

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No: 63/MP/2020**

**Coram:  
Shri Jishnu Barua, Chairperson  
Shri Ramesh Babu V, Member  
Shri Harish Dudani, Member**

**Date of Order: 24<sup>th</sup> February, 2025**

**IN THE MATTER OF:**

Petition under Section 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 for claiming extension of Scheduled Delivery Date on account of force majeure events falling within the scope of Article(s) 3.1, 3.4.3, 4.7 and 9 of the Power Purchase Agreement dated 23.08.2013 read with the Addendum dated 10.12.2013 executed between the Petitioner and the Respondent No. 1/ TANGEDCO.

**AND**

**IN THE MATTER OF:**

**Bharat Aluminium Company Limited,  
Balco Nagar, Korba-495684  
Chhattisgarh**

**...PETITIONER**

**VERSUS**

**1. Tamil Nadu Generation and Distribution Corporation Limited,  
NPKRR Malgai, 6<sup>th</sup> Floor,  
Eastern Wing, 144 Anna Salai,  
Chennai-600002  
Tamil Nadu**

**2. Kerala State Electricity Board,  
Vydyuthi Bhavanam,  
Pattom, Thiruvananthapuram-695004  
Kerala**

**3. Chhattisgarh State Power Distribution Company Limited,  
Vidyut Sewa Bhawan,  
4<sup>th</sup> Floor, Dangania, Raipur-492 013  
Chhattisgarh**

**...RESPONDENTS**

**Parties Present:**

Shri Hemant Singh, Advocate, BALCO  
Shri Chetan Garg, Advocate, BALCO  
Ms. Alchi Thapliyal, Advocate, BALCO



**ORDER**

The Petitioner, Bharat Aluminum Company Limited (BALCO), has filed the present Petition under Sections 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act'), read with Article(s) 3.1, 3.4.3, 4.7 and 9.0 of the Power Purchase Agreement dated 23.8.2013 and read with the Addendum dated 10.12.2013 executed between the Petitioner and the Respondent No. 1/ TANGEDCO, seeking the following reliefs:

*“(a) Declare that the delay in grant and operationalisation of Long-Term Access is a Force Majeure event in terms of Article(s) 3, 4 and 9 of the Power Purchase Agreement dated 23.08.2013 read with the Addendum dated 10.12.2013;*

*(b) Hold and declare that the Revised Schedule Delivery Date is 03.09.2015 and 05.10.2015 for the first 100 MW; and 19.12.2015 for the second 100 MW in terms of Article 4.1.1 of the PPA read with the Addendum;*

*(c) Hold and declare that the 1<sup>st</sup> contract year under the PPA has commenced from 03.09.2015 and 05.10.2015 for the first 100 MW; and 19.12.2015 for the second 100 MW, on which the Petitioner started supplying the Aggregate Contracted Capacity to the Respondent No. 1 in terms of the PPA read with the Addendum;*

*(d) Direct the Respondent No. 1/ TANGEDCO to make payments of the power supplied by the Petitioner in terms of the Revised Scheduled Delivery Date; and*

*(e) Pass any such other or further orders as this Commission deems fit in the facts and circumstances of the case.”*

**Background**

2. The Petitioner, Bharat Aluminum Company Limited, incorporated under the Companies Act, 1956, operates a generating plant in Chhattisgarh, India, supplying power to multiple States through the PSA/PPAs executed with TANGEDCO and KSEB, and a long-term PPA executed with CSPDCL for 5% of the installed capacity.



The details of the PPA executed by the Petitioner are as under:

<b>Date of execution of PPA/ Addendum/ PSA</b>	<b>Procurer</b>	<b>Quantum</b>	<b>Tenure</b>
23.08.2013/ 10.12.2013	Tamil Nadu Generation and Distribution Corporation Ltd.	200 MW RTC Power	15 years (till 30.09.2028)
26.12.2014	Kerala State Electricity Board	100 MW RTC Power	<b>25 years</b> (from 01.10.2017 to 30.09.2042)
19.01.2013	Chhattisgarh State Power Distribution Company Limited	Power equivalent to 5% of the Installed Capacity of 1200 MW of the Petitioner	Life of Plant

3. Respondent Nos. 1, 2, and 3 are distribution licensees for Tamil Nadu, Kerala, and Chhattisgarh, respectively, providing electricity distribution and retail services in the States of Tamil Nadu, Kerala, and Chhattisgarh.

4. Pursuant to the Case-1 competitive bidding, the Petitioner and TANGEDCO signed the PPA on 23.08.2013 for the supply of the 100MW (net) capacity for 15 years (1.2.2014 to 30.09.2028) at Rs 4.91 levelised tariff with Delivery Date as 1.2.2014. Through Addendum No.1 to the said PPA on 10.12.2013, an additional 100 MW with a Scheduled Delivery date of 1.6.2014 was procured.

5. On 23.11.2013, the Petitioner requested PGCIL to change the target region in its long-term PPA for a consolidated 200 MW power quantum with TANGEDCO from the Northern and Western Region to the Southern Region (SR) as it already had a (Bulk Purchase Transmission Agreement) BPTA dated 24.02.2010 for 200 MW power with target regions being Northern and Western Region. However, PGCIL informed the Petitioner that the LTA can only be granted after commissioning the Solapur-Raichur 765 kV corridor, and after six months of Southern Region



synchronization with the NEW Grid, i.e., on 01.08.2014.

6. On 01.09.2015 and 01.10.2015, the LTA for the 1<sup>st</sup> 100 MW was operationalized by PGCIL, and the Petitioner started evacuating the same from 03.09.2015 (56 MW) and 05.10.2015 (44 MW). Thereafter, the 2<sup>nd</sup> 100 MW was operationalized by PGCIL with effect from 16.12.2015, and the Petitioner started scheduling the said power from 19.12.2015.

7. According to the Petitioner, due to PGCIL's delay in acknowledging the Letter of Credit, the Petitioner was unable to supply the Aggregate Contracted Capacity on 16.12.2015. SRLDC's inability to provide the necessary corridor further delayed the supply of power to Respondent No. 1/ TANGEDCO, who was informed about this issue on 17.12.2015. SRLDC confirmed in a letter dated 13.01.2016 that the power supply corridor was only accessible from 19.12.2015 onwards. Accordingly, the Petitioner has sought an extension of the Scheduled Delivery Date (SDD) due to Force Majeure events in the PPA.

### **Submissions of the Petitioner**

8. The Petitioner has mainly submitted as under:

(a) The commencement of power supply is scheduled according to Clause 4.1.1 and 4.2.1(b) of the PPA, read with the provisions of the Addendum dated 10.12.2013.

(b) As per Article 1.1 of the PPA, "Aggregate Contracted Capacity" with respect to the seller shall mean the aggregate capacity in 100 MW contracted with the Procurer for supply at the Interconnection Point from the Power Station's Net Capacity.

(c) As per the addendum to the PPA, Contracted Capacity shall mean the Aggregated Contracted Capacity: 100/200 MW. Therefore, the aggregate contracted capacity became 200 MW.



(d) The obligation to supply 200 MW of Aggregated Contracted Capacity under Article 4.1 of the PPA is subject to force majeure events, as per Article 3.1.1

(e) As per Article 4.2.1 read with Article 3.1.1, the Petitioner shall obtain transmission access for the Aggregate Contracted Capacity delivery by 01.02.2014 for the 1st 100 MW and 01.06.2014 for the 2nd 100 MW, execute necessary agreements, and provide a copy to the Respondent.

(f) Article 9.3 of the PPA defines force majeure, while Clause 9.2 defines the party affected, and Article 9.7 outlines relief options for affected parties.

(g) The PPA not only contemplated the events preventing the seller/ procurer(s) from performing their obligations as force majeure but also those affecting the designated CTU/ STU in granting the transmission access as force majeure events in terms of the PPA. Article 9.3.1 explicitly states that the non-availability of open access is considered a Force Majeure.

(h) The Petitioner submitted that Article 4.7.1 of the PPA allows for an extension of the Scheduled Delivery Date due to force majeure. Obtaining a long-term open access for the transmission system from the Injection Point to the Delivery Point is a prerequisite for supplying 200 MW to Respondent No. 1/ TANGEDCO in terms of Article 3.1.1 (c) of the PPA. Therefore, the grant of the LTOA from Power Grid Corporation of India Ltd./ CTUIL was a necessary precondition.

(i) The Petitioner, vide letter dated 12.8.2013, informed Respondent No. 1/ TANGEDCO that it is applying for the LTA, and that even if the LTA Application is made in the month of August, 2013, PGCIL can grant it only by January, 2014 (in the event system strengthening is not required) or by July, 2014 (in the event system strengthening is required). Due to difficulties in obtaining the LTA, the Petitioner requested the Respondent to revise the Scheduled Delivery date for power supply in line with the PPA provisions.

(j) The Petitioner, on 21.8.2023 made an application to CTUIL for the grant



of LTOA in the Southern Region for the purpose of supply of power under the PPA for a period of 15 years and the Petitioner updated TANGEDCO on the status of the LTA application made with PGCIL, as per its letter dated 16.09.2013.

(k) The Petitioner had requested PGCIL a change in the target region for a 200 MW power quantum with TANGEDCO, but PGCIL informed that LTA can only be granted after commissioning the Solapur-Raichur 765 kV corridor and six months of Southern Region synchronization with the NEW Grid, i.e., on 01.08.2014.

(l) Applying for a new LTA in the SR by relinquishing the LTA/BPTA quantum in NR and WR is the same as applying for a change in target region as per the scheme of the CERC Connectivity Regulations, 2009. The Commission, vide order dated 08.03.2019 in Petition No. 92/MP/2015 allowed the LTA applicant to seek target region transfer. Further, for both, change in target region, and applying afresh for an LTA, PGCIL/ CTUIL is required to follow the procedure specified under Regulations 7 and 9 of the CERC Connectivity Regulations, 2009. Any delay in grant of the LTA is clearly attributable to PGCIL, and is beyond the control of the Petitioner being a Force Majeure situation. From the aforesaid letter dated 20.12.2013 of PGCIL, it became clear that by no stretch of imagination could the Petitioner have scheduled power to the Respondent No. 1/ TANGEDCO as per the Schedule Delivery Date as mentioned in the PPA (i.e. 01.02.2014 for 1st 100 MW and 01.06.2014 for 2nd 100 MW).

(m) The Petitioner, vide letter dated 03.02.2014 informed the Respondent No. 1/ TANGEDCO about the status of its LTA application in SR. However, the Petitioner for the interim period, pending grant and operationalization of the LTA, proposed that it can supply the Aggregated Contracted Capacity through STOA. The Petitioner reiterates that it was unable to supply the Aggregate Contracted Capacity on 16.12.2015 due to PGCIL's delay in acknowledging the Letter of Credit, and SRLDC's inability to provide the necessary corridor further delayed power supply.



(n) SRLDC has failed to provide an official communication about the LTA constraints on 16.12.2015, and a letter dated 31.12.2015 was issued demanding acknowledgement for the said non-availability of the corridor till 19.12.2015. On 13.01.2016, POSOCO confirmed the delay in operationalization of the LTA.

o) Respondent No. 1/ TANGEDCO, vide its letter dated 20.02.2016, treated the transmission constraints in the transmission of power from the NEW Region to the Southern Region and the non-availability of long-term access (as per Article 9.3.1 of PPA) as Force Majeure events. However, TANGEDCO wrongfully claimed liquidated damages from the Petitioner due to a 33 days delay in scheduling power post operationalization of the LTA.

p) The Petitioner did not delay in scheduling power post-operation of the LTA, as alleged by Respondent No. 1, as the LTA for the 1st 100 MW was operationalized in two parts, and scheduling power was started on 03.09.2015. Subsequently, PGCIL allowed operationalization of the LTA for 44 MW and 2<sup>nd</sup> 100 MW, respectively, from 5.10.2015 to 16.12.2015. The Petitioner started scheduling power to Respondent No. 1 from 19.12.2015 due to SRLDC's inability to provide the corridor. Further, Power System Operation Corporation Limited acknowledged a delay in providing a corridor to the Petitioner from 16.12.2015, stating there was no delay attributable to the Petitioner. Thus, they cannot be held liable for the liquidated damages.

q) Therefore, the First Contract Year, for the purpose of the PPA and the addendum, was to commence from the Scheduled Delivery Date under the PPA, i.e., 01.02.2014 for 1<sup>st</sup> 100 MW and 01.06.2014 for 2<sup>nd</sup> 100 MW, but the same was subject to availability of the LTA, which was delayed on account of reasons beyond the control of the Petitioner. Accordingly, the same constituted an event of force majeure as expressly stipulated under Article 9.3.1 of the PPA. The actual/ revised scheduled delivery date ought to be treated as the date on which the Petitioner has been able to supply the Aggregated Contracted Capacity of 1st 100 MW, i.e., 03.09.2015 (56 MW) and 05.10.2015 (44 MW) under LTA. Further, in view of the Addendum dated 10.12.2013, read with the provisions of the PPA dated 23.08.2013, the Scheduled Delivery Date for the



additional 100 MW of power is to be treated as the date on which the Petitioner has been able to supply the Aggregated Contracted Capacity of 2nd 100 MW, i.e., 19.12.2015.

r) If the Commission does not extend the Schedule Delivery date, it could cause severe prejudice, irreparable loss, and injury, as the original 15-year period under the PPA would be arbitrarily reduced (without considering the period during which the force majeure event subsisted), and thereby adversely affecting the tariff stream, which the Petitioner is entitled to. The Petitioner cannot supply 200 MW of aggregate contracted capacity as on the Scheduled Delivery Date, and the first contract year for the first 100 MW and second/additional 100 MW will start in September/October 2015 and December 2015, respectively, with the non-escapable capacity charges payable from September/October 2015 and December 2015, as per Schedule 8 of the PPA.

(s) The first 100 MW of Aggregated Contracted Capacity was supplied on 03.09.2015 (56 MW) and 05.10.2015 (44 MW), and the second 100 MW on 19.12.2015. The year starting from these dates should be considered the first contract year for tariff computation. The above-mentioned revision of the scheduled delivery date is necessary on account of the occurrence of Force Majeure events which is not within the control of the Petitioner inasmuch as the Petitioner does not have any control over the grant and operationalization of LTA as well as the Petitioner cannot ensure the availability of required transmission corridor for evacuation of the Aggregate Contracted Capacity.

9. The Petitioner, in support of its contention, has projected several grounds as under:

a) The Petitioner, as soon as executing its long term PPA with Respondent No. 1 in August 2013, applied for the grant of a LTA to PGCIL on 21.8.2013 and 23.11.2013 for supplying a total quantum of 200 MW of power to the Respondent No. 1. Hence, there was no delay on the part of the Petitioner for applying for the LTA as the same could only have been applied once a long term PPA is executed by the said Petitioner in the SR.

b) Despite applying for the LTA in SR in time, there was a delay in the grant of





the same by PGCIL on account of the non-availability of the corridor, which required augmentation of the inter-State grid. As a result of such delay in the grant of the LTA, the Scheduled Delivery Date as per the PPA, i.e., 1.2.2014 & 1.6.2014, could not be adhered to. Ultimately, the actual grant of the LTA was affected for the 1<sup>st</sup> 100 MW of power (bifurcated into 56 MW and 44 MW) only on 1.9.2015 for 56 MW, 5.10.2015 for 44 MW, and 16.12.2015 for the 2<sup>nd</sup> 100 MW. As a result, it can be seen that there was no deliberate act or omission on the part of the Petitioner wherein it can be saddled with the liability for such non-deliberate delay in scheduling power under the PPA.

- c) Article 4.7.1 of the PPA expressly provides for extension/ revision in the Scheduled Delivery Date due to the occurrence of Force majeure events. The provisions of Article 4.7.1 of the PPA clearly provide that in the event the seller/ Petitioner is not able to supply the Aggregate Contracted Capacity from the Scheduled Delivery Date as mentioned under Article 4.1.1 of the PPA, such date shall be deferred as mentioned under 4.7.3 of the PPA.
- d) In the present case, the Petitioner was obliged to start the supply of power up to the Aggregate Contracted Capacity from the Scheduled Delivery Date, i.e., 1.2.2014 for the 1<sup>st</sup> 100 MW and 1.6.2014 for the 2<sup>nd</sup> 100 MW. However, the Petitioner was not able to supply power to the extent of the first 100 MW till 3.9.2015 and 5.10.2015 and the second 100 MW till 19.12.2015 due to the occurrence of Force Majeure event of non-availability of the transmission corridor, which is completely beyond the control of the Petitioner and the same squarely falls within the purview of Article 9.3.1 of the PPA.
- e) Further, Article 4.7.1 of the PPA provides for Extension/ Revision of the Scheduled Delivery Date in case of occurrence of Force Majeure event affecting the seller from performing its obligations under Article 4.1.1 of the PPA. The Scheduled Delivery Date ought to have been revised by Respondent No. 1 from 1.2.2014 to 3.9.2015 and 5.10.2015 for the 1<sup>st</sup> 100 MW and 1.6.2014 to 19.12.2015 for the 2<sup>nd</sup> 100 MW, which is required to be revised for the purpose of applicability of the tariff for the 1st contract year.
- f) The Petitioner executed the PPA for supply of the 200 MW of power for a period of 15 years. The 1<sup>st</sup> day of the said 15 years shall commence on the Delivery Date, i.e., the Delivery Date on which the Petitioner is able to supply



the full Aggregate Contracted Capacity of 200 MW, as explained above.

- g) A bare perusal of the abovementioned definitions would clearly demonstrate that the PPA is valid for a period of 15 years starting from the date on which the Petitioner starts supplying the first 100 MW from 3.9.2015 and 5.10.2015, and the second 100 MW from 19.12.2015. Hence, the delivery date has to be construed as above, while the expiry date shall be the 15<sup>th</sup> Anniversary starting from the above revised delivery dates.
- h) As per the scheme of the CERC Connectivity Regulations, 2009, applying afresh for the LTA in the SR by relinquishing the LTA/ BPTA quantum in NR and WR, or simply applying for change in target region from NR & WR to SR, is one and the same thing. The Commission in its order dated 8.3.2019 in Petition No. 92/MP/2015 has clarified the above legal position by holding that for change in target regions, qua a BPTA/ LTA, no relinquishment charges can be levied, which means that instead of relinquishing an LTA in a target region and applying afresh in another target region, the LTA applicant can simply seek transfer of the target regions. Further, for both change in the target region and applying afresh for an LTA, PGCIL/ CTUIL has to follow the same procedure as provided under Regulations 7 and 9 of the CERC Connectivity Regulations, 2009. Hence, the present case is squarely covered by the dispensation provided under Article 4.7 of the PPA, which provides for the extension of time in the event of Force Majeure affecting the seller/ Petitioner.
- i) As per Article 3.1.1 (c) of the PPA, obtaining a long term PPA is a material condition for the fulfilment of the terms of the said agreement. Obtaining long term open access for the transmission system from the Injection Point up to the Delivery Point, is entirely dependent upon the availability of a corridor in the inter-State grid owned/ operated by PGCIL/ CTUIL. As submitted hereinabove, there was a delay in the grant of LTA in the target region (SR) to the Petitioner by PGCIL/ CTUIL on account of non-availability of corridor.
- j) The Seller is under an obligation under the PPA to supply the entire aggregate contracted capacity on the scheduled delivery date, and the day on which such obligation is fulfilled the same is reckoned as the Delivery Date. The PPA presupposes the scheduled delivery date and Delivery Date to be one and the same. Accordingly, the provisions of the Contract Year, Expiry Period, Tariff



Schedule etc. are formulated under the Contract. Therefore, unless the PPA is interpreted in the manner provided above, the whole fabric of the PPA will be destroyed, and the defined terms and the milestones under the PPA will be rendered redundant. Hence, the day, on which the Petitioner was able to supply the aggregate contracted capacity, i.e. on 03.09.2015 and 05.10.2015 for the 1<sup>st</sup> 100 MW, and 19.12.2015 for the 2<sup>nd</sup> 100 MW, the same shall have to be considered as the revised Delivery Date.

- k) The provisions of Article 4.7.1 are automatic in their operation, as the clause provides for the language 'shall be deferred'. 'Shall' in this clause gives an automatic and mandatory colour to the Article and therefore on occurrence of any Force Majeure events restraining the Petitioner from supplying the Aggregate Contracted Capacity would itself extend the Scheduled Delivery Date and the Expiry date.
- l) Since the Petitioner has taken all reasonable measures, including but not limited to making timely applications to the CTUIL for grant of open access and consistent follow up, the occurrence of a force majeure event affecting the Petitioner from supplying the full Aggregate Contracted Capacity due to the non-availability of the transmission system, can never be attributable to the Petitioner. The Petitioner had even gone to the extent of offering to supply the available capacity under STOA in the interregnum till the long-term open access was made available to the Petitioner, for honouring its obligation under the PPA. Apart from that, in the absence of availability of transmission system for evacuating aggregate contracted capacity by the Petitioner to the Respondent No. 1, the Petitioner has made best efforts to honour the terms of the PPA.
- m) Even after PGCIL allowed the Petitioner to operationalise the full LTA quantum required for the PPA (2<sup>nd</sup> 100 MW) with effect from 16.12.2015, it was on account of further delay on the part of the Southern Regional Load Despatch Centre that the Petitioner could supply full quantum of power (2<sup>nd</sup> 100 MW) to Respondent No. 1 only from 19.12.2015. The aforesaid further delay was caused on account of SRLDC's inability to provide the requisite corridor to the Petitioner, which consequently resulted in a delay in supplying power to Respondent No. 1/ TANGEDCO. The same was also communicated to



Respondent No. 1/ TANGEDCO by the Petitioner on 17.12.2015. SRLDC has admitted, vide letter dated 13.01.2016, that the corridor for supply of power would only be available to the Petitioner from 19.12.2015 onwards. As such, qua the 2<sup>nd</sup> 100 MW, the revised Scheduled Delivery Date has to be treated as 19.12.2015, instead of 16.12.2015, which is the date of operationalization of LTA by SRLDC.

- n) The total duration of supply of power under the PPA is for fifteen years and, accordingly. The applicable tariff for each Contract Year is separately provided under Schedule 8. It is on the basis of the said levelized tariff for the said fifteen years that the bid of the Petitioner was evaluated and the Petitioner was selected as successful bidder pursuant to and in terms of such evaluation. There is no provision in the PPA that stipulates or contemplates that in case of extension/ deferment of the Scheduled Delivery Date and the consequent extension/deferment of the Expiry Date, the tariff for the Contract Years as stipulated in Schedule 8 to the PPA shall not be re-evaluated or revised. Clearly, the Petitioner is entitled to the first-year tariff from the revised Schedule Delivery Date.
- o) The Commission has the necessary jurisdiction to entertain the present Petition and to provide the reliefs as sought for hereunder. Respondent No. 1 has an obligation in its capacity as a procurer and a distribution licensee to make payments in the spirit of the PPA dated 23.08.2013, read with the Addendum dated 10.12.2013. Unless remedial steps are taken, the interests of the Petitioner will be severely prejudiced. Therefore, the Petitioner, by this Petition, seeks a declaration for the 1st contract year to be effective from the Revised Scheduled Delivery Dates, i.e., 03.09.2015 and 05.10.2015 for the 1<sup>st</sup> 100 MW and 19.12.2015 for the 2<sup>nd</sup> 100 MW, when the full quantum of 200 MW was first supplied to Respondent No. 1.

**Hearing dated 25.02.2020**

10. The matter was admitted, and notice was issued to the parties to file their reply and rejoinder. Reply and Rejoinder have been filed by the Respondent and the Petitioner, respectively.



11. The Respondent, TANGEDCO, vide its reply dated 02.06.2021, has submitted as under:

- a) The present claim made by the Petitioner is hit by laches and conduct of the Petitioner, and in this regard, reliance has been placed on the Commission order in Petition No. 117/MP/2017. After the commencement of the supply of power, the Petitioner raised bills indicating fixed and variable charges strictly in terms of PPA. Billing was made from 30.09.2015 onwards to date as per the provision of the PPA, and now, through this Petition, extraneous issues were raised stating that the PPA provides for the extension of the Scheduled Delivery Date.
- b) The energy bills of the Petitioner from 30.9.2015 also include the escalated variable charges like energy charges and inland transportation charges as on 30.9.2015 escalated from March 2013 as per Schedule 8 of the PPA. Therefore, the application of Schedule 8 by the Petitioner is an erroneous interpretation of the PPA, resulting in shortfalls in the payment of tariff for the power being supplied by the Petitioner to the Respondent under the PPA.
- c) The prayer sought for treating the 1<sup>st</sup> year capacity charges as set out in Schedule 8 of PPA as applicable for the contract year 2015-16 and the 2<sup>nd</sup> year capacity charges to be applicable for the contract year 2016-17 and so on and that the Petitioner claiming the change of 1<sup>st</sup> year tariff through the Petition is clearly an afterthought and barred by the principles of estoppels.
- d) PGCIL accorded a transmission corridor to the Petitioner from 1.8.2015, but the Petitioner commenced the power supply of 56 MW from 3.9.2015 for Phase I. The Petitioner had filed the Petition on 6.11.2019, i.e., after a period of 4 years, claiming revision of the scheduled delivery date and praying for direction to TANGEDCO to make payment of the power supplied by the Petitioner in terms of the revised scheduled delivery date.
- e) As per Article 3.1.1 of the PPA, the Petitioner is responsible for completing certain activities at its own risk and cost before the scheduled delivery date unless impacted by Force Majeure events. A conjoint reading of the provisions of the PPA specifically provides that the Seller has to satisfy the conditions set out in Article 3.1. The three exceptions, that absolve the Seller from the



conditions are Force Majeure or the Procurer's failure to comply with their obligation under Article 3.1.1. of the PPA or, if any, activities are specifically waived in writing by the Procurer.

- f) The Petitioner failed to perform its obligations set out under Article 3.4.1 of the PPA and no tariff adjustment shall be allowed on account of any extension of time arising under any of the serve articles of Article 3.4. Further, the revised scheduled delivery date, Scheduled Delivery Date, and expiry date shall be deferred, subject to the limit prescribed in Article 4.7.2 for a reasonable period but not less than day for day basis, to permit the Seller or the Procurer through the use of due diligence, to overcome the effect of the Force Majeure event affecting the Seller or the Procurer, or till such time the event of default is rectified by the Procurer. Article 4.7.1 (c) is applicable only when the performance of the Seller is affected by the contractor's performance and not due to delay in allocation of the LTA. There is no Force Majeure event that would entitle any relief to the Petitioner under the above clause of PPA.
- g) As per clause 9.3.1 of the PPA, non-availability of the Open Access is treated as Force Majeure without any liability on either side and hence, the period till the grant of the LTA from the Scheduled Delivery Date has been considered by the Petitioner as Force Majeure event, i.e., up to operationalization of 56 MW on 1.8.2015. However, the claim of the Petitioner is against the express provisions of this clause of the PPA.
- h) The affected party shall give the other party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other party may reasonably request without the Force Majeure event. Article 9.5.1 specifically states that such notice shall be a pre-condition to the affected party's entitlement to claim relief under the PPA. Such notice shall include full particulars of the event of Force Majeure, its effect on the party claiming relief, and the remedial measures proposed. Article 9.5.2 provides that the affected party shall give notice to the other party of (i) the cessation of the relevant event of Force Majeure and (ii) the cessation of the effect of such event of Force Majeure on the performance of its rights and obligations under this agreement, as soon as practicable after becoming aware of these cessations. No communication, as mandated under Article 9.5,



was made by the Petitioner to the Respondent.

- i) The Petitioner has based its relief on Force Majeure. However, no notice of Force Majeure was served by the Petitioner on the Respondent for the period after 3.2.2014. In the absence of any notice of Force Majeure by the Petitioner as provided for under Article 9.5.1, no relief can be claimed under Force Majeure.
- j) The Petitioner, in a letter dated 3.2.2014, informed TANGEDCO that the non-availability of a corridor is a Force Majeure under Article 9.5 of the PPA but stated that all project activities have been completed, and permission from the State Government for "Consent to Operate" is expected by March/April 2014. It also received a Corridor grant from PGCIL from 01.06.2014 to 30.11.2015. The Petitioner did not intend to schedule power through STOA but will update if necessary, and the COD of the Plant was achieved on 11.7.2015 only. Therefore, claiming Force Majeure event when the Plant itself is not ready to generate power is not correct and the Petition is not maintainable and liable to be rejected.

12. The Respondent, TANGEDCO, has, on the other hand, made the following submissions without prejudice to the previous submissions mentioned in above:

- a) If the Seller fails to commence supply on the extended Scheduled Delivery Date of 1.8.2015, due to the reasons specified in Article 4.7.1(c), then a time extension is allowed for the newly determined Scheduled Delivery Date of 1.8.2015 and also to the expiry date of 30.9.2028 subject to the maximum period of six months. Since the Petitioner commenced the supply of power on 3.9.2015 for its own reason, the question of extension of the Scheduled Delivery Date as per Article 4.7.5 does not arise.
- b) Since only a Force Majeure event affecting the performance of the Seller's contractors constitutes "the event of Force Majeure affecting Seller", the Petitioner cannot categorise Force Majeure event occurred due to the non-availability of the corridor under Clause 4.7.1 (c) to claim an extension of Scheduled Delivery Date.
- c) Articles 3.1.1, 3.4.3, and 3.4.6 state that if Force Majeure event affects the seller in non-fulfilment of conditions stipulated in Article 3.1.1, time extension



is allowed till the seller has satisfied all the conditions and as a result the scheduled delivery date/revised Scheduled Delivery Date is extended up to the period of Force Majeure event and the seller is bound to commence supply of power on the extended Scheduled Delivery Date i.e. on 1.8.2015 (allocation of the corridor) and no tariff adjustment is allowed on account of extension of period.

- d) Extension of time period is allowed only for Scheduled Delivery Date and not for Expiry Date as per Article 3.1.1. As a result of the extension of the Scheduled Delivery Date, the Seller's liability to commence the supply of power starts from the date of allocation of the corridor (1.8.2015) but the Petitioner commenced supply of the 56 MW of RTC power on 3.9.2015 only.
- e) The expiry date was fixed as 30.9.2028 at the time of floating the tender and tariff quotes were invited up to 30.9.2028. Evaluation of tender was done considering the Scheduled Delivery Date as 1.10.2013 and Expiry date as 30.9.2028 and arrived at a levelized tariff of Rs.4.91 per Kwh. Based on the levelized tariff, the Petitioner was selected as the lowest tenderer. The levelized tariff of Rs.4.91 per Kwh was also adopted by the Tamil Nadu Electricity Regulatory Commission (TNERC).
- f) Issue of change of first year contract was never in issue when the tender of the Petitioner was selected as the lowest tender, execution of the agreement, and before the Commission for the approval of the adoption of tariff. The above was not agreed to under the PPA. There is no provision under the PPA for such escalation /revision of the tariff quoted in Schedule 8 of the PPA.
- g) The levelised tariff calculated for all bidders for the power to be delivered on the Scheduled Delivery Date as signed and agreed between the parties to the PPA cannot be altered to suit the convenience of the Petitioner. Under the provisions of Article 3 where only Scheduled Delivery Date could be extended without any tariff adjustment. Further, the Petitioner commenced supply of power on 3.9.2015 against the extended Scheduled Delivery Date of 1.8.2015 pursuant to Article 3 of the PPA, Article 4, and Clause 4.7.1 of PPA are not applicable to the Petitioner.
- h) Further, in the definition of the Contract Year it is clearly stated that for the purpose of payment, the tariff shall be the Quoted Tariff for the applicable Contract Year as





per Schedule 8 of this Agreement. The Petitioner commenced the supply of power from 3.9.2015, and the Respondent, as per the provisions of the PPA, has paid the tariff applicable for the Contract Year of 1.4.2015 to 31.3.2016 (3<sup>rd</sup> Contract Year ). Thus, the interpretation of the Petitioner that the Contract Year commences from 3.9.2015 is not tenable and the prayer of the Petitioner is not maintainable.

- i) The PPA executed between the Petitioner and the Respondent is valid up to 30.9.2028, and if at all extension is needed, it should be by mutual agreement between both parties. No party to the agreement can be forced to act against its own volition.
- j) As per Schedule 6 of the PPA, energy charges are to be escalated from the bid deadline of 6.3.2013 with the escalation index issued from time to time by CERC. Though the supply of power started on 3.9.2015, the energy tariff paid to the Petitioner on the commencement date was the escalated energy charge from 6.3.2013. This calculation will be adopted till 30.9.2028. (i.e. quoted energy charge at the time of bid is escalated from 6.3.2013 till 30.9.2028 with applicable escalation index for a period of 5478 days, nearly 15.5 years).
- k) There is no privity of contract between the TANGEDCO, and PGCIL. The TSA is exclusively between the Petitioner and PGCIL. The PPA entered into between the Petitioner, and TANGEDCO does not have provision for any compensation or change in Contract Year or tariff to be adopted by the TANGEDCO in the event of delay in getting the LTA by the petitioner from PGCIL.
- l) PGCIL and the Petitioner should have had an indemnity agreement between them to indemnify each other's loss. The Respondent is not responsible and liable to the Petitioner for any loss which is not due to any act or omission of the Respondent. If the Petitioner has incurred a loss due to the delay in the grant of open access by PGCIL, the Petitioner is required to claim damages from PGCIL.
- m) The provisions of the PPA cast certain obligations on the Petitioner and the Petitioner is liable to discharge all those obligations cast on it. No part of the PPA can be read in isolation.

### **Rejoinder to the reply of the Respondent**



13. The Petitioner, in its rejoinder dated 22.6.2021 to the reply of TANGEDCO, has mainly submitted as under:

- a) The PPA in question between the Petitioner and Respondent No. 1, TANGEDCO, is for a period of 15 years, i.e. Long Term PPA, and as such, the claims of the Petitioner for payment of tariff by Respondent No. 1, TANGEDCO under the said PPA is also continuing in nature. Therefore, there is no question of any delay and laches being attributable to the Petitioner.
- b) As regards the issue of limitation, the Petitioner is seeking the 1<sup>st</sup> year tariff under the PPA from the revised SDD as claimed in the present Petition. As such, the issue in the present case directly involves the tariff stream of the Petitioner. It is a settled principle of law that the law of limitation is not applicable to the regulatory jurisdiction of this Commission. This has been held by the Hon'ble Supreme Court in *A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., reported in [(2016) 3 SCC 468]*.
- c) The Respondent No. 1, TANGEDCO vide its letter dated 20.2.2016, treated the transmission constraints in the transmission of power from the NEW Region to the Southern Region and the non-availability of long-term access (as per Article 9.3.1 of the PPA) as Force Majeure event. However, the Petitioner is not being given the benefit of an extension of SDD so that the 1<sup>st</sup> year tariff commences from the said extended date. Consequently, on parity, as held by this Commission in the aforementioned case of the DB Power, the Petitioner is also entitled to an extension of the expiry period of the PPA so that the same continues for a period of 15 years from the revised SDD.
- d) As regards the contention of the Respondent that the Petitioner is not liable for any losses as there is no privity of contract between Respondent No. 1, TANGEDCO, and PGCIL, the claim of the Petitioner is covered by the force majeure provisions of the PPA and the Respondent has specifically and unambiguously agreed under the PPA that the Petitioner will be entitled to extension of SDD on account of occurrence of force majeure events, including transmission grid/ constraints at the end of the CTUIL/ PGCIL. Therefore, there is no requirement of any privity of contract between the Respondent and PGCIL, as a transmission constraint is already factored in the PPA as a force



majeure event. Further, Articles 9.1, 9.2.3, 9.3.1, and 9.7.1 of the PPA specifically provide that there cannot be any breach of the PPA terms if there is an occurrence of force majeure events, as contemplated therein. The Petitioner cannot at all be penalized by denying it the benefit of the 1st year tariff from the revised scheduled delivery date.

14. The matter was further heard on 4.6.2021, 17.9.2021, 6.10.2021, 9.11.2021, and 9.2.2023 but was adjourned.

**Hearing dated 14.12.2021**

15. The case was called out for a virtual hearing. Based on the request of the Petitioner, the matter was adjourned. Vide Record of Proceedings for the hearing dated 14.12.2021, the Petitioner was directed to file certain additional information. In compliance, the Petitioner, vide its affidavit dated 28.1.2022, has submitted as under:

(a) The CODs of the transmission lines (400 kV Balco-Dharamjaigarh-I and 400 kV Balco-Dharamjaigarh-II) from BALCO TPC to Dharamjaygarh Pooling station are 16.6.2016 and 14.6.2016.

(b) The Petitioner has placed on record the copy of the WRPC report dated 15.7.2016, which confirms the commissioning of the aforementioned transmission lines.

(c) As regards point (b) of the RoP, the Petitioner had applied to PGCIL on 21.8.2013 for allocation of the 100 MW transmission corridor to Power Grid Corporation of India Limited (PGCIL) under its transmission corridor. PGCIL, vide letter dated 18.11.2013, proposed to consider the grant of Long-Term Access (LTA) to various applicants, including that of the Petitioner, from 1.8.2014 to 30.9.2028. PGCIL vide letter dated 20.12.2013 informed that since no margins were available on the existing corridor, the Petitioner's request for change in the target region from the Northern Region (100 MW) and Western Region (100 MW) to Southern Region (100 MW) could only be granted with the commissioning of the Solapur-Raichur 765 kV corridor, and therefore, the



LTA could not be granted after six months of synchronization of Southern Region with the New Grid, i.e., 1.8.2014.

(d) The Petitioner, vide its letter dated 3.2.2014, intimated the aforesaid status of its LTA application in Southern Region to Respondent No. 1. As per CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related matters) Regulations, 2009, the first priority for scheduling is allocated to the LTA, and since the LTA was not available, the application under MTOA/ STOA was not filed by the Petitioner. The Petitioner, vide its letter dated 17.5.2014, informed Respondent No. 1 that the supply of power from the alternative source, i.e., through 810 MW power plants, would commence in accordance with Article 4.6 of the PPA, which contemplates that power can be injected from the same injection points from which LTA has been granted by PGCIL.

(e) With regard to point (c), Respondent No. 1 had updated on the transmission corridor situation vide the aforesaid letter dated 3.2.2014. Further, Respondent No. 1 vide letter dated 20.02.2016, acknowledged that the transmission constraints in the transmission of power from the Northern Region to the Southern Region and the non-availability of the LTA was on account of force majeure events as per Article 9.3.1 of the PPA.

### **Hearing dated 20.4.2023**

16. During the course of the hearing, the learned senior counsel circulated a note of arguments and reiterated the same, while the learned counsel for the Respondent argued that the Petitioner's claim is barred by the principle of estoppel due to delay and laches. The Commission allowed the Respondent to record the notes of arguments. The learned counsel for the Petitioner cited the judgment of the Hon`ble Supreme Court in the case of A.P Power Coordination Committee vs Lanco Kondapalli Power Ltd. and submitted that the law of limitation applies only to the Commission's judicial functions. The Commission allowed the parties to file written



submissions. Accordingly, the order was reserved in the matter.

17. The Respondent, TANGEDCO, vide affidavit dated 15.5.2023, has submitted the following:

*The Petitioner's plea for extension of the Scheduled Delivery Date and Expiry Date is barred by limitation.*

(a) The Petitioner commenced the supply of power on 3.9.2015 for 56 MW, on 5.10.2015 for 44 MW, and on 19.12.2015 for 100 MW. The sole basis for seeking an extension of the Scheduled Delivery Date and FY 2015-16 as the first Contract Year and consequent extension of the Expiry Date is that supply could not be commenced on account of delay in the operationalization of the LTA, which was a Force Majeure event. The relief of shifting the Contract Year in Schedule 8 to the PPA is consequential to the said relief of extension of the Scheduled Delivery Date. The cause of action thus arose upon commencement of supply, on which date the Force Majeure ceased to operate.

(b) Since the Petition was filed by BALCO on 6.11.2019, i.e., much beyond 3 years from the start date of supply of power, the Petition is time-barred.

(c) In the DB power Petition, the Commission, for an identical claim, has held that the starting point for limitation would be the date of commencement of supply of power. The aforesaid finding was upheld by the Appellate Tribunal For Electricity in its judgment dated 25.8.2022 in Appeal No. 91 of 2020.

(d) The Petitioner's reliance upon the judgment of the Hon'ble Supreme Court in the case of A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., [(2016) 3 SCC 468], to contend that the limitation does not apply to proceedings before this Commission, is completely misconceived. The observations of the Hon'ble Supreme Court with respect to the non-applicability of the Limitation Act, 1963, were purely in the context of regulatory and administrative functions. It was clearly held that the Commission cannot entertain time-barred claims. The contention of the Petitioner that this was restricted to strict money claims has no foundation in the judgment.



(e)After considering the Lanco judgment, this Commission in DB Power and KSK Mahanadi orders, held that limitation would have to be computed from the date of commencement of supply. Therefore, the Petitioner's contention that the cause of action is continuing, is entirely misconceived, inasmuch as any continuing effect of the delay in commencement of supply neither constitutes a fresh cause of action nor a continuing cause of action. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan, [AIR 1959 SC 798].

*Prayer for extension of the Scheduled Delivery Date and consequent shifting of the Contract Year can only be granted as a relief for Force Majeure.*

(a) The Petitioner's oral contention that the captioned petition pertains to the exercise of regulatory jurisdiction for the determination of tariff instead of adjudicatory jurisdiction is entirely misconceived and deserves to be rejected. The subject matter of the Petition is: (i) an extension of the Scheduled Delivery Date and (ii) the consequent shifting of contract years. The bearing that such relief would have on the tariff is only incidental and consequential.

(b) As per the PPA, an extension of the Scheduled Delivery Date is permissible as a consequence of Force Majeure. In the DB Power Case, this Commission granted the relief of shifting the Contract Year only as a consequence of the grant of extension to the Scheduled Delivery Date. This also emerges from the judgment of the APTEL in the DB Power Case in Appeal Nos. 91/2020, 145/2021 and 327/ 2022 (DB Power judgment). It is thus clear, that neither this Commission nor the APTEL has recognized any standalone right in the generator to seek shifting of the Contract Year, except as a consequence of the extension of the Scheduled Delivery Date under the PPA.

*The Petitioner is not entitled to relief merely on the basis that other generators have secured relief from this Commission.*

(a) The Petitioner is not similarly placed as DB Power or KSK Mahanadi



Power Company Limited (in which the generating companies approached this Commission within three years of commencement of supply). A comparison of the relevant facts pertaining to DB Power Limited, KSK Mahanadi, Dhariwal Infrastructure Limited, and the present Petitioner is as under:

Comparison Chart in the matter of DB Power Limited, KSK Mahanadi Power Company Limited, Dhariwal Infrastructure Limited, and BALCO on the issue of Claim of shifting of Contract Year:

Sr. No.	Generators	DB Power Limited (Petition No. 117/MP/2019)	KSK Mahanadi Power Company Limited (Petition No. 222/MP/2017)	Dhariwal Infrastructure Limited (Petition No. 14/MP/2021)	BALCO (Petition No. 63/MP/2020)
1.	Date of the PPA	19.08.2013	27.11.2013	27.11.2013	23.08.2013 (Suppl. PPA for Addl. 100 MW – 10.12.2013)
2.	Effective Date as per the PPA	19.08.2013	27.11.2013	27.11.2013	23.08.2013
3.	First Contract-Year as per Schedule 8	01.10.2013 to 31.03.2014	01.10.2013 to 31.03.2014	01.10.2013 to 31.03.2014	01.10.2013 to 31.03.2014
4.	Scheduled Delivery Date as per the PPA	01.02.2014	01.06.2014	01.06.2014	01.02.2014 (Suppl. PPA-01.06.2014)
5.	Date of Operationalisation of the Long-Term Access (LTA)	28.07.2015	28.07.2015	22.07.2015 (Allotted) 15.12.2015 (Date of permission of operationalization of LTA)	01.09.2015 and 01.10.2015 (for first 100MW). 16.12.2015 for Additional 100MW.
6.	Commencement of Supply	For 117 MW- 01.08.2015 For 91 MW - 05.10.2015	For 281 MW- 01.08.2015 For 219 MW - 05.10.2015	For 100 MW - 16.12.2015	For 56 MW- 03.09.2015 For 44 MW- 05.10.2015  For Additional 100MW – 19.12.2015
7.	Date of Notice by Generators for shifting of the Contract year	17.01.2017	30.01.2016 & 03.03.2016	06.10.2020	No Notice attached
8.	Date of filing of Petition before CERC	01.05.2017 (MP/117/2017)	04.08.2017 (MP /222/2017)	22.12.2020 (14/MP/2021)	06.11.2019 (63/MP/2020)
9.	Date of CERC Order	23.07.2019	23.07.2019	Order Reserved on 22.12.2022	Order Reserved on 20.04.2023
10.	Extension of Schedule Delivery Date (SDD) by CERC	Extension of SDD up to 15.03.2015	Extension of SDD up to 01.08.2015 and 05.10.2015	Order Reserved on 22.12.2022	Order Reserved on 20.04.2023
11.	Extension of Expiry Date by CERC	Extension of Expiry Date up to 31.03.2029	Extension of Expiry Date up to 31.03.2029	Order Reserved on 22.12.2022	Order Reserved on 20.04.2023

(b) The Petition itself is time-barred, and the period of limitation cannot be



extended merely by virtue of other generators having secured relief from this Commission. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of U.P. Jal Nigam v. Jaswant Singh, [(2006) 11 SCC 464].

*Without prejudice, and in any event, no extension can be granted of the Expiry Date beyond 6 months.*

(a) Extension of the Scheduled Delivery Date as well as of the Expiry Date is an outcome of adjudication by this Commission as to the relief that a party is entitled to, upon the occurrence of a Force Majeure event in a situation where the parties have been unable to mutually agree upon the consequences for the same.

(b) In the DB Power Case, this Commission, while noticing the delay in approaching this Commission and also taking into consideration the impact of extending the Expiry Date on the tariff payable by TANGDECO, extended the Expiry Date only up to 6 months, despite having granted an extension of more than 1 year in so far as the Scheduled Delivery Date was concerned. The above finding was upheld by the APTEL in the DB Power Judgment.

(c) Therefore, without prejudice, in any event, no extension of the expiry date can be granted to the Petitioner beyond six months.

#### **Hearing dated 18.3.2024**

18. Since the order in the Petition (which was reserved on 20.4.2023) could not be issued prior to one Member of this Commission, who formed part of the Coram, demitting office, the matter was re-listed for the hearing, and the learned counsel for the Petitioner requested for time to file additional submissions which was allowed .

19. The matter was finally heard on 19.4.2024, and after hearing the learned counsels for the parties, an order in the Petition was reserved. Parties were permitted to file their respective written submissions. However, the matter was further re-listed





for the hearing on 17.9.2024 due to the order in the Petition not being issued prior to two Members of the Commission, who formed part of the Coram, demitting office. The Respondent TANGEDCO's counsel requested a week to file comprehensive written submissions, and the Commission reserved its order in the Petition.

20. Subsequently, the Petitioner and the Respondent have submitted their respective written submissions, additional submissions, and note of arguments and have reiterated the submissions made in the pleadings, and the same have been considered in subsequent paragraphs.

### **Analysis and Decision**

21. We have considered the submissions of the Petitioner and Respondent, and perused material available on record. The Petitioner, BALCO, has filed the present Petition for seeking a declaration that (i) the delay in grant and operationalization of Long-Term Access is a Force Majeure event in terms of Article(s) 3, 4 and 9 of the TANGEDCO PPA dated 23.8.2013 read with the Addendum dated 10.12.2013; (ii) Scheduled Delivery Dates are 3.9.2015 and 5.10.2015 for the 1<sup>st</sup> 100 MW; and 19.12.2015 for the 2<sup>nd</sup> 100 MW in terms of Article 4.1.1 of the PPA read with the Addendum, and (iii) the 1<sup>st</sup> contract year commenced from 3.9.2015 and 5.10.2015 for the 1<sup>st</sup> 100 MW; and 19.12.2015 for the 2<sup>nd</sup> 100 MW. Consequently, the Petitioner has also sought directions to TANGEDCO for making the payment of the power supplied by the Petitioner in terms of Revised Scheduled Delivery Dates (SDDs). Indisputably, the latter prayed for a declaration that the 1<sup>st</sup> contract year had commenced from 3.9.2015 (56 MW) and 5.10.2015 (44 MW) for the first 100 MW; and 19.12.2015 for the second 100 MW along with the directions to the Respondent, TANGEDCO to make



payment accordingly. However, these prayers are entirely premised upon/consequent to the former prayers *i.e.* delay in grant and operationalization of the LTA be held as Force Majeure event and the revision of SDDs.

22. It is noted that insofar as the issues involved in the instant case are concerned, the reliance has placed by the parties on the Commission's (i) order dated 22.7.2019 in Petition No. 117/MP/2017 in the matter of DB Power Limited v. TANGEDCO, (ii) order dated 23.7.2019 in Petition No. 222/MP/2017 in the matter of KSK Mahanadi Power Co. Ltd. v. TANGEDCO read with order dated 28.1.2021 in Petition No. 7/RP/2020, and (iii) order dated 4.6.2023 in Petition No. 14/MP/2021 in the matter of Dhariwal Infrastructure Limited v. TANGEDCO. While in orders (i) & (ii), the Commission has considered the similar prayers and ruled largely, in the favour of the Petitioners therein, in order (iii), the Commission declined to consider the similar prayers as being time-barred and violative of principles of waiver, estoppel, and acquiescence.

23. In the instant case, the Petitioner filed the Petition on 6.11.2019 seeking similar reliefs as claimed in orders (*supra*) relating to delay due to operationalization of the LTA. Therefore, in this context, it is pertinent to deal with the primary issue as to whether the prayers sought under the present Petition are time barred or not.

24. While on the one hand, the Petitioner has sought to rely upon the DB Power case to submit that the Commission has allowed a similar claim for extension of SDD on account of delay in LTA, on the other hand, in its Note of Arguments dated 7.5.2024 has submitted that the orders pertaining to DB Power, KSK Mahanadi as well as Dhariwal Infrastructure Limited are distinct to the present case as the Petitioner is seeking the Commission's regulatory exercise *qua* the revision of the SDD, re-



alignment of the contract and recovery of the correct contractual tariff. In fact, in the absence of any dispute or a quantifiable monetary claim *qua* the Force Majeure event of delay in the grant of the LTA, the Petitioner has no other option but to approach the Commission for a declaration of Force Majeure, shifting of the 1<sup>st</sup> contract year under the PPA and consequential relief(s). The Petitioner has also submitted that the claim for the 1<sup>st</sup> year tariff is ongoing, and it is not barred by delay or laches. Further, TANGEDCO, *vide* its letter dated 20.2.2016, has acknowledged transmission constraints as a Force Majeure.

25. *Per contra*, the Respondent TANGEDCO has submitted that the cause of action in the present case accrued upon operationalization of the LTA, *i.e.*, on 3.9.2015 and 5.10.2015 for the first 100 MW and 19.12.2015 for the second 100 MW. Also, the Commission in DB Power and KSK Mahanadi cases, while relying on the judgment of the Hon'ble Supreme Court in the case of Andhra Pradesh Power Co-ordination Committee Vs. Lanco Kondapalli Power Limited [(2016) 3 SCC 468] (Lanco Kondapalli) has held that the limitation period would have to be computed from the date of commencement of supply. Therefore, the Petition is barred by principles of estoppel and limitation as the claims raised as such in the Petition pertain to the billing in the year 2015. Further, the Petitioner had failed to notify the Respondent, TANGEDCO, of Force Majeure events as required under Articles 9.5.1 and 9.5.2 of the PPA.

26. We have considered the submissions of the parties. Although no period of limitation has been prescribed in the Electricity Act, 2003 for filing the Petition for adjudication of the disputes, however, such issue of limitation is no longer *res integra* as the Hon'ble Supreme Court in Lanco Kondapalli case has held that the claims



coming for adjudication before the Commission cannot be entertained or allowed if otherwise the same is not recoverable in a regular suit on account of law of limitation.

For the sake of convenience, it will be apposite to refer to the relevant paragraphs of the judgment as extracted under:

28. ....However, the Electricity Act, 2003 requires a further scrutiny to find out whether by virtue of Section 175 of the Electricity Act or otherwise it can be inferred that the provisions of the Limitation Act will govern or curtail the powers of the Commission in entertaining a claim under Section 86(1)(f) of the Electricity Act.

.....

A plain reading of this section leads to a conclusion that unless the provisions of the Electricity Act are in conflict with any other law when this Act will have overriding effect as per Section 174, the provisions of the Electricity Act will not adversely affect any other law for the time being in force. In other words, as stated in the section the provisions of the Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force. Such provision cannot be stretched to infer adoption of the Limitation Act for the purpose of regulating the varied and numerous powers and functions of the authorities under the Electricity Act, 2003. In this context it is relevant to keep in view that the State Commission or the Central Commission have been entrusted with large number of diverse functions, many being administrative or regulatory and such powers do not invite the rigours of the Limitation Act. Only for controlling the quasi-judicial functions of the Commission under Section 86(1)(f), it will not be possible to accept the contention of the appellants that by Section 175 the Electricity Act, 2003 adopts the Limitation Act either explicitly or by necessary implication.

.....

30. .... In such a situation it falls for consideration whether the principle of law enunciated in *State of Kerala v. V.R. Kalliyankutty* [*State of Kerala v. V.R. Kalliyankutty*, (1999) 3 SCC 657] and in *New Delhi Municipal Committee v. Kalu Ram* [*New Delhi Municipal Committee v. Kalu Ram*, (1976) 3 SCC 407] is attracted so as to bar entertainment of claims which are legally not recoverable in a suit or other legal proceeding on account of bar created by the Limitation Act. On behalf of the respondents those judgments were explained by pointing out that in the first case the peculiar words in the statute—"amount due" and in the second case "arrears of rent payable" fell for interpretation in the context of powers of the tribunal concerned and on account of the aforesaid particular words of the statute this Court held that the duty cast upon the authority to determine what is recoverable or payable implies a duty to determine such claims in accordance with law. In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act



*creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”*

27. Clearly, the instant Petition has not only been filed under Section 79(1)(b) but also under Section 79(1)(f) of the Act, invoking the adjudicatory jurisdiction of the Commission. Various declaratory and monetary reliefs sought by the Petitioner under the PPA also necessarily involve the determination of the disputes as have arisen between the parties. Even in terms of Article 4.7.4 of the PPA, if the parties have not agreed on the time period by which the SDD or Expiry Date should be deferred after the cessation of the force majeure event(s), the said article envisages raising a dispute to be resolved in terms of Article 14. Hence, viewed from any angle, the resolution of issues involved requires the exercise of the adjudicatory jurisdiction of this Commission under Section 79(1)(f) of the Act, and therefore, the provisions of the Limitation Act will apply to the present case as held in Lanco Kondapalli Judgment.

28. The aspect of limitation for the grant of similar prayers has been considered by the Commission in its order dated 4.6.2023 in Petition No. 14/MP/2021, wherein the Commission has refused to consider such prayers on the grounds of they being time-barred. The relevant extract of the said order reads as under:

*“.....14. Insofar as the merits of the case are concerned, it was placed before us that the present case, to a large extent, is covered by our earlier order dated 22.7.2019 in Petition No. 117/MP/2017 (DB Power Ltd. v. TANGEDCO) and order dated 23.7.2019 in Petition No. 222/MP/2017 (KSK Mahanadi Power Co. Ltd. v. TANGEDCO) read with order dated 28.1.2021 in Petition No. 7/RP/2020. The said orders were also challenged by TANGEDCO before the Appellate Tribunal for Electricity (APTEL) in Appeal Nos. 91 of 2020 and 145 of 2021 and by KSK Mahanadi*



Power Company Limited in Appeal No.327 of 2022 wherein the APTEL vide judgment dated 25.8.2022 has upheld the aforesaid orders of the Commission and in turn dismissed the appeals preferred by TANGEDCO and KSK Mahanadi Power Company Limited. In fact, the present Petition came to be filed by the Petitioner only on 22.12.2020 i.e. well after the orders of the Commission dated 22.7.2019 and 23.7.2019 in Petition Nos. 117/MP/2017 and 222/MP/2017 respectively - raising similar issues/seeking similar reliefs as allowed by the Commission therein. In this background, the first and foremost question that arises for our consideration is whether the prayers sought under the present Petition are time barred?

**RE: The Commission`s earlier orders**

17. We have considered the submissions made by the Petitioner and the Respondent. We notice that similar issue in the context of delay and laches had been examined by the Commission in orders dated 22.7.2019 and 23.7.2019 in Petition Nos. 117/MP/2017 and 222/MP/2017 respectively. The relevant extract of the order dated 22.7.2019 in Petition No.117/MP/2017, in the above regard, reads as under:

**“Issue No. 1: Whether the Petition suffers from delay and laches?**

10. The Respondent has contended that the claim made by the Petitioner is hit by delay and laches and is barred by the principles of estoppels, in as much as, the request for extension of the term of the agreement i.e. for extension/deferment of the delivery and expiry date was made available on 17.1.2017, which was much after the commencement of the billing from 1.8.2015 onwards. The Respondent, in support of its contention, has relied upon the APTEL judgment in Appeal No. 74 of 2007. Per contra, the Petitioner has submitted that the Petitioner had at the contemporaneous and relevant time addressed notices dated 3.1.2014 and 30.5.2014 to the Respondent, wherein it was expressly and categorically averred that the non-availability of open access be treated as a force majeure event. The Petitioner has submitted that in terms of the PPA, more specifically Article 4.7.1 read with Article 4.7.5, a force majeure event affecting the seller automatically translates into an extension/deferment of the term of the agreement i.e. extension/deferment of the delivery and expiry dates. The Petitioner has submitted that it is wholly erroneous on the part of the Respondent to seek to refer to the Petitioner`s communication dated 17.1.2017 in isolation and de hors the gamut of facts, and thereby seeking to contend that the present claim of the Petitioner is hit by delay and laches and is barred by the principles of estoppel.

11. We have considered the submissions of the Petitioner and Respondents. Though no period of limitation has been prescribed in the Electricity Act, 2003 for filing the Petition for adjudication of the disputes, the Hon`ble Supreme Court in Andhra Pradesh Power Coordination Committee Vs. Lancon Kondapalli Power Limited [(2016) 3SCC 468] has held that the claims coming for adjudication before the Commission cannot be entertained or allowed if otherwise the same is not recoverable in a regular suit on account of law of limitation. Relevant extract of the said judgment is as under:

“30...In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws



*and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”*

*In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable, in the absence of any period of limitation for filing the application before the Commission. Since the supply of power under PPA commenced on 1.8.2015 and the present Petition has been filed by the petitioner on 2.5.2017, the present petition is not hit by delay and laches. Accordingly, we reject the contention of the Respondents in this regard...”*

*18. Thus, in the aforesaid order, the Commission did not accept TANGEDCO’s plea that the said Petitions suffered from the delay and laches keeping in view that the Petitioners therein had filed the Petitions within the period of limitation i.e. 3 years from the date of commencement of power supply under the PPA. The above findings were also contested by TANGEDCO in its appeals before the APTEL. Vide judgment dated 25.8.2022, the APTEL, however, also rejected such objection of TANGEDCO by observing the claim for revised Schedule Delivery Date and expiry date under the PPAs and the consequent relief of tariff being within the period of three years. The relevant extract of the aforesaid judgment of APTEL is as under:*

*“22. The procurer (TANGEDCO) had raised the objection of delay and laches. The same was repelled by the Central Commission, reference being made to the period prescribed by Limitation Act, 1963, and the ruling of the Supreme Court reported as Andhra Pradesh Power Co-ordination Committee v. Lanco Kondapalli Power Limited [(2016) 3 SCC 468]. Though some argument was raised reiterating the said objection before us in these appeals, we find no substance in the same, the claim for revised SDD and Expiry Date under the PPAs and consequent relief of tariff in its accord being within the period of three years, there being no element of laches.”*

*19. In the aforesaid judgment, the APTEL has also considered the cut-off date for raising the claim for revised SDD and expiry date under the PPAs and the consequent relief of tariff being a period three years - basis which the argument of delay and laches was rejected.*

**RE: Right to sue kicked on**

*20. In the present case, it is pertinent to note that as per the provisions of the TANGEDCO PPA, the Scheduled Delivery Date was 1.6.2014. The moment the generating company fails to commence the supply by the said date including owing to the Force Majeure events, the cause of action arises to seek the appropriate remedy under the agreement including approaching the Appropriate Commission. It may be noted that insofar as the declaratory relief is concerned, Article 58 of the Limitation Act provides that the limitation will run from when the right to sue “first” accrues. However, keeping in mind that the plea of Force Majeure by affected party is typically bundled with the various reliefs such as excuse/relieve from the performance/obligations during the period for which Force Majeure existed including extension of delivery date, etc. and assuming that thereby covered under Article 113 of the Limitation Act which provides for limitation period of three years from when right to sue accrues, we do not see as how the period of limitation could commence from any other date than the actual supply date i.e. the date by which the impact of claimed Force Majeure on the affected party stood crystallised and giving rise to cause of action to avail the remedies available under the agreement including approaching the Appropriate Commission for enforcing such remedies.*



21. The Petitioner has however submitted that the cause of action only arose once the Petitioner raised the dispute vide letter dated 6.10.2020 and upon getting no response to its claim from TANGEDCO. The Petitioner has also submitted that the Article 14 of the TANGEDCO PPA does not set any limit for raising a dispute under the said PPA. However, we are not persuaded by the said contention. It is settled position of law that sending letters or exchange of communication do not extend the period of limitation provided by law unless an acknowledgment flows from such correspondences. Notwithstanding above, even if we were to consider the time spent by the parties for the amicable settlement of a dispute under Article 14.2 of the TANGEDCO PPA, we do not find any such efforts undertaken by either party in the present case. As noted above, despite its Force Majeure claim having stood crystallised on 16.12.2015 - upon grant of LTA and commencement of supply under the PPA, the first letter written by the Petitioner raising the issue of revision in applicability of first contract year tariff was only on 6.10.2020 and that too relied upon the grant of similar reliefs by the Commission to the other generating companies namely, DB Power Limited and KSK Mahanadi Power Company Limited in Petition No.117/MP/2017 and Petition No. 222/MP/2017 respectively. Insofar as the contention that Article 14 of the PPA does not provide any period for raising of dispute is concerned, while it may be correct that as such the said Article does not prescribe any time limit till which such dispute can be raised by the parties, it has to be read with relevant Articles of the PPA including Article 4.7.4 which provides that in case the parties do not agree, within thirty days after the affected party's performance has ceased to be affected by the relevant circumstances (including force majeure event affecting seller), on the time period by which Revised Scheduled Delivery Date, Scheduled Delivery Date or expiry date should be deferred, any party may raise dispute to be resolved in accordance with Article 14 of the PPA. Thus, the said Article clearly provided that a party may raise a dispute under Article 14 of the PPA in the event they have not agreed to deferment of Revised Delivery Date and expiry date, etc. within 30 days after the affected party's performance ceased to be affected by relevant circumstances including Force Majeure. In the present case, such timeline elapsed on January, 2016 (16.12.2015 + 30 days) itself. However, as noted above, for the first time such issue was raised by the Petitioner only vide letter dated 6.10.2020 i.e. way beyond the period of three years after the parties having failed to reach to an agreement as per Article 4.7.4 of the TANGEDCO PPA. Such conduct of the Petitioner clearly indicates that raising of such issue and filing of the present Petition was merely an afterthought which cannot be countenanced. The maxim "Vigilantibus non dormientibus jura subveniunt" i.e. "The law assists the vigilant, not those who sleep over their rights" squarely applies to the present case. The Petitioner was not vigilant but was content to be dormant and chose to sit on fence till somebody else's case came to be decided. Thus, it is hit by the principles of waiver estoppel and acquiescence as well.

**RE: Prayers (a) and (b)**

22. In view of the above, the prayers of the Petitioner viz. to hold and declare that the delay in grant and operationalization of LTA as Force Majeure event in terms of Article 9.3 of TANGEDCO PPA and adjustment of the delivery date for supply of 100 MW RTC power under the said PPA to 16.12.2015, are, in our view, time barred and as such cannot be considered by the Commission at this stage. Further, the subsequent prayers viz. declaration that the tariff for the period commencing from 16.12.2015 be the tariff for first contract year and direction to the Respondent to make the payment accordingly are entirely premised upon / consequent to the earlier prayers and due to inability of the Commission to consider such prayers on account of they being time





barred, these subsequent prayers also cannot be entertained by the Commission at this stage.

**RE: Continued caused of action**

23. The Petitioner has, however, contended that in the present case there is a continuous cause of action since every time the tariff is paid taking into consideration a wrong financial year, injury caused itself is continuing since the Petitioner till date has not received the tariff as per the correct financial year for which corresponding tariff was determined in table provided under Schedule 8 of the PPA. Accordingly, the Petitioner has contended that the injury caused was never completed and is still continuing and will continue for the entire period of TANGEDCO PPA, if the tariff is not paid as per the correct application of Schedule 8 of the PPA and as such, it amounts to a continuous cause of action. However, we find the plea that TANGEDCO is not making the correct payment by the correct application of Schedule 8 of the PPA is a wrong which result into a continuous source injury to the Petitioner can arise for consideration only upon there being conclusive finding or declaration in connection to the Petitioner's claim for revision in the Scheduled Delivery Date under the PPA. For continuing wrong to arise, there must in first place be a wrong which is actionable because in absence of wrong, there can be no continuing wrong. In the foregoing paragraphs, we have already noted that such prayers, at this stage, cannot be considered on account of they being time barred and therefore, the above argument of payment of tariff for wrong financial year basis the extension of Scheduled Delivery Date cannot hold. Regardless, even if we were to consider the non-consideration of the delay in operationalization of LTA as Force Majeure event in timely manner by TANGEDCO as a wrong on its part, the injury caused thereof in the form of non-extension of Scheduled Delivery Date for the corresponding days would constitute a complete injury. It is necessary to distinguish the injury caused by a wrongful act and what may be considered as the effect of the said injury. In our view, the wrongful application of the tariff as per Schedule 8 of the PPA, in the present case, would only amount to continuance of the effects of an injury and not the injury itself. It is well settled that when the act of wrongdoer results in an injury which is complete, the wrongful act is not a continuing one even if the damage / effect resulting from the act may continue.

.....  
28. In view of the above observations, the prayers of the Petitioner cannot be allowed on account of them being time barred and hit by the principles of waiver, estoppel and acquiescence. Accordingly, the present Petition stands disposed of on the ground of limitation itself. We are not inclined to examine other issues in view of our finding on the issue of limitation.”

29. The aforesaid findings clearly apply to facts of the present case. In the present case also, the SDD under the PPA was 1.2.2014 (100 MW) and 1.6.2014 (additional 100 MW), and the moment the generating company failed to commence the supply by the said date including owing to any force majeure event(s), the cause of action arises to seek the appropriate remedy including approaching the Appropriate Commission. For the declaratory reliefs, Article 58 of the Limitation Act provides that the period of



limitation will run from the time when the right to sue 'first' accrues. In the above order, the Commission has also noted that even if the plea of force majeure by the affected party is considered to be a bundle of various reliefs, including extension of delivery date, etc. and, thereby, to be covered under Article 113 of the Limitation Act, which provides for the limitation period of three years from when right to sue accrues, the period of limitation could not said to have commenced from any other date than the actual supply date i.e. the date by which the impact of force majeure on the affected party stood crystallized and giving rise to the cause of action to avail the remedies available under the agreement including approaching the Appropriate Commission for enforcing such remedies. In the present case, the supply of power under the PPA commenced on 3.9.2015 (56 MW), 5.10.2015 (44 MW) and 19.12.2015 (additional 100 MW). Whereas, the instant Petition was filed only on 6.11.2019 i.e. way beyond the period of 3 years. In the instant case, the Petitioner has also sought to point out *vide* its letter dated 20.2.2016, TANGEDCO has acknowledged transmission constraints as a force majeure event under the PPA. However, already noted above, Article 4.7.4 of the PPA envisages a party to raise a dispute under Article 14 of the PPA in the event the parties do not agree on the time period by which Revised SDD, SDD or Expiry Date should be deferred within thirty after the affected party's performance ceased to be affected by the relevant circumstances including force majeure event affecting the seller. Even considering the TANGEDCO's aforesaid letter as reference point, the period of 30 days for the parties to agree upon the deferment of the SDD, Revised SDD or Expiry Date would lapse on 20.3.2016 and reckoning the period of limitation from such date would also lapse on 20.3.2019. It is only by way of the present Petition filed on 6.11.2019, the Petitioner has sought the declaratory reliefs *qua* force majeure event(s) and extension of the SDD for the first time and that too, evidently, based upon



the orders passed by the Commission in DB Power and KSK Mahanadi cases.

30. Since the commencement of supply, the Petitioner has all along been raising the invoices consistent with the Respondent's interpretation of the PPA without even raising any dispute. This clearly shows that the Petitioner was not vigilant in approaching the Commission within time framework of limitation and approached the Commission only belatedly on 6.11.2019. The maxim "*Vigilantibus non dormientibus jura subveniunt*" i.e. "The law assists the vigilant, not those who sleep over their right squarely applies to facts of the present case. The Petitioner was not vigilant but was content to be dormant and chose to sit on fence till somebody else's case came to be decided. Thus, it is hit by the principles of waiver, estoppel, and acquiescence as well.

31. We are also not inclined to the Petitioner's contention that the cause of action is continuing in nature. As noted above, the similar contention has already been dealt with and stands rejected by the Commission in the Dhariwal case (*supra*). In view of the above, the prayers of the Petitioner viz. to hold and declare that the delay in grant and operationalization of the LTA as Force Majeure event in terms of Articles 3, 4 & 9 of the PPA and adjustment of the Scheduled Delivery Date for the supply of power under the said PPA, are not only time-barred but also hit by the principles of waiver, estoppel, and acquiescence and as such cannot be considered by the Commission at this stage.

32. Further, the subsequent prayers, viz. declaration that the tariff for the period commencing from 3.9.2015 and 5.10.2015 for the 1<sup>st</sup> 100 MW and 19.12.2015 for the 2<sup>nd</sup> 100 MW be the tariff for the first contract year and direction to the Respondent to make the payment accordingly are entirely premised upon / consequent to the earlier



prayers and due to inability of the Commission to consider such prayers on account of they being time-barred and hit by the principles of waiver, estoppel and acquiescence, these subsequent prayers also cannot be entertained by the Commission at this stage.

33. The Petition No. 63/MP/2020 is disposed of in terms of the above.

Sd/-  
**(Harish Dudani)**  
Member

sd/-  
**(Ramesh Babu V)**  
Member

sd/-  
**(Jishnu Barua)**  
Chairperson

