TELANGANA STATE ELECTRICITY REGULATORY COMMISSION

5th Floor, Singareni Bhavan, Red hills, Lakdi-ka-pul, Hyderabad 500 004

R. P. No. 2 of 2022
and
I. A. Nos. 38 and 39 of 2022
in
O. P. No. 14 of 2020

Dated 28.06.2023

Present
Sri. T.Sriranga Rao, Chairman
Sri. M.D.Manohar Raju, Member (Technical)
Sri. Bandaru Krishnaiah, Member (Finance)

Between:

M/s Ramky Enviro Engineers Limited,
13th Floor, Ramky Grandlose, Anijah Nagar,
Gachibowli, Hyderabad 500 032. ... Review Petitioner

AND

Southern Power Distribution Company of Telangana Limited,
Corporate Office, H.No.6-1-50, 5th Floor, Mint Compound,
Hyderabad 500 063. ... Respondent

The petition came up for hearing on 31.01.2022, 11.04.2022, 02.05.2022, 22.08.2022 and 12.09.2022. Sri Avinash Desai, Advocate for the review petitioner appeared on 31.01.2022, Sri. Matrugupta Mishra, Advocate for the petitioner appeared on 02.02.2022, Sri. Avinash Desai, Advocate along with Sri. Matrugupta Mishra, Advocate for the review petitioner appeared on11.04.2022, Sri. Avinash Desai, Advocate and Sri Matrugupta Mishra, Advocate as well as Ms. Ishita Thakur, Advocate appeared on 02.05.2022, 22.08.2022 and 12.09.2022. Sri. Mohammad Bande Ali, Law Attaché for respondent appeared on 31.01.2022, 02.02.2022, 11.04.2022, 02.05.2022, 22.08.2022 and 12.09.2022 [till 02.05.2022 the matter has been in SR stage R.P.(SR) No.93 of 2021 in O.P.No.14 of 2020 & I.A.(SR) No.94 of 2021 & I.A.(SR) No.95 of 2021 which is for expeditious hearing is allowed on 31.01.2022 and hence closed at SR stage and later petitions were numbered as R.P.No.2 of 2022 and

I.A.No.38 of 2022 in O.P.No.14 of 2020]. The matter having been heard through video conference on 31.01.2022, 02.02.2022 and physically on 11.04.2022, 02.05.2022, 22.08.2022 and 12.09.2022 and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s. Ramky Enviro Engineers Limited (review petitioner) has filed a petition under Section 94(1)(f) of the Electricity Act, 2003 (Act, 2003) seeking review of the order dated 18.04.2020 in O.P.No.14 of 2020 (*Suo Moto*) in respect of determination of generic tariff for refuse derived fuel (RDF) projects.

a. It is stated that vide the order under review, the Commission in exercise of its powers vested in it under Sections 62(1) read with 86(1)(a), (b), (c) and (e) of the Act, 2003 determined the generic tariff for purchase of power, by the distribution licensees, from RDF based waste to energy (WTE) power generation plants whose Commercial Operation Date (COD) was achieved during the period of FY 2020-21 to FY 2023-24.

b. It is stated that vide the directions issued qua tipping fee in the order under review, the Commission has not considered and weighed the vital principles that build the very foundation of payment of tipping fee to the operator of facilities processing Municipal Solid Waste (MSW). To the detriment of the operators of MSW processing facility, the Commission has directed the reimbursement of tipping fee, which is a consideration for the performance of services under the Concession Agreement (CA) to the distribution licensees. Such reimbursement will render the project facility processing MSW financially unviable while also discouraging investment in the sector. It is stated that it appears as if the Commission has overlooked its own jurisdiction, by directing reimbursement of an amount, which is a consideration under an independent transaction and beyond its jurisdiction and applicability of the Act, 2003. Further, such a precedent has been set by the Commission for a sector like waste to energy which is a public social utility contributing to public health and hygiene by scientific disposal of waste and consequent generation of electricity.

c. It is stated that legitimate submissions in this regard were also made by the review petitioner that despite having been recorded in the order under review,

have been rejected without offering any substantial reasoning for such rejection. The order under review is thereby characterized with a lack of transparency, whereas the existence of such transparency is a crucial characteristic to such a tariff order.

d. It is stated that the review petitioner, a company incorporated under the Companies Act, 1956 (Act, 1956), is a pioneer in the field of environmental engineering activities including but not limited to the MSW management. It is operating and managing the Integrated Municipal Solid Waste Management project (IMSWM project) at Hyderabad, vide its subsidiary namely, M/s Hyderabad Integrated MSW Limited (HIMSW) for operation of the MSW processing and disposal facility.

e. It is stated that Southern Power Distribution Company of Telangana Limited (TSSPDCL) (respondent) is a distribution licensee operating in the state of Telangana that has been granted license by the Commission for carrying on the business of distribution and retail supply of electrical energy within its area. It is a distribution licensee within the meaning of Section 2(17) of the Act, 2003.

f. It is stated that the review petitioner succeeded as the selected bidder in the Request for Proposal (RfP) floated by Greater Hyderabad Municipal Corporation (GHMC) in October, 2008, for the purpose of setting up of the aforementioned IMSWM project and was thereby the concessionaire in the CA executed on 21.02.2009, between the review petitioner and GHMC.

g. It is stated that it is important to note that as per the Article 1.2.7 of the RfP, the amount of tipping fee constituted the sole criteria for evaluation of bids. The Article has been extracted herein below:

> *"1.2.7 Bids are invited for the Project on the basis of the Tipping fee payment for the Project by the Authority. The Concession Period is pre-determined, as indicated in the Concession Agreement. The Tipping fee amount shall constitute the sole criteria for evaluation of Bids. Subject to Clause 2.16, the Project will be awarded to the Bidder quoting the lowest Tipping fee."*

h. It is stated that further, certain articles of the CA are significant to understanding the factual background herein. The scope of work to be performed by the concessionaire is stipulated in Article No.2 of the CA. Article No.2.1 (a) defining primary and secondary collection has been extracted herein below:

"a. ***Primary & Secondary Collection****: To ensure waste collection from Waste Generators within GHMC Area, including primary and secondary collection, and transportation of waste upto transfer stations. Initially, the two zones for which the Concessionaire, shall be vested with this right and responsibility shall be the East Zone and West Zone of GHMC. The Concessionaire shall submit project implementation plan and the timelines for the remaining zones. The Independent Engineer shall assess the implementation in East and West zones to ascertain adherence to the performance standards as set out in Schedule 4. GHMC shall assess and review the same and subject to satisfactory performance by the Concessionaire, permit the Concessionaire to continue the services in East and West zones and extend the services to other zones in a phased manner, on the same terms and conditions as contained in this tender."*

i. It is stated that under Article No.2.3, certain rights associated with the concession are guaranteed. The concessionaire has a right to design, engineer, finance, procure, construct, install, commission, operate and maintain each of the project facilities either itself or through such person as may be selected by it. Though, the ultimate responsibility/obligation to fulfil the covenants under the CA vested in the concessionaire.

j. It is stated that Article No.2.6 of the CA deals with sale and marketing of products from processing MSW and grants the concessionaire full liberty to sell or otherwise dispose of any components of MSW and products derived or produced from the plant as a consequence of undertaking the processing of the MSW including but not limited to compost or electricity or RDF. The article is extracted herein below:

"2.6 ***Sale and Marketing of Products from Processing MSW***
GHMC hereby confirms that Concessionaire shall be free to sell or otherwise dispose of any components of MSW and products derived or produced from the Plant as a consequence of undertaking the processing of the MSW including compost or electricity or RDF or fluff or gas or sludge or residual treated water or any other products or by-products, other material recovered or produced from MSW, without any interference or requirement of any additional reporting, clearance or approval in this regard from GHMC. Concessionaire shall have the right to sell or otherwise dispose such products, at such price and to such persons and using such marketing and selling arrangements as it may deem appropriate."

k. It is stated that therefore the scheme of the CA, at one end lays down the scope of work which is obligatory and mandatory on the part of the concessionaire to perform against which the tipping fee is made payable as a consideration. On

the other hand, the byproducts or the components or the products derived from the process, the concessionaire is free to sell or put to process, at its own discretion in the open market by adopting such method or technology which is suitable to it. Thereby making the consideration flowing from the mandatory obligation of performing the scope of work under the CA, entirely independent and distinct from the revenue generation out of the components and other ancillary products.

l. It is stated that Article No.5.21 of the CA vests the right of revenue to the concessionaire realized by way of selling the products out of processing. The relevant portions of the article have been extracted herein below:

"5.21 ***Sale/Distribution of Compost/Manure/Energy and other recyclables***

a. The concessionaire may adopt such processes and methods as it considers necessary or expedient for processing of MSW at all processing facilities subject to meet in the construction and O&M requirements

b. The concessionaire shall be free to sell or otherwise dispose of the recyclables, compost/organic manure, energy (power) and other material recovered prior to or after processing the MSW at such price and to such persons and using such marketing and selling arrangements and strategies as it may deem appropriate

c. The concessionaire is free to choose processing technologies options in line with MSW rules 2000 and is entitled to receive the revenues so generated through the products produced out of such processing such as compost, recyclables, energy/power, RDF, biogas, carbon credits, metals etc and is entitled to have its own marketing set up for the same."

m. It is stated that Article No.5.26 of the CA empowers the concessionaire to incorporate a special purpose company (SPC) as a limited liability company under the Act, 1956. Such company shall undertake and perform the obligations and exercise the rights of the concessionaire under the CA, upon receipt of permission from GHMC. The concessionaire shall hold at least 51% of the paid-up capital of the SPC. The SPC so created, shall be treated as a permitted assignee of the concessionaire and shall be bound to adhere to all the terms and conditions of the CA. Article No.5.26 is extracted herein below:

"**5.26* ***Assignment of Concession to Special Purpose Company (SPC)

In the event of Ramky Enviro Engineers Limited promoting and incorporating a SPC as a limited liability company under the Companies Act, 1956 within 6 (six) months of the Effective Date, Ramky Enviro Engineers Limited shall request GHMC to accept the SPC as the entity which shall undertake and perform the obligations and exercise the rights of the Concessionaire under the Agreement. Ramky Enviro

Engineers Limited shall hold atleast 51% (fifty one percent) of the paid-up capital of the SPC throughout the Concession Period. GHMC agrees that upon incorporation of the SPC, the SPC shall be treated as a permitted assign of Ramky Enviro Engineers Limited and shall, within 15 days, enter into a novation agreement with the SPC. The SPC shall be bound to adhere to all the terms and conditions of the Agreement."

n. It is stated that the provision of the CA addressing the subject of tipping fee is Article No.7.1, which dictates that it is the only fee/consideration payable by GHMC to the concessionaire for rendering services under the CA. The relevant part of Article No.7 reads as under:

"7.1 ***Tipping fee***

Subject to the provisions of this Agreement and bid documents, and in consideration of Concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, GHMC agrees and undertakes to pay to Concessionaire, the Tipping fee, which shall be the only fee paid by GHMC to the Concessionaire for performing the services under this Agreement. The quoted Tipping fee is Rs.1431 per ton of MSW (also called as the base Tipping fee) received and weighed at the gate of disposal facility. The total payment would be a product of number of tons of MSW received at the gate of the disposal facility and the Tipping fee. …

b. As the Tipping fee covers three main components of work, break up of Tipping fee for each of the component is given below:

i. Primary and secondary collection & transportation of waste up to transfer station: 40% of Tipping fee.

ii. Transfer station management and transportation of waste from transfer station to the processing facilities: 20% of the Tipping fee.

iii. Treatment & disposal: 40% of the Tipping fee"

o. It is stated that though the component of Collection & Transportation (C&T) was also part of the scope of concessionaire under the CA, the handing over of the C&T was not accomplished by GHMC for various reasons, not attributable to the concessionaire. Thus, the concessionaire was only paid 40% of the tipping fee since 2012 as it performed treatment and disposal of waste at the processing facility. The Government of Telangana (GoTS) has issued a G.O.Rt.No.583 dated 24.07.2018 deciding to hand over the C&T component also in a phased manner.

p. It is stated that in exercise of power under Article No.5.26 of the CA, the review petitioner incorporated HIMSW as a permitted assignee under the CA and it has been carrying out the scope of work as per the CA, since 2012. A novation

agreement was executed on 01.02.2012 in tripartite mode between HIMSW, the review petitioner and GHMC. Thus, HIMSW has been the operator of the MSW facility since 2012 till date and receiving the tipping fee from GHMC as per Article No.7 of the CA.

q. It is stated that in furtherance to the performance of the services under the CA, HIMSW is entitled to receive base tipping fee of Rs.1431 per MT (as per 2009-10 rates) as received and weighed at the gate of the disposal facility, towards collection, transportation, treatment and disposal of MSW as per the predefined break up. The above tipping fee is subjected to enhancement every year as per the escalation clause of the CA. However, at present HIMSW is receiving a tipping fee of Rs.818.30 per MT towards treatment and disposal facility (40% towards treatment and disposal) in the current year 2021-22.

r. It is stated that HIMSW has been discharging its obligations under the CA, as per the scope of work indicated above, since 2012. It has established and incurred capital expenditure in setting up of the IMSWM project in lieu of tipping fee as the sole consideration. The RDF produced by HIMSW used to be sold to cement manufacturers in the neighboring states. However, the market for RDF started dwindling down into a complete no taker for RDF. Reference may be made to the table below wherein the quantum of disposal of compost and RDF in the open market since 2012-13 viz., since inception and commissioning of treatment and disposal facility has been demonstrated to substantiate the above premise that there is no market for sale of RDF.

RDF	
Year	**Qty (MT)**
2012-13	29
2013-14	157
2014-15	6,754
2015-16	21,260
2016-17	12,254
2017-18	4,902
2018-19	5,793
2019-20	46
2020-21	-
TOTAL	**51,195**

s. It is stated that HIMSW has set up the treatment and disposal facility by availing a loan from M/s Axis Bank Limited (bank) and a substitution agreement was

also executed on 24.09.2012 between bank, HIMSW and GHMC as per the provisions and format of the CA. It becomes apparent that HIMSW has invested its equity as well as through a corporate loan for an amount of Rs.225 crore towards setting up of the processing facility to treat/process the waste and dispose in compliance with requirements and statute. On 28.04.2021, State Bank of India (SBI) replaced the bank and such replacement is under progress in same tripartite mode. The loan agreement with bank and now SBI, has created certain third-party rights that includes a right on the revenues of HIMSW by bank(s) towards securing their loan amount.

t. It is stated that due to the nascent nature of the WTE industry in India and expensive capital cost ranging from Rs.18 crore/MW to Rs.24 crore/MW, it was the review petitioner's corporate strategy to develop the WTE facilities by an independent SPC, being M/s Hyderabad MSW Energy Solutions Private Limited (HMESPL), under the IMSWM project at Jawaharnagar. HMESPL is a generator within the meaning of Section 2(28) of the Act, 2003.

u. It is stated that accordingly, a letter of authentication was issued by GHMC in favor of HMESPL on 29.01.2019, whereby an authentication was granted to HMESPL as a SPC to set up, operate and maintain the WTE facility under the IMSWM project of GHMC with a condition that such facility shall be handed over to GHMC under the same terms and condition of the CA. HMESPL shall be treated as a permitted assignee of the review petitioner, which validity shall cease on expiry of the concession period of the IMSWM project under the CA. The relevant extract of the aforementioned letter is as under:

> *"… … Accordingly, GHMC hereby issues its authentication to Hyderabad MSW Energy Solutions Pvt Ltd as Special Purpose Company (SPC) as incorporated Ramky Enviro Engineers Ltd for setting up and operation & maintenance of Waste to energy facility under the IMSWM project of GHMC with a condition that all such facilities so set up/going to set up and maintained by the SPC shall be handed over to GHMC under the same terms and conditions of the Concession Agreement keeping them encumbrance free. There shall not be any exclusive rights to this SPC (Hyderabad MSW Energy Solutions Pvt Ltd) as the same shall be treated as permitted assign of REEL/HIMSW whose validity shall cease on expiry of the Concession period of the IMSWM project under the Concession Agreement."*

v. It is stated that HMESPL executed a power purchase agreement (PPA) on 19.02.2020 with TSSPDCL for purchase of power generated from 19.8 MW

RDF based power project located at Jawaharnagar Village, Hyderabad at the tariff, to be determined by the Commission. Clause 2.2 of the PPA dealing with the payment of tariff reads as follows:

> *"2.2 The Company shall be paid the tariff for the net energy delivered at the interconnection point for sale to DISCOM at the tariff as determined by TSERC from time to time. No tariff will be paid for the energy delivered at the interconnection point beyond contracted capacity. The orders of TSERC are enforceable in entirety and shall be considered for the purposes of computation of tariff."*

w. It is stated that HMESPL has achieved COD of its 19.8 MW RDF based WTE plant, as per the applicable law read with the terms and conditions of the PPA on 20.08.2020 and has been supplying power to TSSPDCL as per the PPA since achievement of COD.

x. It is stated that a petition, being O.P.No.8 of 2019, was filed by HMESPL under Sections 94(2), 64(6), 86(1)(a), (b) and (e) of the Act, 2003 seeking the extension of the generic tariff, determined by the Commission in its erstwhile order dated 13.06.2016, passed in O.P.No.18 of 2016, for energy generated from MSW and RDF based power projects. The tariff, determined in order dated 13.06.2016, was only applicable to the entities which had achieved COD during the control period of 13.06.2016 to 31.03.2019. Thereafter, there would be no generic tariff order applicable to WTE plants. The review petitioner in the said petition prayed for adoption of the same fixed cost and variable cost for its WTE plant set to achieve operationalization on 20.08.2020.

y. It is stated that the above petition was disposed by the Commission vide its order dated 20.03.2020 in O.P.No.8 of 2019. Through the said order, the Commission rejected HMESPL's request for extension of the generic tariff as determined by the Commission in its order dated 13.06.2016. It was observed by the Commission that the same tariff could not be accepted for plants achieving COD in subsequent years.

z. It is stated that the Commission, however, observed that it may determine the generic tariff and undertake appropriate actions in due course of time, as is required under the mandate of the Act, 2003 with respect to tariff determination, as opposed to the submission made by the DISCOM to go for a project specific tariff determination process.

aa. It is stated that thereafter, the Commission, desirous of determining the generic tariff for electricity generated from RDF based power projects in the state of Telangana, achieving COD during the period of 01.04.2020 to 31.03.2024, issued public notice dated 20.03.2020 inviting suggestions and comments from all the stakeholders and public at large.

ab. It is stated that in the public notice, the Commission mentioned the proposed financial and technical norms considered while computing the levelized tariff as Rs.7.76/kWh comprising of levelized fixed cost of Rs.3.31/kWh and levelized variable cost of Rs.4.45/kWh respectively. The Commission also proposed reimbursement of the levelized impact of tipping fee, computed as Rs.3.54/kWh, taking the benchmark of base tipping fee of Rs.1431/ton of waste by the generator to the respondent, after receipt of the same under the provisions of its concession agreement.

ac. It is stated that consequently, the review petitioner filed its submissions, vide its letter dated 15.04.2020, to the tariff proposal issued by the Commission. The review petitioner, through its letter, opposed the Commission's proposal of reimbursing tipping fee to the distribution licensee by the generating companies. The review petitioner stated that the proposal to reimburse tipping fee defeats the cause of waste management not only in the state of Telangana but also across India and urged the Commission to drop the proposition. It was also stated that WTE facilities are capital intensive and require multi-disciplinary professional skill for operations. The investment being large, the recovery of the same is accomplished through sale of recoverable like compost, RDF, biogas, electricity (power) and recyclables and a tipping fee usually determined through a transparent bidding process. The relevant extracts of the letter are as under:

> *"The Tipping fee fills the gap between the shortfall of revenue and the O&M expenses Plus the fixed costs which is determined by way of a transparent bidding process on the bonafide and legitimate presumption of the provision in the Request for Proposal itself that the revenue by way of sale of recoverables like compost, RDF, biogas, electricity (power) and recyclables accrues to the developer/generator of electricity. tipping fee is a consideration and basis for bid by the chosen developer and payable to such developer for carrying out the composite activities generally comprising of segregation, aerobic composting, anaerobic digestion, thermal processing of waste (Waste to Energy), leachate treatment and disposal, disposal of the residues into a sanitary landfill and post closure maintenance of the same."*

ad. It is stated that HMESPL, through letter dated 14.04.2020, also made submissions pursuant to the public notice issued by the Commission, stating that it does not receive any such fee from GHMC and hence the proposed norm of pass through of tipping fee should not apply to it.

ae. It is stated that after recording the stakeholders' submissions, the Commission passed the order under review on 18.04.2020. In para 91, the Commission has made the following observations:

> *"91. The Commission has gone through the stakeholders' submission regarding the tipping fee. The Commission does not subscribe to the stakeholders' submission that the tipping fee is to cover the difference between the sum of revenue from sale of all products and the O&M expenses. tipping fee means a fee or support price determined by the local authorities or any state agency authorised by the State Government to be paid to the concessionaire or operator of waste processing facility or for disposal of residual solid waste at the landfill. When the cost-plus tariff for electricity generated from waste is determined under Section 62 of the Electricity Act, 2003 by allowing all the legitimate expenses plus Return on Equity, the benefit of tipping fee should be passed on to the ultimate consumers of electricity as otherwise it would amount to double recovery for the same expenses through electricity tariff and tipping fee. Therefore, the Commission directs that the tipping fee should be reimbursed to the Distribution Licensee(s) by the generator on receipt of the same under the provisions of its Concession Agreement. The impact of tipping fee cannot be directed to be deducted upfront in the tariff as there may be a time gap between the developer's claim for tipping fee and the actual receipt from the authorities and the generator should not be subject to financial stress during this period."*

af. It is stated that a perusal of the above would show that the Commission, with respect to the issue of reimbursement of tipping fee, in para 91, has observed that the benefit of tipping fee should be passed on to the ultimate consumer of electricity as otherwise it would amount to double recovery of the same expenses through tariff and tipping fee. In pursuance to this, the Commission concluded that the tipping fee should be reimbursed to the distribution licensee on receipt of the same under the concession agreement. The same direction of reimbursement has been reiterated in para 97.

ag. It is stated that further, in para 92, the Commission did not offer any view on the particular submissions made by some of the stakeholders claiming that their projects are not entitled to any tipping fee whereby leaving the responsibility of

such speculation and verification upon the distribution licensees. Para 92 has been culled out below:

> *"92. The Commission is not expressing any opinion on some of the stakeholders' submission that their projects are not entitled to any tipping fee. It is the responsibility of the Distribution Licensee(s) to verify the facts and make claims for the implementation of the Commission's directions regarding the reimbursement of tipping fee."*

ah. It is stated that being aggrieved by the observations made qua tipping fee in the order under review, the review petitioner has approached the Commission on the following grounds:

A. It is stated that for that determination of tariff is one of the mandatory functions of the Commissions constituted under the Act, 2003. Tariff determination is a process of mathematical analysis of hard cost on the basis of prudent norms established either by virtue of a regulation or by practice and accordingly arrive at a number which is the tariff at which (in the present context) a distribution licensee shall procure power from a generating company. Therefore, over the years, both by virtue of regulations as well as jurisprudential evolution through judicial pronouncements, the procedure and the process to be adhered by a Commission while determining tariff have been established. It is stated that the observations made qua tipping fee, in the order under review, are unfortunately falling short of such process laid down over the years, hence, a specific indulgence is being sought with the present review petition.

B. It is stated that for that it is essential to note that the observations made in paras 91, 92 and 97 of the order is under review. The order under review has been unable to recognize the concept of tipping fee as a consideration and the intent and objective behind its payment to the concessionaire or operator of waste processing facility. The directions issued in the order under review, with respect to tipping fee, are wrong in principle and thereby the review of the order of the Commission is sought.

C. It is stated that the Commission has not adduced adequate reasoning as to why the submissions made by the stakeholders have not been taken

into consideration. Further, recording the submissions of the parties and passing an order would not suffice as a reasoned and transparent order unless the process and the reasoning through which the conclusions have been drawn are well demonstrated in the order itself.

D. It is stated that Section 86 (3) of the Act, 2003 requires that Commission shall ensure transparency while exercising its powers and discharging its functions. It is a settled principle of law that transparency in a judicial order and most specifically in a tariff process would mean holding due consultations with all the stake holders, allowing them to make their submissions to the authority and making decisions fully documented and explained. In the order under review, the Commission has not considered the submissions made by the review petitioner and HMESPL vide their letters dated 15.04.2020 and 14.04.2020, respectively. The Commission has also not provided adequate reasoning for discarding the said submissions.

E. It is stated that here, the observations made have not established a nexus between the submissions of the stakeholders and the decisions arrived at. Further, under para 92, the Commission did not adjudicate upon the submissions made by the review petitioner and HMESPL despite recording the same under para 88.

F. It is stated that the Hon'ble Supreme Court of India in the matter of Cellular Operators Assn. of India v. TRAI, reported in 2016 (7) SCC 703, defined the steps necessary for a process to be transparent. The relevant extracts of the judgment are as under (*see* para 92):

> *"We find that, subject to certain well-defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent" in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation along the lines of the US Administrative Procedure Act (with certain well-defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation-making power is exercised after due consideration of all stakeholders'*

submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the stakeholders concerned prior to the making of subordinate legislation. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable."

G. It is stated that therefore, the order under review, to the extent under review, ought to be reconsidered by the Commission for not fulfilling the essential characteristic of ensuring transparency which is a statutory obligation of the Commission under Section 86(3) of the Act, 2003.

H. It is stated that the Commission is granted powers under the Act, 2003 by virtue of being a sectoral regulator and thereby imposes certain limitation on its powers. Therefore, the Commission, while performing its functions under the Act, 2003 has to act within the limitations imposed by the statute under which it is created. In the present case, while exercising its statutory power of determining tariff for the RDF based power projects, it has extended its jurisdiction to give a direction for reimbursement of tipping fee received by the operator of the MSW processing facility, under the CA, to the distribution licensee. Noteworthy to mention herein is that even if there are generators who have also established MSW processing facility, however, the tipping fee as a consideration, is flowing from an independent contract being the CA for the purpose of discharging functions as assigned under the CA. Therefore, passing a direction for reimbursement of the tipping fee is extraneous to the power and jurisdiction of the Commission in a tariff determination proceeding.

I. It is stated that the concessionaire has to incur significant cost for carrying out its services under the CA, such as setting up the integrated unit for the purpose of processing and disposal of MSW and deployment of vehicles and manpower for collection and transportation of MSW. It is pertinent to mention that tipping fee is a market discovered rate, meant

to compensate the concessionaire for the cost incurred in setting up the integrated unit.

J. It is stated that setting up of an integrated project/unit is highly capital intensive, this can be ascertained from the fact that the 19.8 MW WTE plant at Jawaharnagar required investment of over Rs.465 Crores as assessed by State Bank of India (SBI). While a part of the investment is recovered through receipt of tipping fee the concessionaire also often undertakes sale of compost, RDF, biogas, electricity (power) and recyclables, to recover its investment. The same was also mentioned by the review petitioner in its submissions dated 15.04.2020 made to the Commission.

K. It is stated that the expenditure on MSW disposal has also been noted by NITI Ayog in its three-year action agenda from 2017-18 to 2019-20. The relevant portion has been extracted as under:

> *"Swachh Bharat*
> *Municipal Solid Waste (MSW) Disposal.*
> *… … ULBs spend about Rs.500 to Rs.1,500 per tonne on solid waste management. Out of this expenditure, about 60%-70% is spent on the collection of waste and 20%-30% on transportation but almost nothing on treatment and disposal."*

L. It is stated that the Department of Economic Affairs, Ministry of Finance, Government of India (GoI) has published a "*Position Paper on The Solid Waste Management Sector in India*" as early as in November, 2009. A set of salient postulations made in the said report capture the intention and principle of the government in the SWM Sector. Following excerpts are relevant:

> *"Urban sector is seen as a very high risk sector. … … Further, there is a lack of regulatory or policy enabling framework for PPPs barring a few exceptions and lack of bankable & financially sustainable projects considering the opportunities and risks involved. (page 2)*
> *… …*
> *States & ULBs must encourage the concept of tipping fee for private sector participation in SWM (page 3)*
> *… …*
> *PPP Framework/Initiatives: In developed countries, environmental concerns rather than energy recovery is the prime motivator for waste to energy facilities, which help in treating & disposing of wastes. Energy in the form of bio-gas, heat or power*

is seen as a bonus, which improves the viability of such projects (page 19)

… …

The major benefits of recovery of Energy from Urban waste is to bring about reduction in the quantity of waste by 60 to 90%: reduction in the demand for land as well as cost for transportation of wastes to far-away landfill sites: and net reduction in environmental pollution besides of generation of substantial quantity of energy. (page 20)

… …

Globally, scientific management is done on tipping Fees. The world experience demonstrates tipping fee as a sustainable model (page 23)

… …

States and ULBs must encourage the concept of tipping fee for private sector participation in SWM. tipping fee must be linked to critical inputs like Diesel, WPI etc (page 39)"

M. It is stated that as against the aforementioned position of GoI, the Commission, in the order under review, took the position that it does not subscribe to the stakeholders' submission that power generation is only incidental to the process of solid waste management.

N. It is stated that a report dated 12.05.2014 of the task force on WTE constituted by the Planning Commission categorically noted that tipping fee is not sufficient to cover the amounts spent by concessionaires. The relevant part of the report of task force dated 12.05.2014 is extracted as under:

"… … tipping fee is a charge which municipal authorities are required to pay to a private operator, who undertakes the responsibility of processing the waste aimed at minimizing the waste going to the landfills and in the process derive some useful products to meet part of the cost. The tipping fee is meant to bridge the gap between the amount spent by the concessionaire on processing the waste and the income derived from the products. The municipal authorities therefore need to provide for tipping fee for the sustainability of the projects undertaken on PPP mode.

The gap is generally in the range of 30-50%. This gap should be partly bridged by payment of tipping fee by the municipal authorities and the rest by VGF. Internationally such projects are viable because of payment of adequate tipping fee to bridge the gap. The proposed state MSW mission should determine the percentage of the gap to be bridged through tipping fee depending on the financial status of the municipal authorities. Innovative revenue models should be explored and encouraged.

… …"

O. It is stated that the submission made by the review petitioner to the Commission dated 15.04.2020, with regard to the tipping fee in the set out herein above, is the same as that of the task force constituted by Planning commission, GoI.

P. It is stated that a working paper published by Indian Council for Research on International Economic Relations (ICRIER), in April 2018, titled "Solid Waste Management in India – An Assessment of Resource Recovery and Environmental Impact" contains salient recommendations as under:

> *"It is extremely important to translate the vision from the Rules and the Missions into an operational integrated strategy of solid waste management. (page 2)*
>
> *… …*
>
> *Solid Waste Management Rules (2016) mandate all industries located within 100 km distance from an RDF plant to replace 5 per cent of their fuel consumption with RDF. The Rules are actually observed more in the breach as RDF utilisation has not picked up after the promulgation of the Rules. As with compost, RDF makers find it difficult to market their product, owing to poor demand from industrial units. Significant cost is incurred on segregating mixed stream of incoming waste before processing it, which brings the overall cost of producing, storing and transporting RDF close to the price of conventional fuel in India and sometimes even higher. This, along with additional bottlenecks of RDF management, e.g. high volume and excess residual ash, makes the fuel undesirable for the consumer. (page 15)*
>
> *… …*
>
> *Since the energy generated by waste to energy plants is deemed renewable by the Ministry of New and Renewable Energy, Solid Waste Management Rules (2016) direct that the Ministry of Power should fix tariffs for the electricity generated by these plants appropriately (usually twice as high as the rate for electricity from conventional sources) and also ensure that the distribution companies compulsorily buy power from these plants, currently at around Rs 7 per unit. This is over and above the viability gap funding which these plants receive as a capital subsidy from the Ministry of New and Renewable Energy (page 17)*
>
> *… …*
>
> *The investment requirement to bridge the urban infrastructure deficit in the solid waste management sector for all cities and towns of India over the 20 year period from 2012 to 2031 was last estimated by the high powered expert committee on Indian Urban Infrastructure and Services (2011). They estimated a total*

requirement amounting to Rs 70,000 crore (excluding the cost of land) at 2016-17 prices (page 26)"

Q. It is stated that reference may also be made to the observations of the Asian Development Bank (ADB) in its report on WTE projects published in November, 2020:

> *"… … WtE is often considered as a costly option for waste disposal and energy generation when compared with other fossil fuel-powered generation alternatives. There is a disconnect as the environmental and social benefits of WtE are not valued in comparison with more established renewable alternatives such as wind and solar energy. The business models for WtE are usually more complicated than established alternatives. Considerations such as availability and steady supply of feedstock, choice of technology, and appropriate policy framework, among others, should be given extra consideration in WtE development … …*

R. It is stated that United Nations Environment Programme (UNEP) in its report on WTE (Consideration for Informed Decision-Making) has categorically noted as under:

> *"Income from waste disposal and energy sales is usually insufficient to cover the full investment and operational cost of a thermal WTE plant"*

S. It is stated that another crucial document to consider is the Office Foreign Tour Report by Telangana State Renewable Energy Development Corporation Limited (TSREDCO) from its inspection of WTE plants in China aimed at studying the technology appreciation and working process of WTE. The observations made in this report, indicated that tipping fee is necessary for WTE projects. Further, it was concluded that the same model may be implemented in the state of Telangana with the support of central and state government for successful implementation in this sector.

T. It is stated that contrary to the above and in disregard of the observations, directions and policy measures/promotional aspects towards sustainable waste management, the order under review has the effect of taking away the contractually legitimate tipping fee, transparently determined in 2008-2009 between the parties to the CA, by ordering for reimbursement upon receipt by the generator.

U. It is stated that the underlying objective of the Act, 2003 is reasonable recovery of cost by the generators while ensuring consumers' interest. Section 61(d) of the Act, 2003 mentions 'recovery of cost in a reasonable manner' as one of the guiding factors to be considered by the Commission while specifying the terms and conditions for determination of tariff. The direction of the Commission ordering reimbursement of tipping fee has the effect of impeding this reasonable recovery of cost by the operator of the facility.

V. It is stated that the principal bench of the Hon'ble National Green Tribunal in its order dated 22.12.2016, passed in Almitra H.Patel Vs Union of India and Ors., (O.A.No.199 of 2014), labelled tipping fee as one of the most important factors for the operation of WTE plants. The relevant extracts of the order dated 22.12.2016 are as under:

> *"tipping fee is one of the most important factors for the operation of Waste to Energy plants. Rule 3 (50) [of SWM Rules 2016] defines, tipping fee, to mean a fee or support price determined by local authorities or state government to be paid to the concessionaire or the operator of the waste processing facility or for disposal of residual waste at the sanitary landfill. … … The tipping fee is generally charged by the operators based on the quantity of mixed MSW received at the plant. … … The plant's performance, efficiency and availability are relevant for compliance with SWM Rules, 2016, as the generation of waste will be on a day-to-day basis without any break and any outage of the plant, even for a few days, will create waste disposal crisis. Therefore, it may be relevant to link the tipping fee to the efficient and regular operation of the waste processing plant along with the load of waste provided to plant for actual processing. … … This fee is the support price to be determined by local authorities and payable to the operator of the facility for operation of the facility for processing of waste or for disposal of the residual solid waste at the sanitary landfill... Of course, we are not oblivious to the fact that these are rights and obligations are to be governed by a specific contract entered into between the concerned stake holders/parties. … … This is merely the criteria, we have indicated to ... … RDF and waste to energy are the safest routes which are in consonance with the economic principles as well as the techniques of environmental protection."*

W. It is stated that keeping in view the observations made in the Almitra H. Patel vs Union of India and Ors., as set out above and also the function to promote generation of electricity from renewable sources of energy as laid down in Section 86(e) of the Act, 2003, it is stated that the

Commission has not appropriately appreciated the rationale behind payment of tipping fee, the hierarch and salient aspects of the solid waste management (SWM) and the principles set out by various governments and international institutions of repute, as aforementioned. The Commission has overlooked the heavy capital investments that a WTE plant warrants and the purpose of payment of tipping fee as a necessary consideration to promote generation of electricity from WTE plants.

X. It is stated that for that in making the observations under review, the Commission has shown disregard to the principle of ensuring recovery of cost of the generator company laid down in Section 61(d) and also its function to promote generation of electricity from renewable sources of energy laid down in Section 86(e) of the Act, 2003. That the enforcement of such observations, if not rectified, will deprive the concessionaire of its legitimate consideration for performance of services under the CA and will make the implementation of the IMSWM project financially unviable.

Y. It is stated that the CA is an outcome of a transparent bidding process which culminated in execution of the CA between the authority that is GHMC and the concessionaire, the review petitioner. At the cost of repetition, it is stated that for the purpose of fulfilment of obligations laid down under the scope of work of the CA, a singular consideration is flowing to the concessionaire in the form of tipping fee. As a matter of fact, the concessionaire has the ability to deal and dispose off the components or the incidental outcomes of the MSW facility either on its own or through a third party, in the manner suitable to it. Accordingly, WTE facility was setup for the disposal of RDF generated in the IMSWM facility, by an independent entity/SPC, being HMESPL. The Commission while passing the order under review directed for reimbursement of the tipping fee which is ensuing out of the CA to which the generator that is HMESPL is not a party.

Z. It is stated that the basic scheme and structure of the CA is that GHMC will pay the tipping fee in lieu of the concessionaire undertaking to perform GHMC's public function and obligation of dealing with the

municipal waste. Reimbursement of tipping fee to the distribution licensee, will therefore be in contravention to the contractual provisions of the CA.

AA. It is stated that for that such an interpretation of the terms of the CA would be in violation to the principle of business efficacy as laid down in several judgments. Reliance may be placed on the observations made in the case of *Satya Jain Vs. Anis Ahmed Rushdie*, (2013) 8 SCC 131 (*see* para 33):

> *"The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock [(1889) LR 14 PD 64 (CA)]. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied—the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same."*

AB. It is stated that the provision of tipping fee can therefore be construed as a business efficacy decision of the parties involved in the CA and any interference with the same can only be in consonance to the intent of the said parties.

AC. It is stated that it is pertinent to mention that under Article 1.2.7 of the RfP, tipping fee was the sole bidding parameter for the selection of the bidder. Therefore, the bidder who quoted the lowest tipping fee was declared as the successful bidder.

AD. It is stated that it must be taken into consideration by the Commission that the review petitioner entered the bidding process on the legitimate premise that it would be receiving the tipping fee amounting to 40% as the main consideration towards treatment & disposal.

AE. It is stated that it is established that the payment of tipping fee is towards the performance of services under the CA. The generation of electricity and its subsequent sale to distribution licensees is not an obligation created by the CA. As per Article 2.6 of the CA, it is upon the

concessionaire to adopt whatever methods for expedient treatment and disposal of the MSW.

AF. It is stated that it is also important to note that the CA defined 'DPR' as the Detailed Project Report (DPR) of solid waste management (SWM) component prepared under Jawaharlal Nehru National Urban Renewable Mission (JNNURM) scheme of GoI. The said DPR was prepared by GHMC through an external consultancy agency. It is important to note that the said DPR prepared under JNNURM never referred to WTE plant and considered compost, RDF, recyclables as main sources of revenue arising from the processing of MSW. An estimate of the projected revenue in the said DPR is given below:

"a. RDF fluff generated from the process will be sold to factories and other bulk buyers in the vicinity. Discussions with RDF buyer have been carried out to get the price of RDF Fluff. Approximately 532 tons of RDF is generated per day. The selling price of RDF has been assumed as Rs.2800 per ton. Revenue from Sale of RDF is Rs 49.15 crore/annum

Table 16.12 Revenue from Integrated MSW Project

Component	**Revenue Rs in crore**
User Charges	28.66
Sale of Compost	10.29
Sale of RDF	49.15
Sale of Recyclable plastic	1.46
TOTAL	89.56"

AG. It is stated that the DPR under JNNURM got prepared by GHMC envisaged the revenue out of sale of RDF at the rate of Rs.2800/ton, totaling to Rs.49 Crores (Rupees Forty-nine Crores only) per year as a potential revenue source from the operations. Contrary to the above estimate, HIMSW has been able to dispose of a miniscule of the RDF to cement plants both in the state and outside the state.

AH. It is stated that whilst the concessionaire is entitled to the receipt of the tipping fee along with that of the sale proceeds of compost, RDF, energy (power), biogas, treated water, recyclables etc. as per the express provisions of the CA that formed the basis of the very tendering process in October, 2008, the Commission's observations in the order under review act in contravention to the above stated legitimate position. The Commission in its order at para 20 stated that the capital cost of Rs.9

Crores/MW is considered for determination of fixed cost and the recovery of capital cost of RDF production facilities is inbuilt in the RDF price. It is stated that the observations of the Commission act against the basic tenets of the CA and will resultantly take away the legitimate contractual consideration vested in the concessionaire.

AI. It is stated that it is unjust and arbitrary to deprive the entity receiving tipping fee, through directing reimbursement to distribution licensee, for carrying out the scope of the CA even if it were to choose to set up and operate a WTE plant and generate saleable electricity on its own, as allowed by the commercial contract namely CA.

AJ. It is stated that the Commission has not helped the cause of promotion of renewable energy which is a principle vested in it vide Section 61 read with Section 86(1)(e) of the Act, 2003 extended its jurisdiction and passed the order under review to the detriment of the operators carrying out MSW processing. An important aspect that the Commission may take note of is the financial liability, capital and operational expenditure, of HIMSW which runs the IMSW project receiving the waste and treating to dispose the same. HIMSW having disposed the RDF to HMESPL is deemed to have disposed the RDF and complied with the provisions of CA and thereby its entitled to tipping fee.

AK. It is stated that further, there is no concept of double recovery; the Commission has treated tipping fee as an incentive over and above paid to the operator of IMSW plant apart from the consideration received from other sources. While on the contrary, as already demonstrated above, tipping fee happens to be the only criteria or consideration for rendering all the services under the CA. Further, setting up of a WTE plant is not mandatory under the CA rather it is optional and option has also been given either the concessionaire to do itself or through another party either by assignment or otherwise.

AL. It is stated that the tipping fee is a consideration which shall serve towards all the costs incurred by a developer in setting up the IMSW facility, which cost it is incurring independent of whatever incentives or the sale proceeds it is getting by selling of the byproducts.

AM. It is stated that tariff under Section 62 of the Act, 2003 has to be cost-plus and as stated above such tariff should ensure reasonable recovery of the cost incurred in generation of power. Therefore, the generators are allowed to have a regulated return on investment over and above the recovery of the cost incurred by them, through tariff over a period of the plant life. Therefore, when admittedly no consideration has been made pertaining to the cost incurred by any entity towards setting up IMSW unit, how can the sole consideration flowing under the CA be deprived from the concessionaire.

AN. It is stated that under the Act, 2003, Section 61 makes provision for the principles to be followed by the appropriate Commission while determining tariff. The principles and methodologies specified by Central Electricity Regulatory Commission (CERC) are to be followed or the appropriate Commission is required to be guided by such principles laid down by the CERC. The Commission does not have a regulation specifically dealing with the determination of tariff for RDF based plants. However, while passing the order under review, the Commission has overlooked the following:

a. *The principles laid down by CERC in CERC (Terms and conditions for tariff determination from renewable energy sources) Regulations, 2017. In the tariff structure, there is no room for reimbursement of tipping fee, even assuming the generator is also the operator of MSW management facility, thereby receiving tipping fee from the concerned authority.*

b. *Without considering the capital cost incurred by MSW management facilities, the Commission has gone ahead in directing reimbursement of tipping fee, which is serving towards such capital cost incurred by the facilities.*

c. *The order under review, defeats the principles of Section 61(c), wherein instead of encouraging efficiency, good performance and optimum investments, the direction for reimbursement of tipping fee would be a disincentive for entities to make investment in WTE plants by creating an integration with MSW management facility. Let there be no shortsightedness towards the significance of WTE projects as a mechanism to not only deal with the present threat but also to tackle the future demon. This mechanism has been adopted by universally as the most environmentally benign instrument to deal with the rising generation of solid waste in cities. Therefore, unless such misdirected observations demonstrated under paras 91, 92 and 97 of the order under*

review, are nipped in the bud, this may result into a consequential disincentive for future investment in this sector. This is also essential to be taken as a factor under Section 86(1)(e) read with the preamble of the Act, 2003.

d. *The order under review fails to adhere to the principles under Section 61(d) and (h) of the Act, 2003 which aspect* has been elaborately dealt in the subsequent paras.

AO. It is stated that HIMSW is performing the task of collection, transportation, processing and disposal of the municipal waste. This function is only in public interest and HIMSW is providing a huge aid to the people by taking care of their waste. GHMC is also relieved of the obligation of processing this waste and it is precisely for this reason that the tipping fee gets paid to the concessionaire.

AP. It is stated that that the running of WTE plants as well, as performed by the HMESPL is necessary as it aids in disposal of wastes thus protecting the environment and avoiding higher landfills. Generation of power from waste thus serves to keep the environment clean and also cater to the requirements for grid support. The WTE project is a renewable source of energy within the scope of Sections 61(h), 86(1)(e) etc. of the Act, 2003. The WTE in fact, is extremely beneficial to the environment since it achieves the important social object of treatment of municipal waste/ RDF and also generates electricity. That both HIMSW and HMESPL are therefore conducting activities necessary for functioning of the society in a hygienic and healthy manner. Further, such observations would come in the way of the commitment made by the GoI at the international forum in COP 26 climate summit in the United Kingdom, of promotion and capacity addition of renewable sources of energy. Therefore, the specific indulgence of the Commission is being sought herein to look into the present issue not only from the aspect of the illegality of the observations in terms of the state of Telangana, rather, a holistic approach is required to be taken for the development of the entire IMSWM industry in the country as a whole.

AQ. It is stated that a WTE is a public social utility that contributes to the disposal of waste, whose generated energy is only incidental and a byproduct of the waste combustion to gain the advantage of volume

reduction of the waste. That the said reimbursement as directed by the Commission will render WTE projects financially unviable by depriving it of their sole consideration for services performed under the CA. Such a situation will likely hurt investor sentiment and dissuade further projects to be established. That such a risk of dissuading more WTE plants to be set up cannot be allowed keeping in mind the public social utility that these projects accomplish.

AR. It is stated that it is the call of the hour that such observations, in the manner made in the order under review, are reconsidered in view of the above arguments and assertions and in consideration of the very principles of tariff which are to be adhered to, in a process of tariff determination.

AS. It is stated that the function of determination of tariff under the Act, 2003 is limited, the Commission has taken into consideration all the components of cost and other variables of a generating company which is incurred in generation of RDF based electricity. While doing so the Commission without having any statutory authority cannot expand its jurisdiction and defeat the fundamental terms of the CA which has been executed between the concessionaire and an executive authority. The said agreement is entirely out of the scope of the Act, 2003.

ai. It is stated that it is a settled principle of law that an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason. 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 Civil Procedure Code, 1908 (CPC) is wide enough to include a misconception of law or fact by a court to prevent the miscarriage of justice. An application for review may be necessitated by way of invoking the doctrine "*actus curiae neminem gravabit*".

aj. It is stated that vide the grounds laid down above, it is established that the Commission has committed misconception/error of law by holding the

generators of RDF based WTE plants are liable to reimburse tipping fee to the distribution licences.

2. In view of the facts and reasons stated above, the review petitioner has sought the following reliefs in the review petition.

"Allow review of the order dated 18.04.2020 passed by the Commission in O.P.No.14 of 2020 in terms of the present petition."

3. The review petitioner has also filed an interlocutory application (I.A.No.38 of 2022) seeking condonation of delay in filing the review petition, the pleadings of the same are extracted below.

a. It is stated that the captioned review petition has been filed by the applicant under Section 94(1)(f) of the Act, 2003 read with clause No.32 of the TSERC (Conduct of Business) Regulations, 2015 (CBR, 2015) seeking review of the order dated 18.04.2020 passed by the Commission in O.P.No.14 of 2020.

b. It is stated that the Commission has passed the order under review, overlooking the principles behind payment of tipping fee, in holding that the tipping fee received under the concession agreement has to be reimbursed by the generators of WTE plants to the respondents. The Commission has also acted in excess of its jurisdiction by issuing direction to reimburse a payment that is received under an independent transaction, outside the jurisdiction of this Commission. Being aggrieved by the directions issued in the order under review, the applicant has filed the present review petition.

c. It is stated that the applicant is preferring the present application seeking permission to file the review petition for the order under review. It is submitted that considerable delay has occurred in filing the present review petition since the passing of the order under review on 18.04.2020. The applicant is statutorily permitted to invoke the jurisdiction of the Commission under clause No.32 of the CBR, 2015, within a period of 75 days from the date on which a copy of the order is received.

d. It is stated that however, the applicant seeks exemption from the above limitation by virtue of the directions issued by the Hon'ble Supreme Court of India in order dated 23.09.2021 *vide* SMW (C) No.3 of 2020, In Re: Cognizance For Extension Of Limitation.

e. It is stated that the relevant portions of the above order dated 23.09.2021 have been extracted below:

> *"I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.*
>
> *II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.*
>
> *III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12 A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."*

f. It is stated that in furtherance of the above directions issued by the Hon'ble Supreme Court of India that are applicable to any laws which prescribe periods of limitation for instituting proceedings, including clause No.32 of the CBR, 2015, an extension of 90 days calculated from 03.10.2021 ought to be granted to the applicant. The applicant is entitled to the above extension considering that the period of 75 days granted under clause No.32 of the CBR, 2015, since the passing of the order under review on 18.04.2020, expired within the period from 15.03.2020 to 02.10.2021.

g. It is stated that the applicant thereby urges the Commission to recognize the above grant of 90 days for filling of the present review petition to be calculated from 03.10.2021 in view of the directions passed by the Hon'ble Supreme Court of India in SMW (C) No.3 of 2020.

h. It is stated that in view of this, it is most humbly prayed that this Hon'ble Commission may condone the delay of 526 days in filing the review petition and list the present petition to be heard on merits.

i. It is stated that the balance of convenience lies in favor of the applicant herein as grave and irreparable injury will be caused to the applicant if the delay is not

condoned by the Commission. Further, no prejudice is likely to be caused to the respondent if the relief sought herein is granted.

4. The applicant/review petitioner has sought the following relief in the application.

"a. Allow the captioned application.

b. Condone the delay of 526 days caused in the filing of the review petition by the applicant."

5. The review petitioner has also filed an another Interlocutory Application (I.A.No.39 of 2022) seeking amendment of the substitution of the name of applicant and the averments of the same are extracted below.

a. It is stated that the facts and circumstances leading to the aforesaid review have been stated in detail in the present petition. The applicant, for the sake of brevity and in order to avoid repetition, is not repeating the same. The applicant craves leave to refer and rely to the same at the time of hearing, if necessary.

b. It is stated that the applicant is a company incorporated under the Act, 1956, and is a pioneer in the field of environmental engineering activities including but not limited to municipal solid waste management. It is operating and managing the IMSWM project at Jawaharnagar, Hyderabad.

c. It is stated that the name of the applicant company has been changed from "*Ramky Enviro Engineers Limited*" to "*Re Sustainability Limited*", with effect from 10.02.2022. A Certificate of Incorporation pursuant to change of name has also been issued to the same affect, by the Registrar of Companies, pursuant to the provision laid down in Rule 29 of the Companies (Incorporation) Rules, 2014.

d. It is stated that in light of the above authorisation granted by the Registrar of Companies, dated 10.02.2022, "*Ramky Enviro Engineers Limited*" would now be known by the name of "Re Sustainability Limited", while no other change has been brought about to the applicant.

e. It is stated that in furtherance of the above, in the interest of justice and for proper adjudication of the present matter, it is necessary that the cause title/memo of parties of the captioned review petition is changed, and the review petitioner is permitted to continue with the present petition under the name of "*Re Sustainability Limited*".

f. It is stated that the balance of convenience lies in favour of the applicant. If the present application is not allowed by the Commission, it would be greatly prejudicial to the applicant. Further, no prejudice is likely to be caused to the respondent if the relief sought by way of the present application is granted by the Commission.

6. The review petitioner/applicant has sought the following prayer in the application.

> *"allow the present application for substituting the name of applicant as "Re Sustainability Limited" and accordingly permit amendment of the memo of parties."*

7. The respondent has filed the counter affidavit and the contents of it are extracted below:

a. It is stated that the review petitioner filed the present review petition under Section 94 (1) (f) of the Act 2003, read with clause 32 of the TSERC (Conduct of Business) Regulations, 2015 (Regulation No.2 of 2015) seeking limited review of the order dated 18.04.2020 passed by the Commission in O.P.No.14 of 2020, to the extent of the observations made qua 'tipping fee', wherein the Commission has held that the generators of RDF based WTE plants are liable to reimburse tipping fee, received under CA to distribution licensees.

b. It is stated that the relief sought in the present review petition aggrieved by the observations made by the Commission qua tipping fee in para 91, 92 and 97 of the order in O.P.No.14 of 2020 dated 18.04.2020, praying the Commission to allow review of the order dated 18.04.2020 passed by the Commission in O.P.No.14 of 2020 in terms of the present petition;'

c. It is stated that at the outset, the review petition is required to be filed under clause 32 of Regulation No.2 of 2015. The review petitioner in para 1 of its petition though correctly mentioned the clause 32 under which the review petition is filed but failed to mention the correct number of regulation of conduct of business of the Commission.

d. It is stated that clause No.32(1) of Regulation No.2 of 2015 reads as follows:-

> *"32. Review of the decisions, directions, and orders*
>
> *(1) The Commission may on its own motion, or on the application of any person or parties concerned within 75 days of any decision, direction or*

order, review such decision, direction or order as the case may be and pass such appropriate order as the Commission thinks fit.

Provided that the Commission may allow on production of sufficient cause to the petitioner, a further period not exceeding 30 days for filing review petition on such terms and conditions as may be appropriate."

e. It is stated that at the foremost, the review petition is filed on 14.12.2021 with a delay of 530 days. As per proviso to clause 32 the Commission is empowered to allow a further period of 30 days in case the review petitioner satisfies the Commission that it was prevented by a sufficient cause for not filing the review petition within 75 days.

f. It is stated that the review petitioner appears to have filed an application in I.A.No.38 of 2022 under clause 42 of Regulation No.2 of 2015 seeking condonation of delay in filing the review petition. Clause 42 reads as follows:

"42. Extension or abridgement of time prescribed

Subject to the provisions of the Act, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission."

g. It is stated that the review petitioner in I.A.No.38 of 2022 contending that the Commission in the order under review overlooked the principles behind payment of tipping fee, in holding that the tipping fee received under the CA has to be reimbursed by the generators of WTE plants to the distribution licensees; and that the Commission also acted in excess of its jurisdiction by issuing direction to reimburse a payment that is received under an independent transaction, outside the jurisdiction of the Commission.

h. It is stated that the review petitioner in the said I.A. while admitting that the applicant/review petitioner is statutorily permitted to invoke the jurisdiction of the Commission under clause 32 within a period of 75 days from the date on which a copy of order is received seeks exemption from the above limitation by virtue of the directions issued by the Hon'ble Supreme Court of India in order dated 23.09.2021 vide SMW (C) No.3 of 2020, In Re: Cognizance For Extension of Limitation.

i. It is stated that as per the orders of the Hon'ble Supreme Court in M.A.No.665 of 2021 in SMW (C) No.3 of 2020 in cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021 not standing the

actual fee rate of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the present case the order under review in O.P.No.14 of 2020 came to be passed on 18.04.2020 that is after commencement of the period indicated in the order of Hon'ble Supreme Court that is period between 15.03.2020 till 02.10.2021 and hence the review petitioner cannot take aide of the said order.

j. It is stated that it is pertinent to mention here that the respondent filed review of the said order dated 18.04.2020 and the same was heard through video conference on 28.08.2020 and was disposed of on 14.09.2020. The review petitioner therefore cannot contend that the Commission was not functioning on account of the restrictions due to Covid-19 pandemic.

k. It is stated that the review petitioner submitted the grounds for filing review petition. It is stated that the review petitioner contended that the review petition is maintainable under Order 47 Rule 1 of CPC. The paragraphs relied upon by the respondent is available at point '(ai)' and '(aj)' supra.

l. It stated about Section 94 (1) (f) of the Act, 2003 which is extracted below:

"Section 94. (Powers of Appropriate Commission):

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

… …

(f) reviewing its decisions, directions and orders;"

m. It stated about Order 47 Rule 1 of CPC which is extracted below.

"1. Application for review of –judgment

(1) Any person considering himself aggrieved-

(a) by a decree or Order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or Order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or Order made, or on account of some mistake or error apparent on the face of the record of for any other sufficient reason, desires to obtain a review of the decree passed or Order made against him, may apply for a review of judgment to the Court which passed the decree or made the Order."

n. It is stated that the Hon'ble Supreme Court in *Sir Hari Shankar Pal and another Vs. Anath Nath Mitter and others* [1949 FCR 36], a five Judges Bench of the Federal Court while considering the question whether the Calcutta High Court was justified in not granting relief to non-appealing party, whose position was similar to that of the successful appellant, held:-

> *"That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it. When, however, the court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order XLVII, Rule 1, Civil Procedure Code."*

o. It is stated that the Hon'ble Supreme Court in *Parsion Devi and Others Vs. Sumitri Devi and Others* [1997 (8) SCC 715], held as follows:-

> *"Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47, Rule 1 CPC. In exercise of the jurisdiction under Order 47, Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise"*

p. It is stated that in *Haridas Das Vs. Usha Rani Banik and others* [2006 (4) SCC 78], the Hon'ble Supreme Court made a reference to explanation added to Order 47 by the Code of Civil Procedure (Amendment) Act, 1976 and held:-

> *"In order to appreciate the scope of a review, Section 114 CPC has to be read, but this Section does not even adumbrate the ambit of interference expected of the court since it merely states that it "may make such order thereon as it thinks fit". The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable*

verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection."

q. It is stated that in *Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma*, the Hon'ble Supreme Court while considering the scope of the High Courts' power to review an order passed under Article 226 of the Constitution, referred to an earlier decision in *Shivdeo Singh Vs. State of Punjab* [AIR 1963 SC 1909] and observed:-

"It is true as observed by this Court in Shivdeo Singh Vs. State of Punjab, AIR 1963 SC 1909, there is nothing in Article 226of the Constitution to preclude a High Court from exercising the power of review which is inherent in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all matters or errors committed by the Subordinate Court."

r. It is stated that the Hon'ble Supreme Court in *the State of West Bengal Vs. Kamal Sengupta and another* Civil Appeal No.1694 OF 2006 dated 16.06.2008, having considered various judgments in regard to the power of court under Section 114 CPC and Order 47 CPC laid down the following principles:-

'(i) The power of the Tribunal to review its order/decision under Section 22(3)(f)of the Act is akin/analogous to the power of a Civil Court under Section 114 read with Order 47 Rule 1 of CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(iii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

(v) *An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*

(vi) *A decision/order cannot be reviewed under Section 22(3)(f)on the basis of subsequent decision/judgment of a coordinate or larger bench of the Tribunal or of a superior Court.*

(vii) *While considering an application for review, the Tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*

(viii) *Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/Tribunal earlier.'*

s. It is stated that the review petitioner while contending that an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of record but also if the same is necessitated on account of some mistake or for any other sufficient reason stressed that the word 'sufficient reason' in Order 47 Rule 1 of CPC is wide enough to include a misconception of law or fact by a court to prevent the miscarriage of justice. The review petitioner would further contend that an application for review may be necessitated by way of invoking the doctrine 'actus curiae neminem gravabit' that is 'an act of the court shall prejudice no man'.

t. It is stated that the Hon'ble Supreme Court in Kamal Sengupta (referred supra) has categorically held that the expression 'any other sufficient reason' appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds. The other specified grounds in Order 47 Rule 1 CPC certainly do not empower the court to invoke the doctrine 'actus curiae neminem gravabit' that is 'an act of the court shall prejudice no man'.

u. It is stated that the review petitioner has categorically contended the grounds laid down in the review petition establish that the Commission has committed misconception/error of law by holding the generators of RDF based WTE plants are liable to be reimburse tipping fee to the distribution licensee. In nutshell the contention of the review petitioner is that the order/decision under review is

erroneous since the Commission misconceived the law in the matter in issue and thereby committed an error of law.

v. It is stated that it became very much clear from the decisions cited supra that a misconception/error of law is not an error apparent on the face of record. Misconception of law being an error which is not self-evident and has to be detected by a process of reasoning cannot be said to be an error apparent on the face of record justifying the Court to exercise its power of review under 47 Rule 1 CPC. It also became clear that exercise of jurisdiction under 47 Rule 1 CPC is not permissible for an erroneous decision to be reheard and corrected.

w. It is stated that the grounds of review raised by the review petitioner in para 31 (A to PP) clearly indicate that

(1) the order under review falls short of the process to be adhered by the Commission while determining tariff as laid down under regulations and judicial announcements;

(2) the order under review has been unable to recognise the concept of tipping fee as a consideration and the intent and objective behind its payment to the concessionaire or operator of waste processing facility;

(3) the directions issued in the order under review with respect to tipping fee are wrong in principle;

(4) the Commission has not adduced adequate reasoning as to why the submissions made by the stakeholders have not been taken into consideration;

(5) the Commission has not provided adequate reasoning for discarding the submissions made by the review petitioner and HMESPL;

(6) the observations made have not established a nexus between the submissions of the stake holders and the decisions arrived at;

(7) the Commission failed to fulfil the essential characteristic of ensuring transparency which is a statutory obligation of the Commission under Section 86(3) of the Act;

(8) the Commission has acted in excess of its jurisdiction;

(9) the Commission has not appropriately appreciated the rationale behind payment of tipping fee, the hierarch and salient aspects of the solid waste management and the principles set out by various governments and international institutes of repute;

(10) the Commission has over looked the heavy capital investments that a WTE plant warrants on the purpose of payment of tipping fee as a necessary consideration to promote generation of electricity from WTE plants;

(11) the Commission has shown disregard to the principle of ensuring recovery of cost of the generator company laid down in Section 61 (d) and also its function to promote generation of electricity from renewable sources of energy laid down under Section 86 (e) of the Act;

(12) the Commission overlooked the principles laid down by the CERC in CERC (terms and conditions for tariff determination from renewable energy sources) Regulations 2017;

(13) order under review defeats the principles of Section 61 (c) of the Act, 2003;

(14) order under review fails to adhere the principles of Section 61 (d) and (h) of the Act, 2003; and

(15) the Commission while determining the tariff expanded its jurisdiction without having any statutory authority and defeated the fundamental terms of the CA which has been executed between the concessionaire and an executive authority.

x. It is stated that the aforementioned grounds raised by the review petitioner in review petition clinchingly establish that the review petitioner requires the Commission to travel out of its jurisdiction to write a second order in the name of reviewing its own order by rehearing of the matter as an appellate forum.

y. It is stated that the grounds raised by the review petitioner for seeking review of the order in O.P.No.14 of 2020 dated 18.04.2020 of the Commission may be grounds for appeal, but the same cannot be pressed into service for review of the said order.

z. It is stated that in the circumstances mentioned above, the review petition in R.P.No.2 of 2022 is liable to be dismissed with cost.

aa. It is stated that the review petition is also not maintainable for the following reasons:-

i. It is stated that the documents and submitted by the review petitioner pertain to events before the date of order under review and the review petitioner had the liberty to produce the same before the Commission during the process of determination of tariff. But the review petitioner failed to do so.

ii. It is stated that as can be clearly understood from the order dated 18.04.2020 of the Commission, the grounds on which the present review petition is filed are not new and such submissions were already made by the stakeholders during the proceedings of determination of tariff and the same have been addressed by the Commission.

iii. It is stated that undisputedly, the review petitioner is involved in the process of SWM and as stated in the review petition the review petitioner has been selling the by-product viz., RDF from 2012. As such the documents referred in the review petition were very much available with the review petitioner during the proceedings of determination of tariff.

iv. It is stated that the review petitioner failed to satisfy the pre-requisites for filing a review viz., the discovery of new/important matter or evidence which, after the exercise of due diligence, was not within the knowledge

of the petitioner. Therefore, the review petition filed beyond the period of limitation is liable to be dismissed, since there is no error apparent on the face of the record.

v. It is stated that the review petitioner had option to challenge the tariff order before Hon'ble Appellate Tribunal for Electricity (ATE) under the terms and conditions stipulated by Conduct of Business Regulations of ATE. The review petitioner did not choose to do so. The inaction of the review petitioner to file appeal clearly demonstrates that the review petitioner had no grievance against the order under review.

vi. It is stated that the process of establishment of WTE plant through its subsidiary namely HMESPL was taken up prior to the issuance of generic tariff order. The review petitioner including its subsidiary were very well aware of their entire process of operation by the time the process of determination of tariff was taken up by the Commission during the year 2020. The review petitioner had the liberty and chance to furnish additional details if any, in the permissible manner.

vii. It is stated that the request of the review petitioner amounts to reopening of the matter which attained finality and is in force for the past two years and hence the same cannot be permitted.

ab. It is stated that without prejudice to the submissions made above, the respondent submits the following points on merits:

i. It is stated that the Commission initiated a suo-moto exercise to determine the generic tariff for electricity generated from RDF based power projects in the state of Telangana achieving COD during the period from 01.04.2020 to 31.03.2024, u/s 62 of Act, 2003.

ii. It is stated that the Commission had taken up the exercise of determination of generic tariff for the RDF based power projects under Section 62 of the Act, 2003. The order under review dated 18.04.2020 has already attained finality. Hence, allowing review petition at this juncture ultimately results in redetermination of the tariff in O.P.No.14 of 2020 and as such, it requires initiation of tariff determination process under Section 62 of the Act, 2003 afresh, duly following the procedures laid down therein.

iii. It is stated that the Commission issued public notice dated 20.03.2020 inviting the written suggestions and comments from all stakeholders on the proposed financial and technical norms and the tariff.

iv. It is stated that it has been indicated in the generic tariff order that the Commission received written suggestions and comments from 19 nos. stakeholders in total. The list of the stakeholders was enclosed at Annexure-1 of the order.

v. It is stated that it is pertinent to mention here that the review petitioner herein and its subsidiary HMESPL were among the stakeholders who have submitted written suggestions and comments to the Commission.

vi. It is stated that the review petitioner, being aware of the process of entire SWM, placed its suggestions/objections before the Commission on the proposed financial, technical norms and tariff for the RDF based power projects and tipping fee as well.

vii. It is stated that the 'tipping fee' is defined as follows in the impugned order:

> *"… … tipping fee means a fee or support price determined by the local authorities or any state agency authorised by the State Government to be paid to the concessionaire or operator of waste processing facility or for disposal of residual solid waste at the landfill. …"*

viii. It is stated that from the above definition, it is amply clear that the Commission is conscious of the fact that the tipping fee is received by the concessionaire or operator of waste processing facility or for disposal of residual waste.

ix. It is stated that it is apposite to mention the following observations of the Commission in the impugned order:

"… …

24. It appears that the stakeholders are plainly comparing the capital cost figures and are oblivious of the fact that the generic tariff proposed by the Commission is a two-part tariff. The capital cost of Rs.9 Crore/MW is considered for determination of fixed cost and the recovery of capital cost of RDF production facilities is inbuilt in the RDF price. The recovery of capital cost of RDF production facilities cannot be allowed to be recovered twice through fixed cost as well as variable cost. Even if considering the capital cost of Rs.20 crore/MW allowed to be recovered through single part tariff at the approved norms would translate to the levelised tariff of Rs.7.39/kWh. The proposed levelised tariff under two-part tariff structure is more than the levelised tariff under single part tariff structure. … …

33. The Commission does not subscribe to the stakeholders' submission that power generation is only incidental to the process of solid waste management. There are various technological options of solid waste management and power generation is one among those options. The RDF based power projects currently under development in the State are of 14 MW and 19.8 MW installed capacities. The developer of 19.8 MW capacity power project has further plans to expand two more units of 15 MW and 28 MW in the next 2-3 years. Such significant potential for power generation cannot be brushed away as incidental to the process of solid waste management. Feasibility of such significant power generation capacity is an indication of availability of adequate fuel for power generation. … "

x. It is stated that from the above observations, the Commission made it clear that the tariff for the RDF based power projects was determined duly considering the capital cost of RDF production facilities. It was established that there is availability of adequate fuel for power generation.

xi. It is stated that for better illustration of the facts, the relevant paragraphs from the generic tariff order in the matter of tipping fee are extracted below:

"... ...

Issue No.20: tipping fee

Stakeholders' submission

84. *The WtE plants are generally characterized by gate fee in the countries like Singapore, China, Korea, Japan etc. Globally, the waste management is centered on the concept of gate fee/tipping fee as a sustainable model for investments and accomplishing the task of effective solid waste management. tipping fee is a contract price for operator of MSW facility which is paid for various activities of waste management like segregation, processing, aerobic composting, anaerobic digestion, thermal processing of waste (waste to energy) leachate treatment and disposal, disposal of residues into a sanitary landfill and post closure maintenance of the same.*

85. *The tipping fee is a bidding parameter for MSW projects and the developer agency decides in the tender based on various components in the project including statutory compliances besides high capital and operational costs. The tipping fee is paid by the municipal authority based on the quantity of actual waste processed at the facility. The contract amount is paid as per the Concession Agreement between the developer and the municipality, the authority implementing the project. The developer is eligible for recovering the revenues out of sale of compost, power and as also the revenue from the tipping fee. The tipping fee is expected to cover the difference between the sum of revenue from sale of all products and the O&M expenses. The tendering is carried out by any municipal authority on the basis of such assumption, which is declared in the bid and the Concession Agreement. A part of tipping fee, usually not exceeding 10% is withheld to be deposited into an Escrow Account for meeting the obligation of post closure of the landfill, that is after expiry of the Concession Agreement. The facilities are returned to the concession authority at the end of concession period.*

86. *Presently, irrespective of any technology, the Indian cities are facing great problems in disposal of MSW in scientific and sustainable manner. The processing of combustible fraction of MSW viz., RDF to power meeting environmental norms is better and viable option much suited for waste conditions in India. The fuel with enhanced fuel value used for power generation cannot be benchmarked to the quantum of incoming mixed. Raw waste which does not have any appreciable fuel value and need segregation prior to its use as fuel. The fuel portion is only a fraction of the raw waste.*

87. *The proposal for reimbursement of impact of tipping fee to the Distribution Licensee(s) will make the WtE projects unviable and is also a violation of Concession Agreement. Further, the reimbursement of impact of tipping fee to the Distribution Licensee(s) will not attract investment and purpose of preferential tariff will be defeated. The proposal of reimbursement of impact*

of tipping fee may be withdrawn as significant capacity addition is needed in Telangana State.

88. *The WtE plant being set up by M/s Hyderabad MSW Energy Solutions Pvt. Ltd., is not entitled for any tipping fee from any urban local body and Greater Hyderabad Municipal Corporation. Hence, the proposal of reimbursement of impact of tipping fee to the Distribution Licensee(s) does not apply in the case of M/s Hyderabad MSW Energy Solutions Pvt. Ltd.,*

89. *The WtE plant being set up by M/s Sri Venkateswara Green Power Projects Ltd., is not entitled for any tipping fee as per its agreement with GHMC. However, as per the G.O.Ms.No.413, Dt: 11.06.2018, the State level official committee shall decide the tipping fee/processing fee. As of now, M/s Sri Venkateswara Green Power Projects Ltd., does not have any incoming revenue from the municipal corporation, rather royalty is being paid to the municipal corporation.*

90. *The impact of tipping fee as determined by the Commission may be deducted upfront from the tariff payable by the Distribution Licensee(s).*

Commission view

91. *The Commission has gone through the stakeholders submission regarding the tipping fee. The Commission does not subscribe to the stakeholders submission that the tipping fee is to cover the difference between the sum of revenue from sale of all products and the O&M expenses. tipping fee means a fee or support price determined by the local authorities or any state agency authorized by the State Government to be paid to the concessionaire or operator of waste processing facility or disposal of residual solid waste at the landfill. When the cost-plus tariff for electricity generated from waste is determined under Section 62 of the Electricity Act, 2003 by allowing all the legitimate expenses plus Return on Equity, the benefit of tipping fee should be passed on to the ultimate consumers of electricity as otherwise it would amount to double recovery for the same expenses through electricity tariff and tipping fee. Therefore, the Commission directs that the tipping fee should be reimbursed to the Distribution Licensee(s) by the generator on receipt of the same under the provisions of its Concession Agreement. The impact of tipping fee cannot be directed to be deducted upfront in the tariff as there may be a time gap between the developer's claim for tipping fee and the actual receipt from the authorities and the generator should not be subject to financial stress during this period.*

92. *The Commission is not expressing any opinion on some of the stakeholders submission that their projects are not entitled to any tipping fee. It is the responsibility of the Distribution Licensee(s) to verify the facts and make claims for the implementation of the Commission's directions regarding the reimbursement of tipping fee. …*

xii. It is stated that from the above the following is made clear:

a. It is stated that the submissions made in the present review petition are not new and the same were agitated during the process of determination of tariff. Hence do not qualify the grounds for filing review petition.

b. It is stated that the Commission having taken into consideration the submissions made by all the stakeholder's regarding the tipping fee in detail was not inclined to accept the submission that the tipping fee is to cover the difference between the sum of revenue from sale of all products and the O and M expenses.

c. It is stated that the Commission further observed that in the cost plus tariff determination under Section 62 of the Act, 2003 by allowing all the legitimate expenses plus Return on Equity, the benefit of tipping fee should be passed on to the ultimate consumers of electricity as otherwise it would amount to double recovery for the same expenses through electricity tariff and tipping fee.

d. It is stated that the Commission was not inclined to accept the submission made by the respondent for deduction of tipping fee upfront from the tariff on the ground that there may be time gap between the developer's claim for tipping fee and the actual receipt from the authorities and that the generator should not be subjected to financial stress.

e. It is stated that having observed so, the Commission directed that the tipping fee should be reimbursed to the respondent on receipt of the same under the provisions of its CA.

f. It is stated that the distribution licensee(s) was/were directed to verify the facts and make claim for reimbursement of tipping fee.

xiii. It is stated that in the circumstances mentioned in the foregoing paragraphs, the order under review which has attained finality cannot be permitted to be reopened.

xiv. It is stated that be that as it may, at various places the review petitioner stated that under the provisions of CA the concessionaire is free to choose processing technologies in line with MSW rules and is entitled to receive the revenues so generated through the products produced out of such processing such as compost, recyclables, energy/power, RDF biogas, carbon credits, metals etc and is entitled to have its own marketing set up for the same.

xv. It is stated that in the present case the review petitioner, through its subsidiary M/s HMSEPL established 19.8 MW RDF based power project. The by-product RDF produced in the process of solid waste management is being utilised as fuel for the power project.

xvi. It is stated that as observed by the Commission, the capital cost for RDF production facilities was inbuilt in the RDF price (para-24 of the impugned order) in the determination of generic tariff for the RDF based power projects.

xvii. It is stated that a joint reading of the above (para-m & o) drives the point that the review petitioner is free to sell any of the by-products in the SWM process. However, the capital cost of RDF production facilities is

considered/factored in the determination of tariff by the Commission. If the contention of the review petitioner for non-reimbursement of tipping fee is to be considered then the fuel cost payable shall be made nil and only fixed cost shall become payable to the review petitioner.

xviii. It is stated that it may also be noted that taking into consideration market trends for RDF, the petitioner, instead of selling RDF in the market has chosen to utilise the same as fuel for generation of power by itself, forming a subsidiary for their own operational convenience. However, as per the novation agreements signed by the petitioner, the entire responsibility for establishing and execution lies on the review petitioner itself and not on the subsidiaries.

ac. It is stated that any generic tariff order cannot accommodate the processes/conditions to a particular generator. As such, the impugned tariff order which is not project specific and is generic in nature is applicable to all the RDF based projects commissioned during the control period FY 2020-21 to FY 2023-24 and thus cannot be modified to suit any specific developer.

ad. It is stated that at the cost of reiteration that the operation of SWM and generation of power shall not be viewed as independent processes. The by-product of the solid management process that is RDF is being utilised for generation of power and as such selling the end product that is power.

ae. It is stated that the Commission, in the notification dated 20.03.2020, proposed for reimbursement of tipping fee to the respondent on receipt of the same by the generator under the provisions of CA. The levelised impact of tipping fee was proposed as Rs.3.54/kWh, as observed by the Commission in the generic tariff order itself.

af. It is stated that keeping the higher tariff decided by the Commission in view and taking the interests of the consumers in the state into consideration, the respondent, in the objections/suggestions submitted by it requested the Commission to deduct the tipping fee upfront from the tariff to be paid by respondent to the generators, to avoid any legal disputes that may be created by the generators/developers at a later date.

ag. It is stated that the Commission was not inclined to consider the submissions of DISCOMs for deduction of tipping fee upfront from the tariff payable stating that there may be a time gap between the developer's claim for tipping fee from the local authority and the actual receipt from the authorities and the generator should not be subject to financial stress during the period. The Commission

further held that it is the responsibility of the respondent to verify the facts and make claims for the implementation of the Commission's directions regarding the reimbursement of tipping fee.

ah. It is stated that accordingly, the Commission in the final order dated 18.04.2020, directed the developers that the tipping fee shall be reimbursed to the respondent on receipt of the same by the developers under the provisions of its CA and thus did not quantify the fee, though the Commission made an observation that the impact of tipping fee on the tariff as Rs.3.54/kWh.

ai. It is stated that aggrieved by the order of the Commission regarding the tipping fee, TSDISCOMs filed review petition R.P.(SR) No.20 of 2020 seeking review of Commission order dated 18.04.2020.

aj. It is stated that the Commission by order dated 14.09.2020 rejected the review petition stating that there is no mistake apparent on the face of the record as contended and therefore the review sought is not maintainable.

ak. It is stated that the review petitioner accepted the order and hence it neither filed any review before the Commission nor challenged the order before any higher forum. After about two years the petitioner came up with the present review petition seeking review of the said generic tariff order.

al. It is stated that in addition to the above submissions, the following replies are submitted on the contentions raised by the petitioner:

Contention of the petitioner	**Reply**
The observations made qua tipping fee do not conform to the principles of natural justice	The generic tariff order issued by the Commission is quite extensive and the observations made clarified the objections of the stakeholders. Had the Commission not mentioned in the tariff order that tipping fee is to be reimbursed to the DISCOMs, the tariff should have been reduced to the tune of Rs.3.54/kWh, since the expenditure towards RDF facilities is inbuilt in the capital cost considered for tariff determination.
The Commission has acted in excess of its jurisdiction	As per the Act, 2003 the Commission is entrusted with larger responsibilities of protection of consumer interests along with determination of tariff and promotion of RE sources. The functions of solid waste management process and generation of power cannot be viewed independently and

Contention of the petitioner	Reply
	as such the observations of the Commission in the matter of reimbursement of tipping fee is justified and it cannot be termed as excess of jurisdiction of the Commission.
Tipping fee is a consideration for services rendered under the CA.	The Commission having noted that the tipping fee is part of consideration for services rendered under the concession agreement proceeded to determine the tariff for the RDF based power projects. Also, it cannot be denied by the review petitioner that power generation process is also part of the CA and a separate subsidiary M/s HMESPL was formed with the approval of GHMC under the provisions of the CA for execution of these obligations. Coming to the criteria for selection of the bidder by GHMC, it is the sole discretion of the review petitioner to quote the tipping fee for its own business sustainability. As such, the end consumers cannot be burdened with double recovery of the same expenses through electricity tariff and tipping fee.
Reimbursement of tipping fee defeats the intent of the CA.	The CA dated 21.02.2009 was entered between GHMC and review petitioner for IMSWM project for the city of Hyderabad. Subsequently, with the approval of GHMC, the review petitioner formed two SPCs namely, M/s HIMSW for carrying out the integrated waste management activities and M/s HMESPL for generating/operating the 19.8 MW RDF based power project. Accordingly, novation agreements were signed. The novation agreements were concluded only to facilitate to execute the CA through petitioner's associate/assignees and was not a contract either for substitution of the review petitioner or discharges them from their obligations. The terms and conditions of the novation agreements clearly state that there shall not be any exclusive rights to the SPCs and REEL is principally responsible for all the duties and obligation under the CA. As such, M/s HIMSW nor M/s HMESPL cannot act independently and admittedly they draw their rights/obligations from the CA entered between GHMC and M/s REEL. The activities taken up by the SPCs cannot be viewed or considered as exclusive and autonomous. In the circumstances

Contention of the petitioner	Reply
	mentioned above reimbursement of the tipping fee is justified. On the contention of the review petitioner that tipping fee was the bid selection criteria, the Commission was apprised of the fact that the tipping fee was the bid selection criteria during the tariff determination process and hence was requested for upfront reduction of tipping fee equivalent tariff component. Being aware of the same, the order was issued.
Costing of RDF plant is unrelated to generation of electricity.	The cost of RDF production facilities have been taken into consideration for determination of tariff for the RDF based power projects in the impugned order. In accordance with the provisions of the CA, the review petitioner is also selling the power generated in the process of SWM by way of PPA. If the cost of the RDF facilities was not considered for tariff determination, then the tariff would have been considerably lower and single part, as was fixed in earlier tariff order dated 13.06.2016 for MSW/RDF projects, where tariff of Rs.5.90/unit was fixed for MSW projects and Rs.7.07/unit for RDF based projects. The CERC Regulations are only the guiding principles and the Commissions can independently design own principles/regulations depending on the local conditions taking into consideration what is appropriate in the interests of all the stakeholders.
Managing a WTE plant is a public utility service.	Establishing WTE plant is part of the solid waste management process awarded to the review petitioner through the CA. entered by the review petitioner or its subsidiaries with either GHMC or respondent are business agreements. Taking into consideration the necessity of disposal of waste, National Tariff Policy mandates DISCOMs for procurement of 100% energy from the WTE plants at the tariff determined by the Commission. Else, the power shall be procured through competitive bidding only like in cases of all other renewable energy sources.

am. Hence, it is prayed the Commission to dismiss/reject the review petition being non-maintainable and devoid of merits.

8. The review petitioner has filed rejoinder to the counter affidavit and the contents of the same are extracted below:

a. It is stated that the present rejoinder is being filed by review petitioner whose name is changed to M/s Re Sustainability Limited with effect from 10.02.2022 in response to the counter affidavit filed by respondent.

b. It is stated that a bare perusal of the counter affidavit filed by the respondent, would show that the respondent has misinterpreted the applicable provisions of law, the reply filed by the respondent is strewn with a misconstrued understanding of the laws of limitation and the jurisprudence behind maintainability of review petitions.

c. It is stated that at the outset, the review petitioner denies and disputes all the averments, contentions and allegations, raised by the Respondent in its reply and except for what has been specifically and expressly admitted to hereinafter in writing, any omission on the part of the petitioner to deal with any specific averment, contention or allegation of respondent shall not be construed as an admission on the part of the review petitioner. The respondent vide its counter affidavit has raised extraneous and irrelevant contentions and has blatantly ignored the principles behind payment of tipping fee, which are denied and hence disputed in toto.

d. It is stated that the review petition filed by the review petitioner herein, may also be read as part and parcel of the present rejoinder, since, most of the concerns and issues raised by respondent, have already been addressed in the petition and the respondent has failed to sufficiently counter them. For the sake of brevity, the same are not reiterated here.

e. It is stated that at the very outset the averments made by the respondent, with regard to the condonation of delay in preferring the present review petition, are frivolous and not maintainable at this stage of the hearing. It may be appreciated that the Commission after hearing the submission made by the petitioner on 02.05.2022, condoned the delay in preferring the captioned review petition. Therefore, all the averments made in that respect and submissions made in support of that may kindly be ignored, since the application of condonation of delay has already been allowed by the Commission while

admitting the present review petition. The relevant extract of the daily order dated 02.05.2022 is culled out below for the ready reference of the Commission:

> *"The counsel for petitioner stated that the Commission may consider admitting the review petition by condoning the delay in the filing review petition and issue notice to the respondent. The Commission considered the submission with regard to condoning the delay in filing the review petition and is of the view that the delay can be condoned in view of the orders of the Hon'ble Supreme Court extending the period of limitation in filing the review petition. Accordingly the application filed for condoning the delay in filing the review petition is allowed.*
>
> *The Commission also considered the submission, but it is appropriate to admit the review petition. Accordingly, the same is admitted, issue notice to the respondent. The matter is adjourned and the respondent shall file its counter affidavit or submissions in the matter on or before 30.05.2022 duly serving a copy of the same to the review petitioner either physically or through email. The review petitioner is at liberty to file its rejoinder, if any on or before 15.06.2022 duly serving a copy of the same to the respondent either physically or through email.*
>
> *Call on 02.07.2022 at 11.30 A.M."*

f. It is stated that the present review petition has been filed by the review petitioner seeking review of the order dated 18.04.2020, passed by the Commission in O.P.No.14 of 2020 (order under review), to the extent of the directions passed in relation to reimbursement of tipping fee.

g. It is stated that it was amply established by the review petitioner in its review petition that vide the directions issued qua tipping fee in the order under review, the Commission has not considered and weighed the vital principles that build the very foundation of payment of tipping fee to the operator of facilities processing MSW. Further, the Commission has directed the reimbursement of tipping fee, to the detriment of the operators of MSW processing facility, which is a consideration for the performance of services under the CA, to the distribution licensees.

h. It is stated that the review petitioner has also contended that such reimbursement will render the project facility processing MSW financially unviable while also discouraging investment in the sector. The Commission has further overlooked its own jurisdiction, by directing reimbursement of an amount, which is a consideration under an independent transaction and beyond its jurisdiction and applicability of the Act, 2003.

i. It is stated that legitimate submissions in this regard were also made by the review petitioner that, despite having been recorded in the order under review, have been rejected without offering any substantial reasoning for such rejection. The order under review is thereby characterized with a lack of transparency, whereas the existence of such transparency is a crucial characteristic to such a tariff order.

j. It is stated that the respondent, in ignorance of the above has raised irrelevant grounds by reiterating the observations made in the order under review without adequately countering the submissions made by the review petitioner in the review petition herein.

k. It is stated that the entire submission of the respondent is revolving around the issue of limitation qua the applicability of order dated 23.09.2021 passed by the Hon'ble Supreme Court of India in SMW (C) No.3 of 2020, In Re: Cognizance For Extension Of Limitation and the principles of review under the CPC.

l. It is stated that the respondent has produced numerous judgments to substantiate its argument that the order dated 18.04.2020 passed by the Commission in O.P.No.14 of 2020 is not characterized by a "mistake or error apparent on the face of the record", which is a prerequisite under Order 47 Rule 1 of the CPC, most of which are irrelevant to the grounds relied upon by the review petitioner to establish its maintainability.

m. It is stated that the averments made by the respondent has specifically countered as under:

n. It is stated that at the outset the respondent is making redundant arguments that will have no bearing on the adjudication of the present matter. It is true that the present review petition has been filed under clause 32 of the CBR, 2015 since the review petitioner herein subjects itself to and is required to comply with all sub-clauses of clause 32 in order to carry out the initiation of proceedings under the said regulation.

o. It is stated that to the extent of the respondent's contention that the review petition is ineligible for the exemption under order dated 23.09.2021 passed by the Hon'ble Supreme Court of India, in SMW(C) No.3 of 2020, In Re: Cognizance For Extension Of Limitation. The relevant portions of the above

order dated 23.09.2021 have already been extracted by the review petitioner in its interlocutory application.

p. It is stated that in furtherance of the above directions, an extension of 90 days calculated from 03.10.2021, would be granted in cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021. This direction makes the review petitioner entitled to the above extension considering that the period of 75 days granted under clause 32 of the CBR, 2015, since the passing of the order under review on 18.04.2020, expired within the period from 15.03.2020 to 02.10.2021.

q. It is stated that in view of the above, the review petitioner vide I. A. No.38 of 2022 prayed to the Commission to recognize that the above grant of 90 days for filling of the present review petition ought to be calculated from 03.10.2021, in accordance with directions passed by the Hon'ble Supreme Court of India in SMW(C) No.3 of 2020.

r. It is stated that a bare perusal of the above order would show that the only prerequisite for the applicability of this exemption are cases wherein

> *"the limitation would have expired during the period between 15.03.2020 till 02.10.2021",*

while there is no mention that the period of limitation has to commence before 15.03.2020, as erroneously stated by the respondent. The respondent has also failed to substantiate this claim by any argument.

s. It is stated that the contentions made by the respondent *viz-a-viz* limitation are therefore premised upon a mistaken and farfetched interpretation of the order dated 23.09.2021, without any substantiation.

t. It is stated that additionally, the review petitioner has nowhere relied on the ground that the Commission was not functioning on account of the restrictions due to Covid-19 pandemic. Irrespective of whether or not the Commission was functioning, the review petitioner is entitled to exercise the exemption granted under the order dated 23.09.2021, simply by virtue of the fact that it is entirely eligible for such exemption.

u. It is stated that the respondent has produced judgments arguing that there is no mistake or error apparent on the face of the record, as pointed out by the

review petitioner, therefore the review petitioner cannot approach the Commission for review qua the grounds raised. This argument has been made by the respondent despite its own admittance that the review petitioner has relied upon the grounds of 'sufficient reason' and has produced judgments in the review petition to substantiate the same. Order 47 Rule 1 of the CPC has been extracted herein below for the Commission's ready reference:

"1. Application for review of judgment.—

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

[Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]"

v. It is stated that the applicability of Order 47 Rule 1, to a review under Section 94(1)(f) of the Act, was observed in the case of *Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semiconductor Power Company (India) (Private) Limited*, reported in 2017 (16) SCC 498. The relevant portion of the judgment has been extracted herein below:

"69. Section 94 of the Electricity Act deals with the powers of the Commission as far as the conduct of the proceedings. Under Section 94 (1) (f), the Commission has the power to review its own decision. The power of review under Section 94(1)(f) is akin to that under Order 47 Rule 1 CPC. At the instance of affected parties or the generating companies or the Commission on its own motion may review its own decision only if such order was made under: (i) mistake or error of fact apparent on the face of the record; (ii) discovery of new and important matter which was not

within the applicant's knowledge at the time when the order was made; or (iii) any other sufficient reason to meet the ends of justice."

w. It is stated that it may be noted that Order 47 Rule 1 of the CPC allows for review on the following three grounds:

i. from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or

ii. on account of some mistake or error apparent on the face of the record or

iii. for any other sufficient reason.

x. It is stated that the respondent has produced judgments that are irrelevant to the present matter and do not counter the grounds relied upon by the review petitioner for supporting its maintainability. The review petitioner has clearly established, in the review petition herein that its maintainability is premised upon the 'misconception of law' committed by the Commission in passing of the directions made qua reimbursement of tipping fee in the order under review. The review petitioner has not claimed that the order under review, to the extent challenged, is 'erroneous in law', it has instead claimed that the submissions made by the stakeholders, which highlighted the significance of payment of tipping fee for recovering the capital cost in a WTE plant, have not been addressed.

y. It is stated that the judgment of *Sir Hari Shankar Pal and another Vs. Anath Nath Mitter & Ors.,* reported in 1949 FCR 36, relied upon by the respondent itself in para 8, supports the appellant's maintainability, by stating that when a court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47 Rule 1 of the CPC.

z. It is stated that the review petitioner in its review petition has shown how the Commission has surpassed the jurisdiction granted to it under Section 62 of the Act, 2003 by ordering for the reimbursement of a payment that ensues from an independent contract that is the concession agreement and is therefore outside the purview of the jurisdiction of the Commission to determine tariff. This alone should suffice to show that the order under review, to the extent challenged,

suffers from an 'error analogous to one apparent on the face' thereby it amenable to review by the Commission.

aa. It is stated that further, the judgments referred to in paras 8 to 12 are not relevant to counter the averments made by the review petitioner. The review petitioner has neither claimed that the decision given in the order under review is an 'erroneous decision', nor that a rehearing of the dispute is postulated because 'a party did not highlight all the aspects of the case'. In fact, the review petitioner has highlighted and also provided an extract of the submissions made by it under the public notice dated 20.03.2020, issued by the Commission. The submissions made by the review petitioner amply demonstrated the large investment in the WTE sector, as well as the recovery of such cost through the payment of tipping fee. This makes it clear that the said issues were sufficiently highlighted by the review petitioner in the submissions made by it, however the Commission dismissed the submissions without adducing sufficient reasoning, in violation of the principles of natural justice, as pointed out by the review petitioner in the review petition.

ab. It is stated that the review petitioner would like to rely upon the landmark judgment passed by the Hon'ble Supreme Court in the case of *Board of Control for Cricket in India Vs. Netaji Cricket Club*, reported in 2005 (4) SCC 741. The relevant extracts of the judgment are produced herein below:

> *"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 CPC 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'."*

ac. It is stated that through the averments made by it, the respondent has acted in ignorance of the settled law on the term 'sufficient reason' as has been expanded through evolving jurisprudence. The respondent has also mistakenly used the word 'misconception' and 'error' to hold the same meaning. It is pertinent to mention herein that a perusal of the grounds on which the petitioner has preferred the captioned review petition, would make it sufficiently clear that the grounds are based on how the Commission has acted in excess of its

jurisdiction by overstepping into such contracts, upon which neither the Act, 2003 nor the Commission in exercise of its power under Section 86 of the Act, 2003 has any jurisdiction whatsoever.

ad. It is stated that it is a conscious decision on the part of the review petitioner to prefer the present review petition instead of preferring an appeal, while reading the order under review in its entirety. The observations made under para 90 and 91 of the order, requires a revisit by the Commission for the following reasons, which per se mandates the filing of a review.

i. It is stated that it is an apparent error on the face of the record to give a direction about reimbursement of tipping fee, which is not compulsorily incidental to the operation of a generating company within the meaning of Section 2(28) of the Act, 2003.

ii. It is stated that the Act, 2003 is a comprehensive enactment dealing with a special sector, thereby making provision for regulating a set of activities within that particular sector, in the manner provided under the Act, 2003 being a special statute and also to be subjected to regulations made by the respective Commissions and rules of the central government. While being empowered under a special statute, the regulators are burdened with enormous amounts of constraints, to act within the peripheral limits of the four corners of the enactment. Therefore, by moving an inch beyond the four corners would be very much an error apparent on the face of the record, since, the Act, 2003 has comprehensively codified and demarcated its peripheral limits in the parliamentary legal system of India.

iii. It is stated that the Commission is well aware of its obligations to promote WTE as a renewable energy source under Section 86(1)(e) of the Act, 2003. While doing so, which is apparent from the order itself, there has been misconception driven outcomes recorded under para 91 and 92 of the order, which needs to be cured and revisited, for the purpose of maintaining the sanctity of the order dated 18.04.2020 in its entirety.

ae. It is stated that the respondent has, baselessly, drawn the conclusion that the review petitioner seeks that the Commission travel out of its jurisdiction to write a second order. The review petitioner only seeks that the Commission review its order to the very limited issue of reimbursement of tipping fee, in line with the submissions that the review petitioner has already made, vide its submissions dated 15.04.2020 to the Commission, however the same had not been considered. The review petitioner clearly has approached the Commission on the following two grounds:

i. It is stated that the Commission has disposed of the submissions made by the review petitioner, without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way. This

is evident by the submissions made by the review petitioner in the review petition. Further, the review petitioner has also pointed out the Commission's disregard to its obligation under Section 61(d) of the Act, 2003 to ensure recovery of cost of generators and also its obligations under Section 86 (e) of the Act, 2003 to promote the generation of energy from renewable sources. The judgment passed in *Sir Hari Shankar Pal and another Vs. Anath Nath Mitter & Ors.*, supra, can be relied upon, which stipulates that such traversing of jurisdiction may '*amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47 Rule 1 of the CPC"*.

ii. It is stated that the order under review suffers from a misconception of law, which is a ground forming 'sufficient reason' under Order 47 Rule 1 of the CPC. Such misconception of law is apparent by the following grounds raised by the review petitioner:

a. the order under review has been unable to recognise the concept of tipping fee as a consideration and the intent and objective behind its payment to the concessionaire or operator of waste processing facility.

b. the Commission has not appropriately appreciated the rationale behind payment of tipping fee, the hierarch and salient aspects of the SWM and the principles set out by various governments and international institutes of repute.

c. the Commission has overlooked the heavy capital investments that a WTE plant warrants on the purpose of payment of tipping fee as a necessary consideration to promote generation of electricity from WTE plants.

d. the Commission overlooked the principles laid down by the CERC in CERC (Terms and Conditions for Tariff Determination for Renewable Energy Sources) Regulations 2017.

af. It is stated that the respondent has falsely argued the 'discovery of new/important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner' as the only ground for review. The argument raised by the review petitioner in the petition herein had been briefly raised by it in the submissions made by it to the public notice dated 20.03.2020, issued by the Commission. The submissions made by the review petitioner were denied without sufficient reasoning. The review petitioner did raise the said issues, as permissible at the stage of making submissions to a public notice. Further, in the submissions dated 14.04.2020, made by HMESPL, the issue of establishment of WTE plant by HMESPL, being a subsidiary of the review petitioner had also been highlighted, in contravention to the averments made by the respondent in review petition.

ag. It is stated that the contents to the extent that allowance of review at this juncture at this stage would be a hindrance since it would ultimately result in a redetermination of the tariff in O.P.No.14 of 2020 and as such, requires initiation of tariff determination process under Section 62 of the Act, 2003. Irrespective of the outcome of the review, the review petitioner is entitled to exercise its right to seek review as granted under the CPC, as long as the review is maintainable under Order 47 Rule 1 and the initiation of proceedings is well within the prescribed period of limitation. The review petition's maintainability and the issue of limitation have been sufficiently dealt with above.

ah. It is stated that the respondent has also erred in stating that the tariff for the RDF based power projects was determined duly considering the capital cost of RDF production facilities. The review petitioner, in the review petition, has produced the extracts of various reports by governments and international institutes of repute, which demonstrate the necessity of payment of tipping fee and the insufficiency of income from waste disposal and energy sales to recover the full investment and operational cost of thermal WTE plants. It is this misconception made by the Commission, in arriving at the conclusion that recovery of the capital cost of RDF production facilities is inbuilt in the RDF price, that the review petitioner would like to point out.

ai. It is stated that the review petitioner is not sustaining that the tariff order take into consideration project specific facts, however, the reimbursement of tipping fee, which is an income ensuing from an independent agreement, is an in-principle incorrect treatment of the tipping fee in a tariff proceeding.

aj. It is stated that the Commission may consider the order dated 29.08.2012 passed by the Hon'ble Delhi Electricity Regulatory Commission (DERC) in Petition No.31 of 2012, holding that in case the generation and sale of power from the MSW project was not one of the bid criteria, it would mean that electricity is only incidental or secondary to the project and not one of the primary outputs, for which the bidding took place. The relevant paragraphs of the order dated 29.08.2012 are extracted below.

> "5. The Commission observed that the generation and sale of power from the MSW project was not one of the bid criteria. Hence it can be concluded, that electricity is only incidental or secondary to the project and not one of the primary outputs, for which the bidding took place.

Since the fuel (MSW) is a bi-product of the MSW project, which would otherwise have to be disposed off at a cost, tariff determination by the Commission under Section 62 may amount to effectively changing the bid conditions for award of the MSW project.

6. The Commission is of the view that power generation can at best be considered as merchant power generation which the project developer is free to sell as a merchant generator."

al. It is stated that the contents of paras 26 of the counter affidavit are denied and addressed as follows:

i. The order under review, to the extent of denial of the submissions made by both the review petitioner and HMESPL is squarely in violation of the principle laid down in the case of Cellular Operators Assn. of India v. TRAI, reported in 2016 (7) SCC 703 ensuring transparency in a decision-making process. Under para 92 of the order under review, the Commission did not adjudicate upon the submissions made by the review petitioner and HMESPL despite recording the same under para 88. Recording the submissions of the parties and passing an order would not suffice as a reasoned and transparent order unless the process and the reasoning through which the conclusions have been drawn are well demonstrated in the order itself. The Commission has not adduced adequate reasoning as to why the submissions made by the stakeholders have not been taken into consideration.

ii. It is stated that the payment of tipping fee ensues from an independent agreement and is paid for services rendered under the CA. A transgression into this agreement is extraneous to the power and jurisdiction of the Commission in a tariff determination proceeding.

iii. It is stated that generation of power is only an option under the CA and not an obligation, whereas tipping fee is paid for the rendering of services under the CA relating to waste management. The review petitioner has already emphasized that it was required to establish the WTE plant, through its subsidiary, only because of the lack of market for RDF. The review petitioner, being unable to sell the RDF, had to utilise it as fuel by setting up a WTE plant.

iv. It is stated that further keeping in mind the huge capital cost of setting up a WTE plant, the same will not lead to double recovery and a burdening of the respondent. In this regard, reliance may be placed on the order dated 29.08.2012 passed by the DERC in Petition No.31 of 2012, reproduced above, wherein it has been observed that in case the generation and sale of power from the MSW project was not one of the bid criteria, it would mean that electricity is only incidental or secondary to the project and not one of the primary outputs, for which the bidding took place.

v. It is stated that it is true that both HMESPL and HIMSW are subsidiaries of the review petitioner and novation agreements have been executed between the three parties, notwithstanding which the review petitioner continues to retain the full responsibility under the CA. The existence of a common parent company is no criteria for relating the services provided by either of the subsidiaries, especially when it has been stated

already that setting up of a WTE was only an option under the concession agreement and not an obligation. Further, it can be seen from the above order passed by the DERC that since the generation and sale of power from the MSW project was not one of the bid criteria, the electricity is only incidental or secondary to the project and not one of the primary outputs, for which the bidding took place.

vi. It is stated that under Article 1.2.7 of the RfP, tipping fee was the sole bidding parameter for the selection of the bidder and it was the bidder who quoted the lowest tipping fee who was declared as the successful bidder. The review petitioner, therefore, entered the bidding process on the legitimate premise that it would be receiving the tipping fee amounting to 40% as the main consideration towards treatment and disposal.

vii. It is stated that further tariff under Section 62 of the Act, 2003 has to be cost plus and as stated above such tariff should ensure reasonable recovery of the cost incurred in generation of power. Therefore, the generators are allowed to have a regulated return on investment over and above the recovery of the cost incurred by them, through tariff over a period of the plant life. Therefore, when admittedly no consideration has been made pertaining to the cost incurred by any entity towards setting up IMSW unit, the sole consideration flowing under the CA ought not to be deprived to the concessionaire.

viii. It is stated that additionally irrespective of the agreements being business agreements, the WTE plants have been recognized to be need of the hour, in view of their environmentally benign nature. The Commission is also under the obligation to 'promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity' under Section 86 (1) (e) of the Act, 2003.

9. The Commission has heard the parties and also considered the material available to it. The submissions made by the parties on various dates are extracted for ready reference.

Record of proceedings dated 31.01.2022:

"… … This review petition is filed seeking review of the order of the Commission. It also filed two applications for interim orders and expeditious hearing of the review petition. The interlocutory application for expeditious hearing may be disposed of in view of the listing of the matter. The review petition is connected to the other matter in the list in O.P.No.1 of 2022 pertaining to M/s Hyderabad MSW Energy Solutions Private Limited. The matter may be taken up as and when the said O.P.is taken up for hearing. Accordingly, the matter is adjourned. The interlocutory application for expeditious hearing is allowed."

Record of proceedings dated 11.04.2022:

"… … The counsel for review petitioner stated that the respondent in the original petition has filed its counter affidavit in O.P.No.1 of 2022 and stated that the review petition is pending, therefore, a rejoinder is to be filed in the said petition.

As such, this matter may be adjourned by three weeks. It may be taken up with the O.P.No.1 of 2022. Accordingly, the matter is adjourned."

Record of proceedings dated 02.05.2022:

The counsel for review petitioner stated that the petition is filed seeking review of the order dated 18.04.2020 determining the generic tariff in respect of RDF based projects. The main issue for seeking review is the condition imposed in the order relating to tipping fee that is paid by Grater Hyderabad Municipal Corporation (GHMC) to be reimbursed to the distribution company. He quoted extensively from the order passed by the Commission, the concession agreement entered by it with the GHMC and the applicable provisions under the Electricity Act, 2003 (Act, 2003).

The counsel for petitioner stated that the petitioner had established separate special purpose vehicle (SPV) to undertake generation of electricity from the waste energy plant to be established by the SPV. The concession agreement allowed for disposal of the solid waste and consequent sale of products to any one at any price including power generated by the petitioner through SPV. He stated that for undertaking production of RDF it collects waste from the various parts of the city Hyderabad and undertakes process of the same by converting it to various products. The collection of waste is undertaken in three stages that is primary collection, secondary collection and transformation to various products including RDF. For collection and disposal of the waste generated by the GHMC, it is paying a fee known as 'tipping fee' and this fee is being paid by GHMC for the last ten years approximately. The GHMC itself should have removed the waste and disposed of the same scientifically, but due to its inability it has entrusted the task to the petitioner. Therefore, it is paying the said fee.

The petitioner in the process of producing several products has also established a power generating unit as mentioned earlier in the form of SPV. The energy generated by the said SPV is being supplied to DISCOM. The SPV has separately entered into an agreement for supply of power. The generation of electricity has taken place only in the past two years, whereas production RDF was much earlier.

The counsel for petitioner stated that the Commission had passed orders determining the tariff for RDF based projects and included the condition that the tipping fee paid by GHMC shall be reimbursed to the DISCOM. The review petitioner had obtained loans on the basis of the concession agreement and payment of tipping fee only. The tipping fee which is paid to the review petitioner by the GHMC cannot be part of the tariff as the said amount is the basis of viability of the RDF producer, as the amount is considered by the lenders for extending huge amount as loan. The tipping fee cannot be treated as part of tariff.

The counsel for petitioner relied on the preamble to the Act, 2003, section 61 and 86(1)(a) & (e) thereof. It is his case that the tipping fee cannot be treated as production cost of generation of electricity as the said amount is not being paid to the generator but to the review petitioner, who is producing RDF, which is one of the products of waste that is being collected and processed. He also explained as to what is meant by tipping fee. The loan component as far as generation of power is not related to the loan component availed by the review petitioner. It is his case that the Act, 2003 mandates recovery of charges for

generation and supply of electricity economically to the consumers, but at the same time also mandates promotion of renewable sources of energy by following environmentally benign policies.

The counsel for petitioner would endeavour to submit that the Commission included tipping fee as part of the tariff and also imposed a condition of reimbursing the same to the licensee. However, the licensee is seeking to recover the same upfront even without the same being paid by the GHMC. There will be time log between payment by GHMC and reimbursement by the SPV of the review petitioner. The licensee is estopped from invoking the provisions of the PPA, which is the subject matter of the other petition before the Commission in O.P.No.1 of 2022. The Commission is required to re-examine the said aspect and modify the order suitably so as to avoid the burden of tipping fee on the generator and consequently on the petitioner. The tipping fee itself is not a cost involved in the production of electricity.

The counsel for petitioner stated that the Commission may consider admitting the review petition by condoning the delay in the filing review petition and issue notice to the respondent. The Commission considered the submission with regard to condoning the delay in filing the review petition and is of the view that the delay can be condoned in view of the orders of the Hon'ble Supreme Court extending the period of limitation in filing the review petition. Accordingly the application filed for condoning the delay in filing the review petition is allowed.

The Commission also considered the submission, but it is appropriate to admit the review petition. Accordingly, the same is admitted, issue notice to the respondent. The matter is adjourned and the respondent shall file its counter affidavit or submissions in the matter on or before 30.05.2022 duly serving a copy of the same to the review petitioner either physically or through email. The review petitioner is at liberty to file its rejoinder, if any on or before 15.06.2022 duly serving a copy of the same to the respondent either physically or through email.

<u>Record of proceedings dated 22.08.2022:</u>

"… … The counsel for review petitioner stated that the review petition has been admitted by the Commission earlier and the respondent has also filed their counter affidavit in the matter. Now the review petitioner is filing rejoinder in the matter and it is submitted in the office of the Commission today. The representative of the respondent stated that as the rejoinder has been filed today, the matter may be taken on any other date and a copy of the rejoinder may be made available for the respondent. In view of the status of the pleadings and the submissions of the parties, the Commission is inclined to adjourn the matter, accordingly the matter is adjourned."

<u>Record of proceedings dated 12.09.2022:</u>

"… … The advocate representing the counsel for review petitioner stated that the review petition is filed seeking review of the order dated 18.04.2020 determining generic tariff in respect of RDF based waste to energy projects. The issue is with regard to inclusion of tipping fee in the tariff as determined by the Commission.

The advocate representing the counsel for review petitioner stated that the order of the Commission needs review as is available to it under Section 94 (1) of the Act, 2003 read with Order XLVII Rule 1 of Code of Civil Procedure, 1908.

The ingredients of review are that the order under review should have any typographical error, arithmetical error or material that has been discovered by the parties subsequent to the passing of order, which if made available would make a difference in the decision of the authority. In this review petition, the main aspect that is to be considered is with regard to the material that has not been considered and as such, the order requires the review at the hands of the Commission itself.

The advocate representing the counsel for review petitioner stated that the review petitioner had originally entered into a concession agreement as early as 2008 but the GHMC and subsequently established the project of collection, transportation and conversion of the waste generated in the limits of GHMC. The review petitioner, who is the concessionaire of the project, has been established based on the viability gap funding of the Government of India and the state government. The concession agreement provided for sale of the products derived by the review petitioner after conversion of the material collected by it in the open market did not specifically provider for undertaking generation of electricity either itself or through any third party.

The advocate representing the counsel for review petitioner explained the mechanism of viability gap funding, the detailed project report and several committee report on the aspect of tipping fee. It is his case that tipping fee, which has been made part of the tariff, cannot be treated as an expenditure or income of any activity undertaken by the review petitioner, as such, payment is with reference to the concession provided by the GHMC towards safeguarding the environment and cannot be said to be a component of any activity undertaken by the petitioner.

The advocate representing the counsel for review petitioner stated that the concession agreement entered by the GHMC with the petitioner provided for liberty to sell such products as may be derived by the review petitioner from the processing of solid waste collected by it. However, in order to create an environment friendly situation, the review petitioner has also established two other companies by holding substantial stake in them relating to sale of products derived from the solid wate as also using such products to generate electricity. There was no binding commitment under the concession agreement for the petitioner to establish a power project or for that matter for any other activity. Considering environmental policies and the need to undertake such projects only, the review petitioner ventured to undertake generation of electricity from the waste to energy concept by converting the waste collected by it from GHMC.

The advocate representing the counsel for review petitioner stated that in its preliminary report, it has been observed by GHMC that solid waste recovered would fetch about Rs.2,800/- per tonne in the year 2008 itself, but the Commission while determining the generic tariff for generation of power has only considered Rs.l,800/- in the year 2020. As such, such material collected by the review petitioner would have to be sold to the power company at concessional rate and such sale would constitute a lossmaking proposition. Further, adding tipping fee as a part of tariff would result in the concessionaire being fastened with double penalty.

The advocate representing the counsel for review petitioner stated that the concession agreement did not specifically provide for what is to be done with

the processed and converted solid waste and left it open to the concessionaire to act in a commercial manner. However, the concessionaire, keeping in mind the necessity of effective usage of the products derived from solid wate, has undertaken power generation, which otherwise, could have been sold in the open market at a higher cost to the industry involved in manufacturing of cement etc. The concession agreement itself provided that the state was relieving itself from the burden of maintaining the environmental issues and handing over the same to persons and organizations like the review petitioner.

The advocate representing the counsel for review petitioner stated that there are several reports of the committees constituted by the Government of India to GHMC, which have specifically dealt with the aspect of tipping fee. He has quoted and narrated extensively the findings for which documents have been filed along with the review petition. He submitted that the Commission may consider reviewing the order on the aspect of tipping fee as said charge is neither a fixed cost for any activity nor an O and M income derived by the review petitioner or any other entity, but it is a cost paid by the GHMC or any other authority to relieve themselves from the waste generated and protect the environment.

The representative of the respondent stated that the present review petition is not maintainable as no ground is made out to satisfy the ingredients of the review as provided in law of the order passed by the Commission and sought by the review petitioner. The contentions and submissions made by the counsel for review petitioner in support of the review petition do not constitute any ground for review. The submissions made at best could be ground for appeal before the Hon'ble ATE. The Commission cannot and would not be required to substitute or substantiate its findings to suit the needs of the review petitioner. The review petition was itself filed belatedly, but as the Commission has entertained the same, this respondent is only opposing the contentions raised thereof. The review petitioner is seeking to set at naught an order which has survived for merely two and half years. If at all, the Commissions intends to allow the review petition, it will be burdened with the exercise of redoing the tariff determination duly following the procedure to be adopted for tariff determination of tariff as was originally done. Therefore, the Commission may not venture to undertake such an exercise at this point of time and relegate the review petitioner to pursue such remedies as may be legally available to it. If the Commission proceeds to undertake determination of tariff afresh, there is a possibility of the DISCOMs losing the viable tariff determined by the Commission on their part. Hence, he requested for dismissal of the review petition.

The advocate representing the counsel for review petitioner stated that the contentions and submissions of the respondent are neither appropriate nor relevant to the context of issue in the review petition. No doubt, the review petition has its own limitations, yet as the original order came to be passed on erroneous consideration, it deserves to be reviewed even if it amounts to redoing the exercise of the determination of tariff. Also, it is relevant to submit that the Hon'ble Supreme Court elucidated on what constitutes 'sufficient reason' in the provision for review under XLVII Rule 1 CPC in the matter of Board of Control for Cricket in India Vs. Netaji Cricket Club reported in 2005 (4) SCC 741. Therefore, there is good and sufficient reason for the Commission to

entertain the review petition and to review the order passed by it to the limited extent of including tipping fee in the tariff. Hence, review petition may be considered and allowed in favour of the review petitioner. Having heard the submissions of the parties, the matter is reserved for orders."

10. Alongside the contentions of the review petitioner, the respondent has also raised certain issues with regard to maintainability of the review petition as also entertaining the same beyond the time stipulated for filing the same.

11. Insofar as the delay in filing the review petition is concerned, the Commission is inclined to accept the contentions of the review petitioner and reject the submissions of the respondent for the reasons that the decision of the Commission occurred during the pandemic situation of COVID–19. The Hon'ble Supreme Court had at first instance extended the limitation under all enactments and rules upto 02.10.2021 and later on by its order dated 28.02.2022 extended the limitation upto the said date and granted ninety (90) days grace period from thereon. Thus, the review petition is maintainable, as if it is filed within time, even though, the Conduct of Business Regulation of the Commission stipulates specific period for filing as also the period for which the Commission can condone the delay. Thus, the Interlocutory Application (I.A.No.38 of 2022) for delay is ordered accordingly.

12. The present review petition is with regard to only one aspect that is – whether the review petition is entertainable or not?

13. The aspect of review of an order is provided under the Civil Procedure Code,1908. The relevant provision has been extracted specifically by the review petitioner and the respondent in their pleadings. The ingredients of the review have been extensively canvassed by both the parties to highlight the requirement of the review as also non-maintainability of the review on the ground of the limitation.

14. Insofar as, the aspect of the review is concerned the following extracts of judgments referred to below, would enlighten and throw light as to how and in what circumstances, a review is required to be undertaken or to be entertained. The considered judgments are noticed below:

Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh

O. XLVII.r.1(1) of the Civil Procedure Code permits an application for review being filed "*from a decree or order from which an appeal is allowed but from which no appeal has been preferred."* In the present

case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this Court and therefore the terms of O. XLVII.r.1(1) did not stand in the way of the petition for review being entertained. Learned Counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting the petition for review on that ground. The crucial date for determining whether or not the 'terms of O. XLVII.r.1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.

… …

What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "*error apparent on the face of the record*". The fact that on the earlier occasion the court held on an 'identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "*error apparent*". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

Parsion Devi And Ors. Vs. Sumitri Devi And Ors.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule I CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "*an appeal in disguise*".

10. Considered in the light of this settled position we find that Sharma, J. clearly over-stepped the jurisdiction vested in the court under Order 47 Rule 1 CPC. The observations of Sharma, J. that "accordingly, the order in question is reviewed and it is held that the decree in question was of composite nature wherein both mandatory and prohibitory injunctions were provided" and as such the case was covered by Article 182 and

not Article 181, cannot be said to fall within the scope of Order 47 Rule 1 CPC. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction.

Haryana State Industrial Development Corporation Ltd. Vs Mawasi & Ors. etc.

10. The aforesaid provisions have been interpreted in several cases. We shall notice some of them. In S. Nagaraj v. State of Karnataka 1993 Supp (4) SCC 595, this Court referred to the judgments in Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai AIR 1941 FC 1 and Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 Moo PC 117 and observed:

> "Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In *Raja Prithwi Chand Lal Choudhury Vs. Sukhraj Rai* the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh that an order made by the Court was final and could not be altered:
>
> "... … nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in. … … The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority.
>
> The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies." Basis for exercise of the power was stated in the same decision as under:
>
> "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard." Rectification of an order thus stems from the

fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court.

The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

11. In Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526, the three-Judge Bench referred to the provisions of the Travancore Code of Civil Procedure, which was similar to Order 47 Rule 1 CPC and observed:

"It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.

It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason.

It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". See Chhajju Ram v. Neki AIR 1922 PC 12 (D). This conclusion was reiterated by the Judicial Committee in Bisheshwar Pratap Sahi v. Parath Nath AIR 1934 PC 213 (E) and was adopted by on Federal Court in Hari Shankar Pal v. Anath Nath Mitter AIR 1949 FC 106 at pp. 110, 111 (F). Learned counsel appearing in support

of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto."

12. In Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174, another three-Judge Bench reiterated that the power of review is not analogous to the appellate power and observed:

> "A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

13. In Aribam Tuleshwar Sharma v. Aibam Pishak Sharma (1979) 4 SCC 389, this Court answered in affirmative the question whether the High Court can review an order passed under Article 226 of the Constitution and proceeded to observe:

> "But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

14. In Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170, the Court considered as to what can be characterised as an error apparent on the fact of the record and observed:

> "… … it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:
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> "An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions

can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

15. *In Parsion Devi Vs. Sumitri Devi* (1997) 8 SCC 715, the Court observed:

> "An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC. … … A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

16. In Lily Thomas v. Union of India (2000) 6 SCC 224, R.P. Sethi, J., who concurred with S. Saghir Ahmad, J., summarised the scope of the power of review in the following words:

> "Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised."

17. In *Haridas Das Vs. Usha Rani Banik* (2006) 4 SCC 78, the Court observed:

> "The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict."

18. In *State of West Bengal Vs. Kamal Sengupta* (2008) 8 SCC 612, the Court considered the question whether a Tribunal established under the Administrative Tribunals Act, 1985 can review its decision, referred to Section 22(3) of that Act, some of the judicial precedents and observed:

> "At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex

debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

The term "*mistake or error apparent*" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

19. In the light of the propositions laid down in the aforementioned judgments, we shall now examine whether the petitioner has succeeded in making out a case for exercise of power by this Court under Article 137 of the Constitution read with Order 47 Rule 1 CPC. This consideration needs to be prefaced with an observation that the petitioner has not offered any explanation as to why it did not lead any evidence before the Reference Court to show that sale deed Exhibit P1 was not a bona fide transaction and the vendee had paid unusually high price for extraneous reasons. The parties had produced several sale deeds, majority of which revealed that the price of similar parcels of land varied from Rs.6 to 7 lakhs per acre.

… … "

15. The respondent has extensively relied on the provisions of the review in the Civil Procedure Code, 1908 as also several decisions of the Hon'ble Supreme Court, some of which are extracted supra. Taking into consideration the submissions of the respondent, the review petition may not be maintainable as the review petitioner has not made out any case to satisfy the ingredients of the review. However, the review petitioner's contentions have not been answered by the respondent except stating that the reasons analysed by the review petitioner do not constitute for review. Therefore, the Commission does not find any support in the contentions of the respondent to take decision in the matter.

16. It has been contended by the DISCOM that the review grounds are raised by discussing the factual matrix. Instead of contesting on the sustainability of the grounds that were considered under review, the respondent merely addressed them as if it is replying to the facts mentioned in the original proceedings. In those circumstances,

the Commission is not inclined to rely on the contentions opposing the review petition to buttress the argument of the review petitioner.

17. Based on the ratios laid down in the above cited judgements, the Commission inclined to entertain the instance review petition.

18. This review petition has been filed on 14.12.2021 and on the same day M/s Hyderabad MSW Energy Solutions Private Limited which is a Special Purpose Company (SPC) formed by the review petitioner has also filed an original petition with a prayer for quashing the impugned notice dated 16.07.2021 issued by TSSPDCL under which TSSPDCL sought reimbursement of tipping fee. That petition has been numbered as O.P.No.1 of 2022 and the present review petition and that O.P.No.1 of 2022 were heard together since both the matters are connected.

19. The main grievance of the review petitioner against the order of the Commission dated 18.04.2020, is with regard to consideration of tipping fee as part of the tariff and for reimbursement of the same to the respondent upon it being paid by the competent authority.

20. That the contention of error apparent on the face of the record would constitute that error which could directly be visible and not on verification and thorough examination of the order. In the instant case as could be seen, there is nothing material that is shown to be error, except stating that the issue of tipping fee has been refused indirectly by the intent of the reasoning set out in the order. As such, it does not constitute a ground for reviewing the order.

21. The contention raised by the review petitioner that the Commission had overlooked its own authority and jurisdiction is not based on any specific provision of the Act, 2003 as also, any other law for the time being in force, which has imposed any restriction on the powers and functions of the Commission in respect of such other activities. The review petitioner did not specifically show to the Commission as to what constitutes a specific power which would denude the Commission of its authority totally or partially, the authority to impose reasonable restrictions or include such parts in the tariff. In fact, the preamble of the Act, 2003 would emphasize on the Commission to adhere to environmentally benign policies. The review petitioner at first instance neither contended nor placed on record all these aspects relating to the issue of tipping

fee which have now been placed on record. Thus, it cannot be said that the Commission had either overlooked its own jurisdiction or misdirected itself.

22. The review petitioner sought to rely and explain various provisions of the CA as also the PPA to claim that it is entitled to the tipping fee which cannot be refunded to the respondent. This contention of the review petitioner, at this stage, seeking review amounts to reopen the whole exercise of determination of the tariff itself. This is not permissible under law on a petition for review of the order.

23. The review petitioner had not placed on record nor explained the need of paying tipping fee and thus, the Commission had rightly recorded its findings based on the material available on record. At the same time, the Commission was conscious of the fact that the tipping fee should be reimbursed to the Distribution Licensee by the generator on receipt of the same under the provisions of its Concession Agreement and the impact of Tipping Fee cannot be directed to be deducted upfront in the tariff as there may be a time gap between the developer's claim for Tipping Fee and the actual receipt from the authorities and the generator should not be subject to financial stress during this period. That way the Commission had taken the care to safeguard the interest of the review petitioner to that extent by removing the burden which would occur upfront and reduce the tariff received by the generator. Thus, the review petitioner has no case to allege that the Commission had not considered the issue at all insofar as reimbursement of tipping fee or that it had considered erroneously.

24. It is trite to state that the submission of no reasoning in the original order with regard to the contentions of the review petitioner stated through objections, is misconceived for the reason that whatever submissions have been made as part of the objections filed by the review petitioner and others have been considered effectively. Therefore, the review petitioner cannot seek for the review of the order on its surmises and conjunctures.

25. The review petitioner sought to allege that the Commission had omitted to follow Section 86(3) of the Act, 2003 in deciding the matter by exercising transparency in its actions. It is uncalled for on the part of the review petitioner that there was no public consultation in the matter and the material relevant for the purpose had not been considered. It is fact that soon after the public notice was initiated by the Commission,

there was a big health emergency in the form of pandemic and even in that situation, the Commission proceeded to decide the matter through public consultation process, in order to facilitate appropriate tariff to the RDF based WTE power projects. In that scenario the averments set out in the review petition stand no ground requiring the Commission to undertake review of the order in the original proceedings.

26. Reference has been invited to the observations of the Hon'ble Supreme Court in the matter of *Cellular Operators Assn. of India Vs. TRAI*, reported in 2016 (7) SCC 703. The paragraph extracted from this judgment had emphatically considered and observed the actions or inactions of any authority undertaking legislative exercise more particularly in subordinate legislation and it does not consider or alleviate the need for transparency in respect of judicial proceedings but it is common knowledge that such transparency has to be followed axiomatically. Hence, the said judgment has no bearing on this case and would not support the contention of the review.

27. The contention of the review petitioner the tipping fee may be earned by a company or a firm as a part of its CA. Deriving the same pursuant to CA that tipping fee would not constitute an income out of generation, may also be correct in general parlance. However, it has to be stated here that Section 86(1)(a) & (b) read with Section 62 of the Act, 2003, the Commission has to and is required to factor all the components of generation including any external receipts that would have bearing on the tariff while finalizing the same. Given this principle, the action of the Commission in this matter is appropriate in terms of the provisions mentioned above. The Commission had considered all the aspects including reasonable return and sustainability of the project having RDF process and CA as its back support, as well as such tariff should not burdened on the end consumer. If the above aspects are taken into consideration, there is no case for the review petitioner to seek review of the order of the Commission.

28. The review petitioner sought to place reliance on several reports and findings of various authorities under various schemes and policies extensively to claim the benefit of tipping fee. The Commission has to point out that all these aspects did not find place in the submissions at first instance and the review petitioner in order to extract and extrapolate its case, has brought on record the material to succeed in the

review petition. However, considering the law that is set out in the case of review and the ingredients of review, this contention is not falling under the ambit of the review.

29. The contention of the review petitioner that the Act, 2003 provides for promotional and policy measures as also requiring reasonable recovery of cost of generation, is sine-qua-non to generation of power. Keeping this aspect in view only, the Commission had considered the issue on a holistic approach and required review petitioner to reimburse the same to the respondent as it would amount to a double recovery. Moreover, the Commission had not deviated from the provisions of the Act, 2003 including but not limited to encouraging the investment in waste to energy project as also ensuring reasonable return which is mandated to be done by the Commission. In the premise of the above discussion, there is no case for the review petitioner to seek modification of the order passed by the Commission in any context.

30. The review petitioner had referred to the decision of the National Green Tribunal in the matter of Almitra H. Patel vs Union of India and Ors. (O.A.No.199 of 2014). Such a reference is only of persuasive value to this Commission as the decision rendered therein was in the context of environmental protection and not in the context of generation of power. Thus, the contention of the review petitioner is not tenable.

31. The review petitioner raised the issue of contravention of CA as also the aspect of business efficacy. Contravention of CA is neither within the fort of the Commission nor it can adjudicate on the same. Further, the review petitioner cannot allege that the adjudicating authority itself had contravened the CA. In the absence of any pleading as to or otherwise of the understanding of the CA and the power of the Commission, it is uncalled on the part of the review petitioner to set forth this issue as one of the reasons seeking review of the order of the Commission. Also, the review petitioner sought to rely on the decision of the Hon'ble Supreme Court in the matter of *Satya Jain Vs. Anis Ahmed Rushdie*, 2013 (8) SCC 131 on the aspect of business efficacy. It is not clear from the submissions of the review petitioner that the intention of this submission is with regard to the review petitioner implementing the CA or the generator, who is producing energy. Coupled with the contention of contravention CA, the argument set forth by the review petitioner would not inspire the review being undertaken by the Commission, due to mutually contradicting submissions. It has not made out any case on both the counts.

32. The review petitioner had drawn parallels to the determination of cost of fuel in the CA to that of determination in tariff and to highlight the differentiation shown contrary to legitimate contractual consideration vested in the CA. Suffice it to state that the CA was formulated in the year 2010 and the tariff determination exercise was undertaken in the year 2020 and that too by different authorities by taking into account different parameters that waive with the fuel cost. The review petitioner cannot allege and canvas that what is considered by different authority should be the yardstick for another authority which is exercising its statutory right to examine and fix the tariff for generation and not for the activities mentioned in the CA. As this was not raised at the first instance this cannot be a ground for review.

33. The review petitioner cannot allege depriving of the tipping fee for reason that it is neither a generator nor a trader of the generated energy to get affected by the decision of the Commission. Moreover, even though the Commission is bestowed with the authority to encourage renewable sources of supply, it does not mean that it has no authority to do prudent check of the parameters that affect the generation and the cost of generation that is passed on to the end consumer.

34. The review petitioner stated that the tariff determined by the Commission should ensure reasonable return under the Act 2003. The Commission had considered reasonable return taking into account all the relevant factors. There is no specific contention satisfying the ingredients of review in determination of tariff. In the absence of the same, the review petitioner has not made out any case.

35. The review petitioner sought to rely on the provisions of Act 2003 and regulations made by CERC. It is to be stated emphatically that the word ‘guided’ is used in Section 61 of the Act 2003. The word guided means it is only a guidance and does not constitute a binding on the Commission as is the case of ‘shall’ or ‘direction’. As such, any rule, regulation or notification so notified by the CERC would only constitute a persuasive value and nothing more. This Commission is at liberty to follow or not to follow the same. Inasmuch as these aspects were not part and parcel of the original submissions and thus the same cannot be a ground for review and as such cannot be considered for undertaking a review.

36. The review petitioner relied on the provisions of the Act, 2003 with regard to rewarding efficiency and performance. It is worth mentioning that the Commission has determined the tariff by placing reasonable return without affecting the generation or burdening the end consumer. Further, such reimbursement has not been made upfront but as and when received. That way the review petitioner is sufficiently safeguarded and it does not constitute any ground for review.

37. Reliance is placed by the review petitioner on the provisions of the Act, 2003 relating to recovery of cost of electricity in a reasonable manner and promotion of renewable sources, it is appropriate to state that the Commission while undertaking determination of tariff had effectively considered these aspects. The order effectively projects the recovery of cost of generation as also encourages of renewable sources of energy as that of the review petitioner. The review petitioner cannot in the guise of seeking review of the original order is attempting to strangulate the Commission that it had not considered certain aspects and that therefore, it should review its order, which is not correct.

38. The review petitioner, while contending the fact that it would derive the income from by products, would seek to emphasize that the tipping fee as directed to be reimbursed, would amount to bringing the CA to unviable position. Also, it is the contention of the review petitioner that such condition would denude the likely investment as the investor would get dissuaded. These aspects have no bearing on the exercise undertaken to determine the tariff for power generation. Therefore, it is not appropriate for the review petitioner to seek review on this ground also.

39. The contention of the review petitioner that the aspect of overstepping the jurisdiction as conferred on the Commission under the Act, 2003 and directing the reimbursement of the tipping fee is misplaced in view of the fact that the governing statute of the Act, 2003 does not place any restriction on taking into account or not taking into account certain aspects, which may or may not be within the ambit of power generation. However, this Commission is not precluded from safeguarding the interest of the consumer to the extent that is permitted under the law. In that direction, if certain conditions have been imposed, such conditions cannot be said to be a deviation from the powers that have been vested in the Commission. Therefore, the review petitioner cannot, without showing what had been violated under the Act, 2003, allege that the

Commission had overstepped its jurisdiction and that the Commission should review the order passed while determining the tariff. This contention of review petitioner is not tenable.

40. The review petitioner sought to state that the review petition is maintainable as it has raised new and important points which are discovered subsequent to the passing of the order and that there are sufficient reason to entertain the review, as there is an error apparent on the face of the record. The contentions now raised would not show that there is any aspect which is not considered by the Commission in the original order and as it had failed to place on record such required information to enable the Commission to determine the tariff, it cannot now seek to take umbrage under the ingredients of review to say that the order passed by the Commission is erroneous.

41. Having discussed on various contentions of both the parties, the Commission finds that the power of review as provided in the Act, 2003 is coextensive with that of a Civil Court exercising the review power under the Order XLVII Rule 1 of C.P.C. In this regard, the Commission is inclined to follow the decisions of rendered by the Hon'ble Supreme Court in the matter of *Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semiconductor Power Company (India) Private Limited* reported in 2017 (16) SCC 498 *and Board of Control for Cricket in India Vs. Netaji Cricket Club* reported in 2005 (4) SCC 741. However, as stated extensively by the Commission, the review petitioner has not set out any of the ingredients which the Hon'ble Supreme Court had considered for undertaking review in the above said decisions. Even though, several contentions are raised by the review petitioner, which are discussed in the earlier paragraphs as not satisfying the grounds of review, the Commission is constrained that it will not be able to apply the principles set out in the above said judgments of the Hon'ble Supreme Court as extracted above in favour of the review petitioner. Suffice it to state that the Commission had extensively considered the submissions in the original proceedings to the extent it has been submitted by the review petitioner and its subsidiary and other stakeholders.

42. Viewing from any angle, the contention of the review petitioner that there is an error apparent on the face of the record, that the business efficacy has been affected or that there are sufficient reasons for revising the order, cannot be accepted. The review petitioner has not made out any case duly satisfying the ingredients of review

Thus, the review petitioner has not shown any ground to undertake a review of the order passed by this Commission.

43. Having considered elaborately the submissions of both the parties, the Commission is not inclined to entertain the review due to lack of merits. Accordingly, the review petition is dismissed and the parties are allowed to bear their own costs.

44. Before parting with this case, it is the duty of the Commission to remind itself that the Commission has already refused to entertain a review on the very same order by the respondent and another. Having done so, now entertaining the review petition filed by the review petitioner would only amount to negating the view taken earlier. Thus, also the review cannot be entertained. Thus, the conclusion arrived at in the preceding paragraph is appropriate.

45. Since the review petition is being refused and as there will be no equities created, the Interlocutory Application (I.A.No.39 of 2022) filed to order the change the title of the case, in view of the change of the name review petitioner, is unnecessary at this stage and is accordingly closed.

This order is corrected and signed on this the 28th day of June, 2023.

Sd/-	**Sd/-**	**Sd/-**
(BANDARU KRISHNAIAH)	(M. D. MANOHAR RAJU)	(T. SRIRANGA RAO)
MEMBER	MEMBER	CHAIRMAN

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