as well as this Tribunal, it has been categorically held that when a Regulation is made under section 178, then in that event, framing of terms and conditions for determination of tariff has to be in consonance with the Regulations. In other words, when Regulations have been framed by the Commission for tariff determination, the tariff would have to be determined strictly in accordance with the Regulations and not de hors the same. It is evident from the impugned order that the State Commission has determined the STOA charges for FY 2016-17 in contravention of its own MYT Regulations.

8.4) In view of these facts, we are of the opinion that the State Commission ought to have determined the STOA charges for the year in question as per its MYT Regulations and not otherwise.”

....

“The impugned order dated 08.11.2016 passed by the Haryana Electricity Regulatory Commission in Review Petition, being case no. HERC/RA-2 of 2016 as merged in the order dated 31.03.2016 in case no. HERC/PRO -31 of 2015, is hereby set aside to the extent challenged in the appeal by the Appellant.

The matter stands remitted back to the State Commission with a direction to re-determine the STOA charges in accordance with law within a period of three months from the date of this judgment and order.

- J. Consequently, in light of the order dated 28.08.2019 passed by the Hon'ble Tribunal, the Commission vide order dated 22.10.2019 and corrigendum dated 20.11.2019 was pleased to redetermine the STOA Charges for Short Term Open Access based on energy sales, in conformity with MYT Regulations and accordingly order dated 31.03.2016 in case no. HERC/PRO -31 of 2015 stands modified.
- K. In light of the above, the petitioner is filing the present review petition seeking redetermining of STOA charges for the FY 2018-2019 based on energy sales by distribution licensee. In this regard and for the convenience of the Commission, Table-A containing STOA charges for the FY2018-2019 (calculated based on energy sales by distribution licensee) is produced below:

The transmission charges for the short-term open access consumers for the FY 2018-19 are proposed as below:

Particulars (Rs. Million)	Approved, as per Tariff order dated 31 st Oct. 2018	Proposed (As per tariff order of 31 st Oct. 2018)
Transmission Cost for FY 2018-19 (Rs. Million)	17,635	17,635
Unitary Charges (Rs. Million)	516.204	516.204
Total Cost to be recovered from Short term OA consumers	18,152	18,152
Energy proposed to be drawn through the transmission system based on the ARR filings for the FY 2018-19 (MU)	50,871	--
Transmission Tariff for Short Term Open Access customers based on energy drawn by the Discoms during FY 2018-19 (Rs. / kWh)	0.36	--
Approved energy sales for the Discoms (previous year i.e. in the FY 2017-18) as per HERC order dated 11th July 2017	--	36573.41
Transmission Tariff for Short Term Open Access customers based on approved energy sales for the Discoms (previous year i.e. in the FY 2017-18) (Rs / kWh) (Rounded off)	---	0.50

3) Grounds of Review

The present review is preferred on the following grounds which are taken without prejudice to each other.

- 3.1 It is respectfully submitted that, while passing the impugned order, the Commission determined STOA charges without adhering to the determination procedure prescribed under the MYT Regulations. It is pertinent to mention that the Commission, by placing reliance on an order dated 31.03.2016 in case no. HERC/Pro-31 of 2015, determined STOA Charges for the FY 2017-2018 based on the energy drawl/energy wheeled by the petitioner instead of energy sales by distribution licensee. Therefore, failure to adhere to the said procedure is an error apparent on the face of the record, which deserves to be rectified by the by redetermining STOA charges for the FY2018-2019 based on energy sales by distribution licensee. The same principle is upheld by the Hon'ble Tribunal in case titled Tamil Nadu Electricity Board Vs. Tamil Nadu Electricity Regulatory Commission numbered

appeal no. 51 of 2008 decided on 02.04.2009. For ease of reference findings of the Hon'ble Tribunal is reproduced below:

"11) In our opinion, the failure to adhere to the procedure for passing a tariff order is an error apparent and can be set aside in review. Secondly, as mentioned above, sufficient opportunity to represent its case was not given to the appellant. This has resulted in failure of justice to the extent the principal order dated 20th March, '06 has ignored all revenue implications for the appellant. The impugned order can therefore, be said to be suffering from apparent error. In any case, this lapse can be covered by a third ground for review namely 'any other sufficient reason'. In the case of Board of Control for Cricket in India And Another Vs. Netaji Cricket Club and Others in case No. (2005) 4 SCC 741, the Supreme Court, inter alia, observed the following:

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit".

12) In this judgment, the Supreme Court also said that justice is a virtue that transcends all barriers and rules or procedures or technicalities of law cannot stand in the way of administration of justice. The Supreme Court observed if the court finds that an error pointed out was such that an earlier judgment would not have been passed but for erroneous assumptions and that its perpetration would result in miscarriage of justice, it can be rectified by the court under its power of review."

3.2 The Commission is an independent statutory body having full power to frame its own regulations specifying terms and conditions for determination of tariff. However, once such regulations are notified, the Hon'ble Commission shall necessarily determine tariff in accordance with its own regulations. The same principle is upheld by the Hon'ble Tribunal in case titled Haryana Vidyut Prasaran Nigam Limited Vs. Haryana Electricity Regulatory Commission numbered appeal no. 102 of 2011 decided on 18.04.2012. For ease of reference finding of APTEL is reproduced below:

"46. In this Case the Commission's decision to allow RoE @ 10% lacks transparency. In case the Commission had decided to allow RoE at less/higher rate than 14%, it should have declared beforehand and sought comments on the same. In this case the Commission's decision to allow ROE @ 10% is contrary to the Regulations, and we must direct the Commission to allow Return on Equity @ 14% in accordance with Tariff regulations 2008. Once the Regulations have been framed the Commission has to act in accordance therewith."

However, it is submitted that, while passing the impugned order the Commission determined STOA charges based on the energy drawl by the transmission licensee, which is contrary to the methodology provided in the MYT Regulations. Therefore, the same amounts to an error which is apparent on the face of record, which deserves to be rectified by the Commission by redetermining STOA charges for the FY2018-2019 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee.

3.3 It has been submitted that the Commission is bound by its own regulation and ought to have followed methodology for determination of STOA Charges as prescribed in the MYT Regulation. However, while passing the impugned order, the Commission failed to appreciate the said principle. Therefore, the same amounts to an error which is apparent on the face of record, which deserves to be rectified by the Commission by redetermining STOA charges for the FY2018-2019 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee. It is pertinent to mention that the said principle is upheld by the Hon'ble Supreme Court of India in the constitutional bench decision of PTC India Limited Vs. Central Electricity Regulatory Commission (2010)4 SCC 603. The Hon'ble Court has held that the State Electricity Regulatory Commission is bound by the statutory regulations. For ease of reference, the relevant finding of the Supreme Court of India is reproduced below:

“54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in interstate trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation. conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g).

However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178.”

3.4 It is submitted that the impugned order was passed by the Commission by placing reliance on the methodology adopted in order dated 31.03.2016 in case no. HERC/PRO -31 of 2015, which is being set aside by the Hon’ble Tribunal vide order dated 28.08.2019. Pursuant thereto and in order to rectify the error highlighted by the Hon’ble Tribunal, the Commission vide consequential order dated 22.10.2019 and corrigendum dated 20.11.2019 modified order dated 31.03.2016 by redetermining STOA Charges for FY 2016-2017 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee. Therefore, passing of the said consequential orders and occurrence of subsequent events post passing of the impugned order, as stated above, is a substantial ground for seeking review and modification of the impugned order. This principle has been upheld by the Hon’ble Supreme Court of India in case titled Board of Control for Cricket, India and Ors. Vs. Netaji Cricket Club and Ors. (2005) 4SCC741. For ease of reference the relevant finding of the Supreme Court of India is reproduced below:

“93. It is also not correct to contend that the court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event. In a case of this nature when the court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned senior counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on 29th September, 2004, the subsequent event may be taken into consideration by the court for the purpose of rectifying its own mistake.”

It has been submitted that the Commission may be pleased to review and modify the impugned order in light of the consequential orders, which were passed in order to rectify the error as highlighted by the Hon’ble Tribunal in its order dated 28.08.2019.

4) Submission on Condonation of Delay

It has been submitted that there is a delay of 445 days in filing the present petition and the said delay is neither intentional nor deliberate. The submissions on delay are taken without prejudice to each other and are as under:

- (I) At the time of passing of the impugned order, the issue of determination of STOA (whether to be determined based on the energy drawl/energy wheeled by the petitioner or based on energy sales by distribution licensee) was pending adjudication before the Hon'ble Tribunal, wherein order dated 31.06.2016 was challenged. The petitioner, based on the legal advice, thought it appropriate to wait for the outcome of the appeal and therefore at that time review of the impugned order was not sought in relation to STOA charges, thought the review petition was filed regarding other issues. Further, the petitioner was of the firm belief that, once the Hon'ble Tribunal would resolve the controversy qua determination of STOA Charges in favour of the petitioner, the Commission would be passing consequential order thereby modifying order dated 31.06.2016 and subsequently, the petitioner, would seek review of the impugned order and accordingly the consequential order would be made applicable to the impugned order.
- (II) On 28.08.2019, the Hon'ble Tribunal passed order in the Appeal. Consequently, in compliance of the direction issued by the Hon'ble Tribunal, the Commission passed the consequential orders dated 22.10.2019 and 20.11.2019 (which were received by the petitioner on 31.10.2019 and 03.12.2019, respectively) thereby modifying order dated 31.06.2016.
- (III) On receipt of the consequential orders, the impact of same were analysed by the concerned departments and necessary approvals were sought to file the present petition. Pursuant thereto, the petitioner commenced the process of collating necessary data for the FY 2018-2019 for the purpose of preparing the present petition and coordinated with the concerned officials. While the petitioner was engaged in the said process, there was an outbreak of COVID-19 and consequently, lockdown was declared by the Government and the said process was significantly impacted. After the necessary data was collated, the issue was discussed with the petitioner's advocate. Thereafter, pursuant to discussions between the petitioner and its advocate, the draft of review petition was prepared. Thereafter, the draft of the review to be filed before the Commission was finalised and approved by the petitioner and filed before the Commission.
- (IV) It is respectfully submitted that the petitioner was pursuing the above stated course of action with a bona fide belief and therefore the Commission may be pleased to condone the delay of 455 days in filing the present petition for the reason stated herein. The similar view has been upheld by the Hon'ble Tribunal in case titled Damodar Valley Corporation Vs. West Bengal Electricity Regulatory Commission numbered IA No. 1553 of 2018 in DFR No. 3178 of 2018 decided on 31.01.2019, wherein the delay of 1143 days was condoned. For ease of reference, the relevant findings of the APTEL are reproduced below:

"On perusal of the first affidavit and the additional affidavit filed in support of condonation of delay application, it indicates that there was no intentional withholding of any facts by the Appellant. On the other hand, pendency of the Review Petition for the last three years is not denied. The reason for the delay in filing the present appeal is explained by the Appellant stating that they were pursuing the review petition with all endeavour and were hoping an early disposal of the said petition. They further believed that in Review Petition they would get the controversy resolved. Therefore, till the Review Petition came to be rejected, there was no occasion for the Appellant to think, analyse the situation and file the appeal. Merely because the other set of parties have filed appeals challenging the order dated 25.05.2015, it does not mean that all other

parties to the same proceedings need to file appeal. It depends on the advice (legal) they receive and probably they believed that Review Petition would be the proper solution instead of appeal, in that view of the matter, we are of the opinion that the Appellant has placed sufficient material and the explanation as to why the delay of 1143 days is caused. We accept the said explanation and condone the delay of 1143 days in filing the appeal.

- (V) It is respectfully submitted that the Commission may be pleased to condone the delay, as the petitioner has a good case and the same is *inter alia* covered by the order dated 28.08.2019 passed by APTEL and consequential orders 22.10.2019 and 20.11.2019 passed by the Commission.
- 5) In view of the aforesaid, it is submitted that the Commission may be pleased to allow this petition as prayed. In addition, it is respectfully submitted that this is an appropriate case, wherein the Commission may be pleased to exercise its inherent power by allowing the present petition in the interest of justice.
- 6) That no appeal has been preferred against the order under review. Further, the petitioner undertakes to duly inform the Commission, in case it approaches the appellate forum for requisite direction during the pendency of this petition.
- 7) Prayer in view of the aforesaid, it is most respectfully prayed that the Hon'ble Commission may:
- (A) Review, reconsider, modify and/or clarify the orders dated 31.10.2018 in case no. HERC/PRO-08 of 2018, in terms of the submissions made above;
- (B) Condone the delay in filling the present petition in terms of the submissions made above;
- (C) Pass any such other order/s and/or direction/s, which the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.
5. **RA 11 of 2020:** Submissions of the petitioner are as under:
- 1) The present petition has been filed Under Section 94 (1) (c) of the Act, 2003 (Electricity Act), read along with Regulation 57, 58, 65 and 66 of Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 (HERC 2019 Regulations) seeking review and modification of orders dated 07.03.2019 in case no. HERC/PRO-60 of 2018 ("impugned order") passed by the Commission while determining transmission charges for the Short Term Open Access consumer for the FY 2019-2020. There is an inadvertent delay in filling the present petition and the same has been duly explained at paragraph 4 of this petition.
- 2) It has been submitted that the following vital facts merits attention and consideration of the Commission for adjudication of the present petition.
- A. For determination of tariff for the Transmission licensees in the State of Haryana, the Commission has framed Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail Supply under Multi Year Tariff Framework) Regulations, 2012 (MYT Regulations). In accordance with the above MYT Regulations, the petitioner is required to file each year an Annual Performance Review Petition for true-up of past year and review of estimates for the current year and determination of Transmission Tariff and STOA charges for the ensuing year as per the MYT Regulations for the control period, in accordance with Regulation 11 of the MYT Regulations.
- B. The petitioner, on 26.11.2015, filed its true-up petition for the Aggregate Revenue Requirement (ARR) for Transmission Business and State Load Dispatch Centre (SLDC)

charges for FY 2014-15, Annual (Mid-Year) Performance Review for the FY 2015-16 and determination of Transmission Tariff and SLDC Charges for the FY 2016-17.

- C. The petitioner published its petition to invite comments from all the stakeholders/general public in accordance with the provisions of Section 64 of the Act. During the course of public hearing on 15.02.2016, the Petitioner made its submission. The Commission vide order dated 31.03.2016 passed a tariff order in case no. HERC/PRO -31 of 2015. It is respectfully submitted that the Commission did not consider certain elements of True-up of ARR for Transmission Business and SLDC for the FY 2014-15, Annual (Mid-Year) Performance Review for FY 2015-16 and Determination of Transmission Tariff for the FY 2016-17.
- D. In view of the above, the Petitioner moved a review petition being case no. HERC/RA-2 of 2016 before the Commission on 17.05.2016 seeking review of the order dated 31.03.2016 on the aspect of trueing up elements for FY 2014-15, Annual (Mid-Year) Performance Review for FY 2015-16 and Determination of Transmission Tariff and SLDC Charges for the FY 2016-17. The Commission heard the matter on 31.08.2016 and has partly allowed the review petition vide order dated 08.11.2016. However, it is respectfully submitted that, the Commission has estimated Short Term Open Access charges (STOA Charges) based on the energy drawl/energy wheeled by the transmission licensee instead of energy sales by distribution licensees.
- E. Aggrieved by the wrongful determination of STOA charges, the Petitioner challenged orders dated 31.03.2016 and 08.11.2016 before the Appellate Tribunal for Electricity (Tribunal) by preferring an appeal numbered appeal no. 214 of 2017 (Appeal).
- F. While the appeal was pending adjudication, on 24.12.2018 the Petitioner filed its true-up petition for the FY 2017-2018, Annual (Mid-Year) Performance Review for FY 2018-2019 and Transmission Tariff and SLDC Charges for the FY 2019-2020. The STOA Chagres were proposed by the Petitioner for the FY 2019-2020 based on the energy sales by distribution licensees.
- G. Pursuant thereto, after conducting the hearing, the Commission passed the impugned order and disallowed the Petitioner’s claim relating to certain issue including STOA Charges. It is respectfully submitted that the Commission disallowed STOA charges as proposed by the Petitioner and determined the same in contravention of the MYT Regulations. It is pertinent to mention that the Commission, by placing reliance on an order dated 31.03.2016 in case no. HERC/Pro-31 of 2015, determined STOA Charges for the FY 2017-2018 based on the energy drawl/energy wheeled by the Petitioner instead of energy sales by distribution licensee. For ease of reference the relevant findings of the.

Commission in the impugned order are reproduced below:

“The Commission, based on the approved ARR for FY 2018-19 for the transmission business, determines the transmission charges to be paid by Short Term Open Access consumers based on the methodology approved by the Commission vide its order dated 31.03.2016 based on the energy drawn through the transmission system for the year. Accordingly, the transmission cost for the calculation of short-term open access charges is under: -

Transmission Cost for Short Term Open Access consumers for FY 2019-20 (Rs. Millions)

<i>Transmission Charges from STOA consumers</i>		<i>(in Millions)</i>
Particulars	Proposed	Approved
Transmission Cost for FY 2019-20(Rs. Million)	16096	1286.79
Unitary Charges (Rs. Million)	513.17	513.17
Total cost to be recovered from the Short-Term OA Consumers		18152
Projected Sales for the FY 2019 – 20 for the distribution	42,454.68	

	Licensee (MU) (based on the submissions made by UHBVNL & DHBVN in their ARR Petition for FY 2019-20)		
	Energy proposed to be drawn through the transmission system based on the ARR fillings for the FY 2019-20		49447.22
H.	Transmission Tariff for Short Term Open Access customers based on energy drawn by the Discoms in the FY 2015-16 of ₹46591 MUs (Rs / kWh)	0.39	0.27

- I. As the issue of determination of STOA charges was sub-judice before the Hon'ble Tribunal the petitioner, based on the legal advice, thought it appropriate not to seek review of the impugned order, at that time, in relation to STOA charges, though review petition was filed regarding other issues.
- J. On 28.08.2019, the Hon'ble Tribunal was pleased to allow the appeal and held that the STOA charges for FY 2016-17 has been erroneously computed based on the energy drawl by the transmission licensee instead of energy sales by distribution licensees. Further, a direction was issued to the Commission to redetermine the STOA charges as per MYT Regulations and not otherwise. For ease of reference the relevant findings of APTEL is reproduced below:

"8.3) It is relevant to note from the findings of the State Commission that it has acknowledged the shift in methodology for computation of STOA charges for the year 2016-17 and has supported the same with rationale. It is, however, noticed that the reasoning given by the State Commission goes contrary to the provisions of the MYT Regulations regarding computation of STOA charges. In the host of judgments of the Hon'ble Supreme Court as well as this Tribunal, it has been categorically held that when a Regulation is made under section 178, then in that event, framing of terms and conditions for determination of tariff has to be in consonance with the Regulations. In other words, when Regulations have been framed by the Commission for tariff determination, the tariff would have to be determined strictly in accordance with the Regulations and not de hors the same. It is evident from the impugned order that the State Commission has determined the STOA charges for FY 2016-17 in contravention of its own MYT Regulations.

8.4) In view of these facts, we are of the opinion that the State Commission ought to have determined the STOA charges for the year in question as per its MYT Regulations and not otherwise."

"The impugned order dated 08.11.2016 passed by the Haryana Electricity Regulatory Commission in Review Petition, being case no. HERC/RA-2 of 2016 as merged in the order dated 31.03.2016 in case no. HERC/PRO -31 of 2015, is hereby set aside to the extent challenged in the appeal by the Appellant.

The matter stands remitted back to the State Commission with a direction to re-determine the STOA charges in accordance with law within a period of three months from the date of this judgment and order.

- K. Consequently, in light of the order dated 28.08.2019 passed by the Hon'ble Tribunal, the Commission vide order dated 22.10.2019 and corrigendum dated 20.11.2019 was pleased to redetermine the STOA Charges for Short Term Open Access based on energy sales, in conformity with MYT Regulations and accordingly order dated 31.03.2016 in case no. HERC/PRO -31 of 2015 stands modified.

- L. In light of the above, the petitioner is filing the present review petition seeking redetermining of STOA charges for the FY 2019-2020 based on energy sales by distribution licensee. In this regard and for the convenience of the Commission, Table-A containing STOA charges for the FY2019-2020 (calculated based on energy sales by distribution licensee) is produced below:

The transmission charges for the short-term open access consumers for the FY 2019-20 are proposed as below:

Particulars (Rs. Million)	Approved, as per T.O dated 07 th March 2019	Revised Proposed (as per T.O dated 07 th March 2019)
Transmission Cost for FY 2019-20	12867.79	12867.79
Unitary Charges	513.17	513.17
Energy proposed to be drawn through the transmission system based on the ARR filings for the FY 2019-20	49447.22	-
Transmission Charge (Rs./kWh) from STOA Consumers	0.27	-
Approved energy sales for the Discoms (previous year i.e. in the FY 2018-19) as per HERC order dated 15 th Nov 2018	--	36549.09
Transmission Tariff for Short Term Open Access customers based on approved energy sales for the Discoms (previous year i.e. in the FY 2018-19) (Rs / kWh) (Rounded off)	---	0.37

3) Grounds for seeking review

The present review is preferred on the following grounds which are taken without prejudice to each other.

- 3.1 It is respectfully submitted that, while passing the impugned order, the Commission determined STOA charges without adhering to the determination procedure prescribed under the MYT Regulations. It is pertinent to mention that the Commission, by placing reliance on an order dated 31.03.2016 in case no. HERC/Pro-31 of 2015, determined STOA Charges for the FY 2017-2018 based on the energy drawl/energy wheeled by the petitioner instead of energy sales by distribution licensee. Therefore, failure to adhere to the said procedure is an error apparent on the face of the record, which deserves to be rectified by the by redetermining STOA charges for the FY2019-2020 based on energy sales by distribution licensee. The same principle is upheld by the Hon'ble Tribunal in case titled Tamil Nadu Electricity Board Vs. Tamil Nadu Electricity Regulatory Commission numbered appeal no. 51 of 2008 decided on 02.04.2009. For ease of reference findings of the Hon'ble Tribunal is reproduced below:

"11) In our opinion, the failure to adhere to the procedure for passing a tariff order is an error apparent and can be set aside in review. Secondly, as mentioned above, sufficient opportunity to represent its case was not given to the appellant. This has resulted in failure of justice to the extent the principal order dated 20th March, '06 has ignored all revenue implications for the appellant. The impugned order can therefore, be said to be suffering from apparent error. In any case, this lapse can be covered by a third ground for review namely 'any other sufficient reason'. In the case of Board of Control for Cricket in India And Another Vs. Netaji Cricket Club and Others in case No. (2005) 4 SCC 741, the Supreme Court, inter alia, observed the following:

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in order

47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit".

12) In this judgment, the Supreme Court also said that justice is a virtue that transcends all barriers and rules or procedures or technicalities of law cannot stand in the way of administration of justice. The Supreme Court observed if the court finds that an error pointed out was such that an earlier judgment would not have been passed but for erroneous assumptions and that its perpetration would result in miscarriage of justice, it can be rectified by the court under its power of review."

- 3.2 The Commission is an independent statutory body having full power to frame its own regulations specifying terms and conditions for determination of tariff. However, once such regulations are notified, the Hon'ble Commission shall necessarily determine tariff in accordance with its own regulations. The same principle is upheld by the Hon'ble Tribunal in case titled Haryana Vidyut Prasaran Nigam Limited Vs. Haryana Electricity Regulatory Commission numbered appeal no. 102 of 2011 decided on 18.04.2012. For ease of reference, finding of APTEL is reproduced below:

"46. In this Case the Commission's decision to allow RoE @ 10% lacks transparency. In case the Commission had decided to allow RoE at less/higher rate than 14%, it should have declared beforehand and sought comments on the same. In this case the Commission's decision to allow ROE @ 10% is contrary to the Regulations, and we must direct the Commission to allow Return on Equity @ 14% in accordance with Tariff regulations 2008. Once the Regulations have been framed the Commission has to act in accordance therewith.

However, it is submitted that, while passing the impugned order, the Commission determined STOA charges based on the energy drawl by the transmission licensee, which is contrary to the methodology provided in the MYT Regulations. Therefore, the same amount to an error which is apparent on the face of record, which deserves to be rectified by the Commission by redetermining STOA charges for the FY2019-2020 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee.

- 3.3 It has been submitted that the Commission is bound by its own regulation and ought to have followed methodology for determination of STOA Charges as prescribed in the MYT Regulation. However, while passing the impugned order, the Commission failed to appreciate the said principle. Therefore, the same amounts to an error which is apparent on the face of record, which deserves to be rectified by the Commission by redetermining STOA charges for the FY2019-2020 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee. It is pertinent to mention that the said principle is upheld by the Hon'ble Supreme Court of India in the constitutional bench decision of PTC India Limited Vs. Central Electricity Regulatory Commission (2010)4 SCC 603 has held that the State Electricity Regulatory Commission is bound by the statutory regulations. For ease of reference the relevant finding of the Supreme Court of India is reproduced below:

"54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in

discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation. conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178.”

- 3.4 It has been submitted that the impugned order was passed by the Commission by placing reliance on the methodology adopted in order dated 31.03.2016 in case no. HERC/PRO -31 of 2015, which has been set aside by the Hon'ble Tribunal vide order dated 28.08.2019. Pursuant thereto and in order to rectify the error highlighted by the Hon'ble Tribunal, the Commission vide consequential order dated 22.10.2019 and corrigendum dated 20.11.2019 modified order dated 31.03.2016 by redetermining STOA Charges for FY 2016-2017 in consonance with MYT Regulations i.e. based on energy sales by distribution licensee. Therefore, passing of the said consequential orders and occurrence of subsequent events post passing of the impugned order,

as stated above, is a substantial ground for seeking review and modification of the impugned order. This principle has been upheld by the Hon'ble Supreme Court of India in case titled Board of Control for Cricket, India and Ors. Vs. Netaji Cricket Club and Ors. (2005) 4SCC741. For ease of reference, the relevant finding of the Supreme Court of India is reproduced below:

"93. It is also not correct to contend that the court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event. In a case of this nature when the court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned senior counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on 29th September, 2004, the subsequent event may be taken into consideration by the court for the purpose of rectifying its own mistake."

It is submitted that the Commission may be pleased to review and modify the impugned order in light of the consequential orders, which were passed in order to rectify the error as highlighted by the Hon'ble Tribunal in its order dated 28.08.2019.

4) Submission on Condonation of Delay

It has been submitted that there is a delay of 295 days in filing the present petition and the said delay is neither intentional nor deliberate. The submissions on delay are taken without prejudice to each other and are as under:

- (I) That at the time of passing of the impugned order, the issue of determination of STOA (whether to be determined based on the energy drawl/energy wheeled by the petitioner or based on energy sales by distribution licensee) was pending adjudication before the Hon'ble Tribunal, wherein order dated 31.06.2016 was challenged. The petitioner, based on the legal advice, thought it appropriate to wait for the outcome of the appeal and therefore at that time review of the impugned order was not sought in relation to STOA charges, thought the review petition was filed regarding other issues. Further, the petitioner was of the firm belief that, once the Hon'ble Tribunal would resolve the controversy qua determination of STOA Charges in favour of the petitioner, the Commission would be passing consequential order thereby modifying order dated 31.06.2016 and subsequently, the petitioner would seek review of the impugned order and accordingly the consequential order would be made applicable to the impugned order.
- (II) That on 28.08.2019, the Hon'ble Tribunal passed order in the Appeal. Consequently, in compliance of the direction issued by the Hon'ble Tribunal, the Commission passed the consequential orders dated 22.10.2019 and 20.11.2019 (which were received by the petitioner on 31.10.2019 and 03.12.2019, respectively) thereby modifying order dated 31.06.2016.
- (III) On receipt of the consequential orders, the impact of same were analysed by the concerned departments and necessary approvals were sought to file the present petition. Pursuant thereto, the petitioner commenced the process of collating necessary data for the FY 2019-2020 for the purpose of preparing the present petition and coordinated with the concerned officials. While the petitioner was engaged in the said process, there was an outbreak of COVID-19 and consequently, lockdown was declared by the Government and the said process was significantly impacted. After the necessary data was collated, the issue was discussed with the petitioner's advocate. Thereafter, pursuant to discussions between the petitioner and its advocate, the draft of review petition was prepared. Thereafter, the draft

of the review to be filed before the Commission was finalised and approved by the petitioner and filed before the Commission.

- (IV) It is respectfully submitted that the petitioner was pursuing the above stated course of action with a bona fide belief and therefore the Commission may be pleased to condone the delay of 295 days in filing the present petition for the reason stated herein. The similar view has been upheld by the Hon'ble Tribunal in case titled Damodar Valley Corporation Vs. West Bengal Electricity Regulatory Commission numbered *IA No. 1553 of 2018 in DFR No. 3178 of 2018* decided on 31.01.2019, wherein the delay of 1143 days was condoned. For ease of reference the relevant findings of the APTEL are reproduced below:

"On perusal of the first affidavit and the additional affidavit filed in support of condonation of delay application, it indicates that there was no intentional withholding of any facts by the Appellant. On the other hand, pendency of the Review Petition for the last three years is not denied. The reason for the delay in filing the present appeal is explained by the Appellant stating that they were pursuing the review petition with all endeavour and were hoping an early disposal of the said petition. They further believed that in Review Petition they would get the controversy resolved. Therefore, till the Review Petition came to be rejected, there was no occasion for the Appellant to think, analyse the situation and file the appeal. Merely because the other set of parties have filed appeals challenging the order dated 25.05.2015, it does not mean that all other parties to the same proceedings need to file appeal. It depends on the advice (legal) they receive and probably they believed that Review Petition would be the proper solution instead of appeal, in that view of the matter, we are of the opinion that the Appellant has placed sufficient material and the explanation as to why the delay of 1143 days is caused. We accept the said explanation and condone the delay of 1143 days in filing the appeal.

- (V) It is respectfully submitted that the Commission may be pleased to condone the delay, as the petitioner has a good case and the same is *inter alia* covered by the order dated 28.08.2019 passed by APTEL and consequential orders 22.10.2019 and 20.11.2019 passed by the Commission.
- 5) In view of the aforesaid, it is submitted that the Commission may be pleased to allow this petition as prayed. In addition, it is respectfully submitted that this is an appropriate case, wherein the Commission may be pleased to exercise its inherent power by allowing the present petition in the interest of justice.
- 6) That no appeal has been preferred against the order under review. Further, the petitioner undertakes to duly inform the Commission, in case it approaches the appellate forum for requisite direction during the pendency of this petition.
- 7) Prayer in view of the aforesaid, it is most respectfully prayed that the Hon'ble Commission may:
- (A) Review, reconsider, modify and/or clarify the orders dated 07.03.2019 in case no. HERC/PRO-60 of 2018, in terms of the submissions made above;
 - (B) Condone the delay in filing the present petition in terms of the submissions made above;
 - (C) Pass any such other order/s and/or direction/s, which the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

Proceedings of the Case

6. The case was initially heard on 10.11.2020.
7. In the Interim order dated 11.11.2020, Commission sought petitioner's response on four specific issues (listed below), within one month from the date of order:
- i. How HPPC will recover the enhanced amount, if allowed, from short-term Open Access Consumers.
 - ii. What would be the monetary impact overall and on each short-term Open Access Consumer, who may be different in different years

- iii. How many consumers shall be affected in case the relief sought is granted.
 - iv. What was the amount actually collected from different short-term Open Access Consumers subsequent to the corrigendum dated 20.11.2019 issued by the Commission?
8. In compliance of the queries as the aforementioned Interim order, Haryana Vidyut Prasaran Nigam Limited filed its reply on an affidavit vide Memo no Ch-36/STU/OA-777 dated 06.01.2021 as under:

i. That the affidavit has been filed in compliance of the order dated 11.11.2020 passed by this Hon'ble Commission in the captioned matters which are pending adjudication before the Commission.

ii. That the response to the above queries is as under:

Response to query No. (i)

It has been submitted that as the short-terms open access consumers are embedded consumers of the Discoms (DHVBN and UHBVN), HVPNL provides requisite data i.e. quantum of energy purchased by STOA consumers. Based on that data, component of STOA Charges are incorporated in the monthly bills of the respective embedded consumers by Discoms and accordingly the payment is made by the embedded consumers. Thereafter, once the present petitions are allowed, the said procedure will be followed.

Response to query No. (ii) and (iii)

It has been submitted that the cumulative monetary impact on short-terms open access consumers, along with the number of consumers, for the respective years is tabulated below:

Sr No.	Description	FY 2017-18	FY 2018-19	FY 2019-20
1	No. of Consumers to be affected if relief is granted	268	64	129
2	Total Energy Purchased by all the above consumers through open access (in MWh)	1000532.28	580340.14	1502989.475
3	Relief Proposed in the petition (Rs/ MWh)	110	140	100
4	Financial Impact (Rs. in crores)	11.006	8.125	15.030

Further, to demonstrate consumer-wise impact an excel sheet has been attached to the affidavit.

Response to query No. (iv)

It is submitted that, pursuant to the order dated 20.11.2019 passed by the Commission for the FY 2016-17, HVPNL collated the requisite data and thereafter vide communication dated 21.01.2020 shared the same with DHVBN and UHBVN for their necessary action. Now, pursuant to order dated 11.11.2020 passed by the Commission in the captioned matters, HVPNL requested DHVBN and UHBVN to provide response to query no. iv.

Response to HVPNL's said communication is awaited. A copy of letters dated 21.01.2020 and 24.11.2020 and 01.12.2020 are attached to the affidavit.

9. After the hearing on 09.03.2021, vide Interim order dated 09.03.2021, the Commission observed that reply to "Query no 4: What was the amount actually collected from different short-term Open Access Consumers subsequent to the corrigendum dated 20.11.2019 issued by the Commission" as per Commission's order dated 11.11.2020, has not been filed by the petitioner (HVPNL). And the Ld. Counsel, appearing for the petitioner replied that certain information regarding embedded Open Access Consumer is still awaited from the Discoms. He sought a months' time to file the requisite information.

Commission's Analysis & order

10. The case was heard on 11.08.2021, as scheduled, through virtual court, in view of the pandemic.
11. At the onset, the Commission has considered the prayer of the petitioner for condonation of delay in filing the present review petitions i.e. RA-9, RA-10 and RA-11. Considering the detailed grounds for seeking condonation in all the three review petitions under consideration, already reproduced earlier in the present order, the Commission condones the delay.
12. The Commission observes that the very basis of determining STOA was the methodology adopted by the Commission in its order dated 31.03.2016 in case no. HERC/PRO – 31 of 2015. The said order, on an appeal preferred by the petitioner under section 111 of the Electricity Act, 2003 in the Hon'ble Appellate Tribunal for Electricity, was set aside by the Hon'ble APTEL vide judgement dated 28.08.2019. Hence, the very premise of determining STOA on the basis of energy drawn through the transmission system instead of energy sales by the Discoms, was set aside. Further, against the ibid order of the Hon'ble APTEL, as informed by the petitioner, no appeal has either been preferred by any party in the Hon'ble Supreme Court under section 125 or a review petition u/s 120 (2) (C) of the Electricity Act, 2003 within the period prescribed for the purpose. Hence, the said judgement dated 28.08.2019 passed by the Hon'ble APTEL has reached a finality.
13. The operational part of the order Supra is as follows:

"8.3) It is relevant to note from the findings of the State Commission that it has acknowledged the shift in methodology for computation of STOA charges for the year 2016-17 and has supported the same with rationale. It is, however, noticed that the reasoning given by the State Commission goes contrary to the provisions of the MYT Regulations regarding computation of STOA charges. In the host of judgments of the Hon'ble Supreme Court as well as this Tribunal, it has been categorically held that when a Regulation is made under section 178, then in that event, framing of terms and conditions for determination of tariff has to be in consonance with the Regulations. In other words, when Regulations have been framed by the Commission for tariff determination, the tariff would have to be determined strictly in accordance with the Regulations and not de hors the same. It is evident from the impugned order that the State Commission has determined the STOA charges for FY 2016-17 in contravention of its own MYT Regulations.

8.4) In view of these facts, we are of the opinion that the State Commission ought to have determined the STOA charges for the year in question as per its MYT Regulations and not otherwise."

“The impugned order dated 08.11.2016 passed by the Haryana Electricity Regulatory Commission in Review Petition, being case no. HERC/RA-2 of 2016 as merged in the order dated 31.03.2016 in case no. HERC/PRO -31 of 2015, is hereby set aside to the extent challenged in the appeal by the Appellant.

The matter stands remitted back to the State Commission with a direction to re-determine the STOA charges in accordance with law within a period of three months from the date of this judgment and order.

In line with the aforesaid judgement, the Commission, vide order dated 22.10.2019 and corrigendum dated 20.11.2019, redetermined the STOA Charges for the short-term open access based on energy sales of the Discoms, in conformity with MYT Regulations, and accordingly order dated 31.03.2016 in case no. HERC/PRO -31 of 2015 was modified.

14. Having modified the methodology for estimating the short-term open access charges in view of the remand order of the Hon’ble APTEL, the Commission has proceeded to examine the present review petitions seeking similar relief for the FY 2017-18, FY 2018-19 and FY 2019-20.
15. The petitioner, in the review petitions under consideration, has argued that while the appeal was pending adjudication in the Hon’ble APTEL, the petitioner filed its ARR petitions for the FY 2017-18, 2018-19 and FY 2019-20. The STOA Charges were proposed by the petitioner, based on the energy sales by distribution licensees. However, the Commission disallowed the petitioner’s claim relating to STOA Charges by placing reliance on its order dated 31.03.2016 in case no. HERC/Pro-31 of 2015.
16. The petitioner, by citing various case laws, has argued that the Commission, by not following its own Regulations, has committed an error that is apparent on the face of record. Hence, the same calls for exercising of review jurisdiction. The grounds for seeking review in all the three review petitions are similar and dealt with as under:

As per the 2nd proviso to Regulation 50 (b) of the HERC MYT Regulations in vogue during the financial year(s) for which review has been sought, the dispensation for calculating Short Term Open Access Charge (STOAC) is reproduced below:

“Provided also that the transmission charges shall be payable by the short-term open access consumers for the scheduled energy drawl at per kWh rate as worked out by dividing the annual transmission charges by the total volume of energy sales by the distribution licensee(s) during the previous year”.

Admittedly, the ibid proviso provides for ‘energy sales volume’ of the Discoms to be used as the denominator for dividing the numerator i.e. annual transmission charges determined by the Commission for the relevant year for arriving at STOAC.

- i) The Commission, in the impugned order relied on its dispensation in the order dated 31.03.2016 in case no. HERC/PRO-31 of 2015 wherein energy handled by the petitioner (transmission system), after accounting for the Intra-State transmission losses, was considered for working out STOAC. The same methodology was continued while determining STOAC in the FY 2017-18, FY 2018-19 and the FY 2019-20 based on the precedence and nothing to the contrary was placed on record by the

petitioner. Hon'ble APTEL's order, which is being relied upon for seeking review, was a subsequent development.

ii) The APTEL's order was passed in reference to the Commission order determining STOAC for the FY 2016-17. In compliance with the same, the Commission had modified its order for that particular year i.e. calculation of STOAC was changed to 'energy sales of the Discoms'. Based on the same premises the petitioner herein has sought review of the subsequent orders of the Commission i.e. from FY 2018, FY19 and FY20. The Commission, in the following paragraphs, has examined the relief sought by the petitioner.

17. In order to examine the scope of review jurisdiction, the Commission has perused the provision of Regulation 57 & 58 of the HERC (Conduct of Business) Regulations, 2019, which empowers the Commission to exercise review jurisdiction. The relevant regulation is reproduced below: -

"REVIEW OF THE DECISIONS, DIRECTIONS, AND ORDERS:

57 (1) All relevant provisions relating to review of the decisions, directions and orders as provided in the Code of Civil Procedure 1908, as amended from time to time, shall apply mutatis mutandi for review of the decisions, directions and order of the Commission.

Provided that the Commission may on the application of any party or person concerned, filed within a period of 45 days of the receipt of such decision, directions or order, review such decision, directions or orders and pass such appropriate orders as the Commission may deem fit

(2) No application for review shall be considered unless an undertaking has been given by the applicant that he has not preferred appeal against the decision, direction, or order, sought to be reviewed, in any Court of Law.

(3) No application for review shall be admitted/ considered unless an undertaking has been given by the applicant that in case he files an appeal of the decision, direction or order of which review is pending adjudication, he shall immediately inform the Commission regarding the fact of filing the appeal.

58 The Commission may on its own motion or on the application of any party correct any clerical or arithmetical errors in any order passed by the Commission."

Further, the Commission has perused the case laws cited by the petitioner in support of the relief sought in the light of Hon'ble APTEL's judgement for the FY 2016-17. The crux of the citations is as under:

- Tamil Nadu Electricity Board Vs. Tamil Nadu Electricity Regulatory Commission, appeal no. 51 of 2008 decided on 02.04.2009, wherein it has been held that the failure to adhere to the procedure for passing a tariff order is an error apparent and can be set aside in review.
- *Board of Control for Cricket in India And Another Vs. Netaji Cricket Club and Others in case No. (2005) 4 SCC 741, the Supreme Court.*

An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words “sufficient reason” in order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine “actus curiae neminem gravabit”.

The Commission observes that review jurisdiction can be exercised if there exist sufficient reasons. However, the well-known maxim of “actus curiae neminem gravabit”, referred to in the *ibid* judgement, can be exercised only when the Court is legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise i.e. to say that while passing the decree the court must have in its mind that the order or the decree should be passed on a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. In the present case the Commission was aware of the regulations as well as its own order dated 31.03.2016 (case no. HERC / PRO – 31 of 2015). Hence, the maxim *supra* is not squarely applicable in the present matter.

- Supreme Court of India (constitutional bench) PTC India Limited Vs. Central Electricity Regulatory Commission (2010)4 SCC 603

The measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

- Supreme Court of India - Board of Control for Cricket, India and Ors. Vs. Netaji Cricket Club and Ors. (2005) 4SCC741.

The court while exercising its review jurisdiction in any situation whatsoever can take into consideration a subsequent event

A perusal of the aforesaid case laws makes it clear that sufficient grounds exist for the Commission to exercise review jurisdiction. Moreover, the basic premise of the present review petition is the order dated 28.08.2019 passed by the Hon’ble APTEL setting aside the Commission’s order dated 31.03.2016 which was the basis of subsequent orders, now under review. Consequently, the Commission, in line with the HERC Regulations, 2012, occupying the field, orders that the methodology of calculating STOAC, in the present case, shall be reckoned with as per the judgement of the Hon’ble APTEL based on which the present review petitions have been preferred.

In order to avoid any doubts, it is made clear that going forward the STOC calculations shall be governed by the MYT Regulations in vogue including its subsequent amendments and / or re-enactments.

From the petitioner's response to the queries (reproduced earlier in the order) raised, the Commission is satisfied that the consumers who had availed Short Term Open Access during the period from the FY 2018 to FY 20 are identifiable and the quantum of power drawn by them individually is known. The petitioner has also quantified the year wise financial impact amounting to INR 33.16 Crore. Hence, the petitioner herein shall collect the differential amount from the short-term open access consumers so identified.

18. In view of the above discussions, the Commission allows the petition filed by HVPNL in case no RA 9 of 2020, RA 10 of 2020 and RA 11 of 2020. The petitioner shall recover the differential amount from the short-term open access consumers who had availed short – term open access during the FY 2017-18 to the FY 2019-20 worked out on the basis of their energy draws under Short Term Open Access mechanism i.e. for which they have already paid STOAC as per the impugned order(s). The petitioner shall treat the additional revenue so generated as per the relevant regulations.

In terms of the above findings, the review petitions preferred by the petitioners against the Commission's order dated 30.05.2017, 31.10.2018 and 07.03.2019 (case no. HERC/ RA 9 of 2020, case no. HERC/ RA 10 of 2020 and case no. HERC/ RA 11 of 2020) are allowed.

The bunch of review petitions are accordingly disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 13th September, 2021.

Date: 13.09.2021

Place: Panchkula

(Naresh Sardana)

Member

(Pravindra Singh Chauhan)

Member

(R.K Pachnanda)

Chairman