

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No: 382/MP/2023

Coram:

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

Date of Order: 23rd June, 2025

In the matter of:

Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 111 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for seeking correction of the error in date mentioned as 1.10.2013, instead of 1.6.2014. as commencement date of first contract year (i.e. Scheduled Delivery Date) under Schedule 8 of the PPA dated 27.11.2013 and hence bring it in alignment with Scheduled Delivery Date, which is mentioned as 1.6.2014 under Article 4 of the PPA, and accordingly grant consequential relief.

And

In the matter of:

Dhariwal Infrastructure Limited
CESC House, Chowringhee Square
Kolkata – 700001.

...Petitioner

Vs

Tamil Nadu Generation & Distribution Corporation Limited
6th Floor, Eastern Wing, 144, Anna Salai,
Chennai – 600002.

...Respondent

Parties Present:

Shri Avijeet Lala, Advocate, DIL
Ms. Somya Sahni, Advocate, DIL
Ms. Ritika Singhal, Advocate, DIL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

ORDER

The Petitioner, Dhariwal Infrastructure Limited (in short 'DIL'), has filed the present Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003, read with Regulation 111 and 113 of the CERC (Conduct of Business) Regulations, 1999, or seeking the following reliefs:



- a) *Hold and declare that the date mentioned in Schedule 8 of PPA i.e., 01.10.2013 as the commencement of the first Contract Year for the supply of 100 MW RTC power from the generating station under the PPA, is an inadvertent typographical error.*
- b) *Declare and allow the date i.e., 01.06.2014 mentioned as the Scheduled Delivery Date in Article 4 of the PPA to be the commencement of the first Contract Year under Schedule 8.*
- c) *Allow the rectification of all the dates following the date of 01.10.2013 as mentioned under Schedule 8 of the PPA, as per the scheme provided under the definition of Contract Year of the PPA.*
- d) *Declare and allow, as a consequence of the above prayers, the rectification of the Expiry Date in the PPA, to bring it in alignment with the RfP, Lol and the PPA which clearly stipulates the operating period to be for 15 years.*
- e) *Declare that the tariff mentioned for the respective years under Schedule 8 of the PPA would be shifted by one year and hence, direct the Respondent that the tariff mentioned for the first Contract Year, to be paid for a period of 01.06.2014 to 31.03.2015 and allow the same principle to be applied for the subsequent years. Further, direct the parties for consequent reconciliation of the amount and payment of outstanding dues to the Petitioner along with interest.*
- f) *Pass such other order(s) and grant relief(s) that the Commission deems fit in the interest of justice and equity.*

Background facts

2. The Petitioner DIL has established a 2 x 300 MW coal-based thermal generating station (in short, "the generating station") at Tadali, Chandrapur in the State of Maharashtra. TANGEDCO on 21.12.2012 issued Request for Proposal (RfP) for long-term procurement of power under case-1 competitive bidding process for meeting its base load requirements in the State of Tamil Nadu for a period of 15 years, from the Scheduled Delivery Date (SDD). The RfP dated 21.12.2012 mentioned the SDD as 1.10.2013. The RfP was subsequently revised and issued on 21.1.2013, with the last date of submission of bid as 6.3.2013. Pursuant to the competitive bidding process, DIL was selected as the successful bidder, and TANGEDCO issued an LOI dated 14.11.2013 to DIL for the supply of power from its generating station for a period of 15 years from 1.6.2014 to 30.9.2028, which was unconditionally accepted by DIL on 18.11.2013. Subsequently, DIL entered into a PPA with TANGEDCO on 27.11.2013 for the supply of power from its generating station, for a period of 15 years. Both these parties signed an addendum to the PPA on 20.12.2013. As per Article 4.1 of the PPA, the SDD was



mentioned as 1.6.2014, in line with the LOI issued on 14.11.2013. The SDD under the PPA was 1.6.2014, and the expiry date was 30.9.2028.

3. Based on the application of DIL, PGCIL vide its letter dated 22.7.2015 granted LTA for the supply of 100 MW power from the generating station to Tamil Nadu from 1.4.2015 onwards. DIL also entered into an LTA with PGCIL on 20.8.2015 after a delay of almost 1.5 years from the date of application. However, PGCIL, vide its letter dated 15.12.2015, intimated DIL regarding the operationalization of the LTA granted and the commissioning of the Narendra-Kolhapur 765 D/C line, enhanced Available Transmission Capacity being utilized for the operationalization of LTA, granted notionally to December 2013 applicants. DIL vide letters dated 10.2.2014 and 19.5.2014 informed TANGEDCO regarding the delay in the grant of LTA by PGCIL. Thereafter, PGCIL permitted the operationalization of the full LTA quantum of 100 MW w.e.f. 16.12.2015, for evacuation of power from the generating station to Tamil Nadu, and accordingly, DIL commenced the supply of power from the generating station to TANGEDCO w.e.f. 16.12.2015. TANGEDCO had no objection to accepting the power flow from the actual delivery date of 16.12.2015, after the grant of LTA by PGCIL. The Tamil Nadu Electricity Regulatory Commission (TNERC) vide its order dated 29.7.2016 in P.P.A.P. No. 3/2014 approved the PPA and adopted the levelized tariff of Rs. 4.91/kWh discovered under the competitive bidding process in terms of Section 63 of the Electricity Act, 2003 ('the Act'). DIL is also supplying 170 MW of power from the same unit to Noida Power Company Limited (NPCL) under Section 62 of the Act.

4. Thereafter, DIL vide its letter dated 6.10.2020, requested TANGEDCO for revision in the applicability of the first contract year tariff for 2015-16 and a suitable extension of the expiry date of the PPA to ensure the operating period of 15 years from the date of power supply. No response was received from TANGEDCO to the above letter. Accordingly, DIL filed Petition No.14/MP/2021 before this Commission seeking relief(s),



amongst others, to (a) hold and declare that the delay in grant and operationalization of LTA as a Force Majeure event in terms of Article 9.3 of the PPA, (b) hold and declare that the Delivery Date and Expiry Date for supply of 100 MW RTC power from the generating station under the PPA to TANGEDCO are 16.12.2015 and 15.12.2030 respectively and (c) hold and declare that the tariff for the period commencing from 16.12.2015 shall be the tariff for the first contract year, i.e., 1.10.2013 to 31.3.2014 as mentioned in Schedule 8 of the PPA and so on and consequently direct TANGEDCO to pay tariff for the entire term of the PPA on the said basis. The Commission, vide its order dated 4.6.2023, rejected the prayers of DIL in the said petition as time-barred, thereby refusing to entertain the claims of DIL. However, on the question of rectification of the error in the SDD mentioned in Schedule 8 of the PPA, the Commission in the said order refused to entertain and examine the prayer of DIL

5. Against this order, DIL has filed an appeal (Appeal No.660/2023) before the Appellate Tribunal for Electricity (APTEL), and the same is pending. In the above background, DIL has filed the present Petition, with the prayers as mentioned in para 1 above.

Submissions of the Petitioner DIL

6. DIL, in support of its prayers in the present petition, has submitted the following:

- a) As per the bidding documents initially circulated, the SDD was 1.10.2013. However, the same was changed to 1.6.2014 vide LOI dated 14.11.2013 issued by TANGEDCO. While the SDD was shifted, the expiry date of the PPA remained as 30.9.2028. Hence, the 'operating period' of the PPA was inadvertently reduced to 14 years and 4 months, instead of the 15-year period, as stipulated under the RfP, LOI, and the PPA.
- b) Article 4.1.1 of the PPA categorically mentions that the SDD for the supply of aggregated contracted capacity of power from DIL's plant to TANGEDCO is 1.6.2014. Therefore, Schedule 8 of the PPA, mentioning 1.10.2013 as the commencement of the first contract year (SDD), is undoubtedly a clerical/typographical error, caused on account of oversight of both parties, thereby rendering Schedule 8 inconsistent with the expressed provisions of the PPA.
- c) The inconsistencies pointed out in Schedule 8, is an error apparent in the light



of the fact that the Lol and Article 4 of the PPA makes it amply clear that the SDD for the arrangement of supply of power from DIL's power plant to TANGEDCO was changed to 1.6.2014 from 1.10.2013, at the behest of TANGEDCO itself and hence, does not warrant any further proof.

- d) The SDD for the PPA, being 1.6.2014, is an undisputed fact. TANGEDCO has never disputed the said fact either through their pleading or oral submissions, throughout the course of adjudication of Petition No. 14/MP/2021. Further, the Respondent, in paragraph 2 of their reply filed in Petition No. 14/MP/2021, has unequivocally stated that 1.6.2014 is the SDD.
- e) Further, Article 4.1 of the PPA constitutes the operative part of the PPA as against Schedule 8, which is ancillary to the operative part. Accordingly, the operative part should be held sacrosanct, and Schedule 8 should be corrected and aligned with Article 4.1 of the PPA. The Hon'ble High Court of Kerala in *Paryari and ors (AIR 1987 Ker 80)* held as under:

"The counsel for the respondents made a forceful plea based on the perambulatory portion of the deed which, according to him, indicates the mind of the donor that he resolved or desired to have a hospital building put up on this land. Had there been any ambiguity in the operative portion of the deed, resort to its preamble would have been advisable in order to bring about a construction consistent with the preamble. But such a course is unnecessary in the case of Ext. A1 wherein the recitals are explicit and the terms used in the operative portion are unambiguous. More than a century ago, the Privy Council had emphasized the need to give predominance to the operative part of a document over the rest of the recitals. In the words of Sir R.P. Collier in Marcar v. Sigg, (1878-80) ILR2 Mad 239 (PC) "The construction of an ambiguous stipulation in a deed may be governed or qualified by a recital, but on the other hand if the intention of the parties is to be collected from the operative part of the instrument, that intention is not to be defeated or controlled by the other recitals."

Years later the same principle had been reiterated by the Privy Council in Beli Ram and Bros. V. Mohd. Afzal, 1948 AIR (PC) 168 Sir John Beaumont in that decision said :

"The operative part of a deed cannot be controlled by recitals in the preamble if the operative words are clear"...."

In view of the above, the recitals, Schedules, Appendix, Annexures, etc., cannot override the operative part of the contract (i.e., Article 4 of the PPA), and in case of any conflict, the operative part of the contract will prevail over the Schedule.

- f) If the SDD as per the PPA is stated to be 1.6.2014, then the first contract year for the commencement of supply of the power cannot, under any circumstances, fall prior to the date of SDD. However, the table under Schedule 8 of PPA has wrongly mentioned the first contract year to commence from 1.10.2013. Hence, the said typographical error under Schedule 8 of the PPA needs to be corrected, and consequently, the changes have to be made even for the rest of the foregoing dates as mentioned under Schedule 8.
- g) The intention of the Parties, as gathered from the precursor documents to the



PPA, such as the RfP and LOI, as well as the PPA itself, when read as a whole, clearly indicates that the duration of the PPA was to be for 15 years, and the SDD was to be 1.6.2014. Therefore, the typographical error, as pointed out by DIL under Schedule 8 of the PPA, is an inadvertent mutual oversight on the part of both parties. Hence, Schedule 8 in its present form, being not reflective of the real intention of the parties, needs to be immediately rectified.

- h) DIL tendered its financial bid under the subject RfP with the legitimate expectation of supplying power to TANGEDCO for a period of 15 years, on a particular quoted tariff for each contract year, as per Schedule 8 of the PPA. In the absence of correction of Schedule 8, the operating period would be unreasonably reduced by a period of 8 months. The reduction in the 'Operating period' is against the express provisions of the PPA, which clearly states that the expiry date would be on the 15th anniversary of the Delivery Date. Hence, any variation contrary to the express provision of PPA cannot be further countenanced.
- i) Once the wrongly mentioned date i.e., 1.10.2013 for the commencement of the first contract year under Schedule 8 of the PPA, is corrected, then consequently, the rest of the dates mentioned in Schedule 8, must be changed in accordance with the scheme provided by the definition of 'Contract Year' in the PPA. As per the RfP, the Expiry Date was mentioned as 30.9.2028, which falls exactly after the completion of the 15-year operating period of the PPA from SDD, which was mentioned as 1.10.2013 in the RfP. However, SDD was changed vide the LOI to 1.6.2014, at the behest of TANGEDCO, whereas the 'Operating Period' still remained the same, i.e., 15 years. Accordingly, if the SDD is changed and the Operating Period remains unchanged, then the Expiry Date ought to be changed to 31.5.2029, to bring it in alignment with the 15 years of operating period, as stipulated in the RfP, LoI, and the PPA.
- j) As a result of rectification in the date of commencement of the first contract year to 1.6.2014, under Schedule 8 of the PPA, the tariff mentioned for the first contract year would be disbursed for the period 1.6.2014 to 31.3.2015, instead of 1.10.2013 to 31.3.2014. Similarly, the tariff mentioned for the second contract year, under Schedule 8, would be disbursed for the period 1.4.2015 to 31.3.2016, and so on and so forth.
- k) In the present form of the PPA, Article 4 mentions 1.6.2014 as the SDD, whereas Schedule 8 mentions 1.10.2013 as the SDD, which would invariably deem to mean that there are two different SDDs for the same PPA. Such an interpretation is not only absurd, illogical, and unreasonable, but also arbitrary. Hence, the present Petition is filed for the rectification of the anomaly as pointed out under Schedule 8 of the PPA.
- l) The wrong realization of the tariff amount, on account of the wrong dates mentioned under Schedule 8, greatly affects the financial interest of DIL. The tariff, which has been realized as per the dates that are presently mentioned



under Schedule 8, is not in accordance with what was mutually agreed by the parties. Further, the overall period of operation of the PPA is also arbitrarily reduced by 8 months. The bid in the present case was structured based on the estimated recovery of the tariff, which would meet the expected profitability of DIL. If Schedule 8 is not aligned with Article 4.1 of the PPA, the whole intent of entering into the contract would be vitiated, and DIL would be denied its legitimate dues, expected out of the contract, and as such, would cause an irreversible injury, that would continue till the end of the contract. Therefore, the correction in Schedule 8 of the PPA necessitates an immediate rectification.

- m) Similarly, in the present case, if the wrong, as indicated in the present Petition, despite being identified, is not corrected at its source, it will result in a cascading effect and continue till the end of the contract and will be a cause of further injustice to DIL. (Reliance placed on the judgment of the Hon'ble Madras High Court in *Canara Bank vs. G.Raj* (A.S. No. 279/2019)).

Maintainability

- n) DIL, vide its letter dated 6.10.2020, raised the issue of the dates under Schedule 8 of the PPA remaining unchanged with the change in the SDD in Article 4.1. There is no specific time limit mentioned in the PPA for raising any dispute. Article 14.2.1.1 mentions that any party is entitled to raise any claim, dispute, or difference arising out of the PPA, and both parties should first make an attempt to resolve the dispute amicably. However, in the light of the absence of any response by TANGEDCO, a dispute arose between the parties in terms of Article 14.3 of the PPA. The dispute as raised by the Petitioner is a continuous cause of action, since incorrect dates are mentioned under Schedule 8 of the PPA, from the very inception of the PPA, and the same has not been rectified even till the date of filing of this Petition. Consequently, every year, the tariff is released in accordance with the incorrect dates mentioned in Schedule 8 of the PPA. Therefore, every time the wrong amount of tariff is released by taking into consideration the wrong dates as mentioned under Schedule 8, a new cause of action arises in favour of DIL. Further, the overall Operating Period of the PPA is also unreasonably and arbitrarily reduced by the period of 8 months.
- o) Further, it has already been established that Unit-2 of the Project located in the State of Maharashtra, is supplying 100 MW power to the TANGEDCO in the State of Tamil Nadu under a case-1 long-term PPA and 187 MW (gross contracted capacity) to Noida Power Company Limited in the State of Uttar Pradesh, under a separate long-term PPA. Therefore, DIL has entered into an arrangement for the generation and sale under the composite scheme of generation from its Project. Accordingly, the Commission would be the 'Appropriate Commission' in terms of the provisions of the Act, for addressing the issues related to the supply of 100 MW power from Unit-2 of the generating station, to TANGEDCO under Sections 79(1)(b) and 79(1)(f) of the Act. Thus, the Commission is adequately empowered to adjudicate upon the disputes between the parties herein, in terms of the relevant provisions of the PPA, the



Act, and the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, and as such, the present Petition is maintainable before the Commission.

- p) From Article 14.3 of the PPA, it is evident that in case of a dispute between the seller and the procurer under the above case-I PPA pertaining to matters related to the applicability of the tariff for any year, the appropriate commission shall adjudicate upon such matters. Further, without prejudice to the rights and contention of DIL in the present Petition, the reliefs sought before the APTEL vide Appeal No. 660/2023 in no way is overlapping with that sought before this Commission vide this Petition and as such, the decision of the Commission and the APTEL shall not cause any conflict.

Hearing dated 19.9.2024

7. The Petition was heard on 19.9.2024 through virtual hearing, and the Commission, at the request of the parties, adjourned the hearing, with directions to complete their pleadings on 'maintainability'.

Reply of the Respondent TANGEDCO

8. The Respondent, TANGEDCO, vide reply affidavit dated 4.10.2024, mainly submitted the following:

- a) The Petition is baseless, untenable, misconceived, without merit, and liable to be rejected. The averments are denied unless specifically admitted herein, or unless the same pertains to matters of record. Nothing contained in the Petition may be construed to have been admitted merely on the ground of specific non-traverse.
- b) DIL entered into PPA dated 27.11.2013 with TANGEDCO, the procurer, in the State of Tamil Nadu, for supply of 100 MW power from the generating station of DIL. The parties signed the Addendum to the PPA on 20.12.2013. Admittedly, the Petitioner commenced supply of 100 MW RTC power on 16.12.2015.

Petition barred on the principles analogous to Order 2 Rule 2

- c) Previously, DIL filed Petition No. 14/MP/2021 under Section 79 (1) (b) and (f) of the Act, before this Commission read with Article 4 of the PPA dated 27.11.2013 wherein, DIL prayed that this Commission hold and declare that the delay in grant and operationalization of long-term access is a Force Majeure event in terms of Article 9.3 of PPA and the delivery date and expiry date for supply of 100 MW RTC power under the said PPA be extended to 16.12.2015 and 15.12.2030 respectively. DIL also prayed for a declaration that the tariff for the period commencing from 16.12.2015 be the tariff for the first contract year, i.e., 1.10.2013 to 31.3.2014, as mentioned in Schedule 8 of the PPA.



- d) This Commission dismissed the aforesaid Petition vide order dated 4.6.2023, holding that the Petition is time-barred and is hit by the principles of waiver, estoppel, and acquiescence. Aggrieved by the said order, DIL has preferred an appeal before APTEL, and the matter is currently under consideration.
- e) The reliefs prayed for by DIL in Petition No.14/MP/2021 was that the tariff applicable as per Schedule 8 of the PPA to the first contract year (i.e., 1.10.2013 to 31.3.2014) mentioned therein, ought to be made applicable from 16.12.2015, and consequently, the tariff for the entire term of the PPA ought to be paid on that basis. The said relief was prayed for, on the ground that DIL was entitled to extension of the SDD, due to non-operationalization of the open access until 16.12.2015.
- f) Both the identification of the SDD, as well as the period to which the tariff for the first contract year as stipulated in Schedule 8 of the PPA was to be applied, were squarely in an issue in, and constituted part of the cause of action, in the original Petition. The relief prayed for in the present Petition is that the tariff applicable under Schedule 8 of the PPA for the first contract year should apply to the contract year commencing from 1.6.2014. The relief presently prayed for is clearly subsumed within the larger relief that was prayed for in the earlier Petition. The pleas taken in the present Petition were available to be pleaded by DIL in the alternative, in the earlier Petition. Nevertheless, in the pleadings before the Commission in the earlier Petition, no alternative plea was raised, or prayer made by the Petitioner that the tariff stipulated for the first contract year ought to be applied for the contract year commencing from 1.6.2014, if not from 16.12.2015.
- g) Order II Rule 2(1) provides that a plaintiff is to include the whole of the claim, which he is entitled to make, in respect of the cause of action. In this, DIL, while filing the earlier Petition, intentionally omitted to sue and/ or relinquished the claim that on account of an alleged typographical error in Schedule 8 of the PPA, the first contract year ought to be declared to commence from 1.6.2014. Therefore, DIL is barred from seeking any relief on the basis that the first contract year ought to commence from 1.6.2014, having omitted and/or relinquished some claim at the time of filing the earlier Petition. Applying the principles analogous to Order 2 Rule 2 of the CPC, 1908, DIL is not entitled to a grant of any relief in the present Petition, having failed to seek such relief in the earlier Petition.
- h) The position that DIL could have, and ought to have urged, the pleas raised in the present Petition in the earlier Petition itself, is endorsed by DIL's own conduct. At the stage of the final hearing in the earlier Petition, DIL argued that, in addition, and alternatively, there was an error in Schedule 8 of the PPA. The Petitioner contended that the SDD had been changed from 1.10.2013 to 1.6.2014 and recorded under Article 4.1.1 of the PPA; however, due to an alleged clerical/typographical mistake, the same was not reflected in Schedule



8 of the PPA. The Commission, however, rejected the said contention of DIL holding that: (i) there was no agreement between the parties that there was a typographical error in Schedule 8 of the PPA; and (ii) since the Petitioner had failed to plead its case that there was a typographical error, no decision could be rendered on such plea. The Commission did not grant DIL the liberty to file a fresh petition to raise such a plea in the original order.

- i) The present Petition is barred by principles analogous to Order 2 Rule 2 of the CPC. Further, the present Petition is also barred by the principles of constructive res judicata, as DIL could have, and ought to have, raised a plea with respect to the alleged error in Schedule 8 of the PPA. Having failed to do so, and the earlier Petition having been heard and conclusively decided by the Commission, the principles of constructive res judicata apply, and the present Petition is barred.
- j) The Petitioner has not raised any ground or plea with respect to the alleged error in Schedule 8 of the PPA, even in the appeal preferred before APTEL. DIL is thus precluded from bringing a fresh Petition to urge such a plea, and the present Petition accordingly deserves to be dismissed at the outset.

Petition hit by Limitation, Delay, and Laches

- k) DIL has sought a declaration to the effect that the date mentioned in Schedule 8 of the PPA, i.e., 1.10.2013, as the commencement of the first contract year, be declared to be a typographical error and has prayed for consequential relief on that basis. Under Article 58 of the Schedule to the Limitation Act, 1963, the limitation period for instituting any suit or proceedings seeking a declaration is three years from the date when the right to sue first accrues.
- l) The PPA was executed on 27.11.2013, and the addendum to the PPA was signed on 20.12.2013. The Petition was filed in November 2023, i.e., much beyond 3 years from the execution of the PPA. Without prejudice to TANGEDCO's submission that DIL has failed to demonstrate any cause of action, or right to sue having accrued, any right to sue, if at all, in the present case, accrued when the PPA was executed, i.e., November and December 2013. Further, DIL raised its first invoice in December 2015-January 2016, as per the rate applicable for the 3rd contract year in Schedule 8 of the PPA. Therefore, any error would have obviously been discovered by that time. It is clear, therefore, that from all standpoints, the Petition is time-barred. It is well settled that the Commission cannot entertain time-barred claims, which cannot be entertained or allowed if not otherwise recoverable in a regular suit [*Andhra Pradesh Power Coordination Committee and Others v. Lanco Kondapalli Power Limited*, (2016) 3 SCC 468]. The APTEL in *Kalani Industries Pvt. Limited vs. RERC and Ors. in Appeal No. 185 of 2015- Order dated 25.10.2018* and *MSEDCL vs. MERC & Ors. in Appeal No. 75 of 2017- Order dated 24.04.2018*.
- m) DIL has been raising invoices right since December 2015, as per the original Schedule 8 of the PPA, consistent with TANGEDCO's interpretation of the PPA, without any such shifting of the first contract year as prayed for. Even in its notice



dated 6.10.2020, DIL only prayed that the contract year be shifted on account of a Force Majeure event, being non-operationalisation of the LTA. Even in the said notice, no issue was raised that there was any error in Schedule 8 of the PPA.

- n) The plea of DIL for correction of the typographical error, after having acted upon the allegedly erroneous Schedule 8 of the PPA, without any demur or protest for nearly 10 years, is clearly hit by the doctrine of delay and laches. DIL has not even explained its delay in approaching the Commission, after an inordinate delay of 10 years after the execution of the PPA. In this regard, the Supreme Court in *Union of India v. N. Murugesan*, (2022) 2 SCC 25 has held that the Court should consider factors such as the length of the delay, acquiescence, the nature of acts done and the change in position in the interregnum and a man responsible for his conduct in equity cannot be allowed to avail the remedy belatedly.
- o) If the position with respect to the applicability of tariffs as per Schedule 8 of the PPA is unravelled after nearly 10 years, it would cause grave prejudice to TANGEDCO, considering that DIL has been raising invoices in terms of the existing Schedule 8 to the PPA, and TANGEDCO has been making payments accordingly. The conduct and delay of DIL, thus, constitute laches on its part.

Petition hit by Doctrine of Election, Approbate and Reprobate

- p) The plea of the Petitioner is further hit by the doctrine of election as the Petitioner accepted the payments under the PPA for the last 10 years and adopted the whole contents of the PPA at least till 6.10.2020. Hence, DIL cannot approbate and reprobate.
- q) Earlier, DIL prayed for declaration before the Commission as “that the Tariff for the period commencing from 16.12.2015 shall be the Tariff for the First Contract Year, i.e., 01.10.2013 to 31.03.2014 mentioned in Schedule 8 of the TANGEDCO PPA and so on and consequently direct the Respondent to pay tariff for the entire term of the PPA on the said basis”. The said prayer was made by DIL without raising any dispute that the first contract year starts from 1.10.2013 itself and prayed for shifting to 16.12.2015, the date of operationalisation of LTA. Thus, the earlier Petition was premised upon the first contract year being 1.10.2013 to 31.3.2014 for the purpose of the tariff schedule.
- r) DIL has sought to approbate and reprobate, inasmuch as it has raised invoices and received payments on the basis of the rates mentioned in Schedule 8 of the PPA, and has now sought to repudiate the very same schedule of rates. The Petition is thus clearly hit by the doctrine of election, approbate and reprobate.
- s) TANGEDCO has an excellent case even on merits, and reserves the right to file a detailed reply on merits in the event that the Commission is pleased to entertain the present Petition on merits.



Rejoinder of DIL

9. DIL, vide its rejoinder affidavit dated 7.10.2024, has mainly submitted as under:

- a) The present petition is not barred by the principles of Order II Rule 2 of the CPC. It is a settled position of law that Order II rule 2 bars the subsequent suit on the same cause of action, but does not bar a subsequent suit based on a different and distinct cause of action. Petition No.14/MP/2021 was preferred by DIL for adjudication of disputes with TANGEDCO regarding payment of tariff, considering the period from 16.12.2015 to 31.3.2016 as the first contract year.
- b) The cause of action in Petition No.14/MP/2021, i.e., delay in grant and operationalization of LTA due to Force Majeure event and consequent declaration of 16.12.2015 as SDD, is distinct and separate from the cause of action in the present petition, i.e., obvious error/mistake in the PPA. The same is also evident from the fact that even if the relief sought in the present Petition is granted by the Commission, it would have no impact on the relief sought in Petition No. 14/MP/2021 and Appeal No. 660/2023, currently pending before the APTEL. Therefore, the reliefs sought before APTEL and the present Petition are mutually exclusive, and hence, the decision of the Commission and APTEL shall not cause any mutual conflict.
- c) The Commission in para 27 of its order dated 4.6.2023 noted that this prayer of DIL is not connected with the underlying subject matter of the Petition. From a bare perusal of the said order, it is evident that the Commission has already held that the issues urged in the captioned Petition and the relief sought thereto are separate and distinct from the prayer sought in Petition No.14/MP/2021. Accordingly, the captioned Petition is not hit by the principle of Order 2 Rule 2 of CPC. Further, since the Commission in Petition No. 14/MP/2021 categorically refused to go into the issues raised in the captioned Petition, there was no need for DIL to seek leave/ liberty to approach the Commission by way of a fresh Petition.
- d) It is further denied that the captioned Petition is hit by the principles of constructive *res judicata*. It is a settled principle of law that unless the issue was involved directly and decided by the court of exclusive jurisdiction, it will not be barred by *res judicata*. In the matter at hand, the Commission vide its order dated 4.6.2023 categorically refused to entertain the oral arguments of DIL. Evidently, the captioned Petition is not hit by *res judicata*. Even otherwise, it is settled that the principles of *res judicata* do not apply to tariff matters. The ultimate relief in the captioned Petition is the tariff that DIL will be entitled to get for the correct respective contract year.
- e) Further, the proceedings before the Commission are not strictly subject to the rules of procedure laid down in CPC. The Commission has been inherently empowered by the Act and the 2023 Conduct of Business Regulations to pass



orders to meet the ends of justice. It is also a settled position of law that procedure must serve as the handmaid of justice, which essentially means that rules of procedure are made to advance the cause of justice and not to defeat it.

- f) TANGEDCO is incorrect in stating that the captioned Petition is hit by limitation, delay, and laches. DIL is seeking correction of an obvious and evident error in the PPA, which will ensure that it is able to supply power to TANGEDCO for the full 15 years, as mentioned in the PPA and the bid documents. It is pertinent to note that every time TANGEDCO pays tariff as per the wrong application of Schedule 8 in each contract year of the PPA, it gives rise to a fresh/ new cause of action.
- g) It is denied that DIL is hit by the doctrine of election, approbate and reprobate. DIL is consistent with its stand that the SDD should be 16.12.2015, i.e., the date from which it commenced supply to TANGEDCO on account of the delay caused due to Force Majeure events, and accordingly, the first contract year for the purpose of tariff should be from 16.12.2015. The relief claimed in the captioned Petition is in no way contrary to the aforementioned stance of DIL. Even if the SDD in the PPA is aligned to 1.6.2014, DIL would continue to contest its appeal before the APTEL and seek recognition of 16.12.2015 as the SDD and consequential relief. DIL, by the present Petition, is only seeking a correction of a blatant typographical error as Article 4.1 of the PPA, constitutes the operative part of the PPA, as against Schedule 8 being ancillary to the operative part, the operative part should be held sacrosanct and the Schedule 8 should be corrected and aligned with Article 4.1 of the PPA.
- h) TANGEDCO is seeking to benefit from an evident error/mistake in the PPA executed between the parties. DIL is merely seeking alignment of the provisions of the PPA, which, when read together, make it obvious that the SDD should be 1.6.2014. Acceptance of TANGEDCO's contention, that DIL agreed to Schedule 8, i.e., 1.10.2013 to 31.3.2014 would be the first contract year, would lead to an absurd situation, wherein, DIL would end up supplying power for less than the term of 15 years, as mentioned in the LOI, the PPA and the bid documents, pursuant to which DIL participated in the bidding process. TANGEDCO, having assured DIL that the supply of power would be for a period of 15 years, cannot now rescind from its representation and promise, by curtailing such supply to a period of less than 15 years. TANGEDCO is bound by the doctrine of legitimate expectations and promissory estoppel.

Hearing dated 10.10.2024

10. During the hearing, the learned counsel for DIL and the learned counsel for TANGEDCO made detailed oral submissions in the matter. The Commission, after permitting the parties to file their written submissions on 'limitation', reserved its order



on 'maintainability'.

Written submissions of DIL

11. In compliance with the above, DIL vide affidavit dated 2.11.2024 has mainly submitted the following:

- a) DIL identified an error in the PPA in 2020, which was communicated to TANGEDCO through its letter dated 6.10.2020. The Hon'ble High Court of Delhi in *Jagatjit Industries Ltd. v. Labour Officer* (2011 SCC OnLine Del 4185) explained that a continuing cause of action arises from repeated acts or omissions of the same kind. In this case, the wrongful action of recovering tariffs for each contract year in the PPA, based on 2013-14, is continuing due to a typographical error in Schedule 8, which needs to be corrected.
- b) The present Petition is not barred by limitation, as a fresh and continuing cause of action exists. The correction of the SDD would have a direct and consequential impact on the tariff, which is determined in Schedule 8 of the PPA independently for each contract year. Therefore, with the commencement of each new contract year, a new cause of action arises, necessitating the correction sought in this Petition.
- c) DIL's ongoing monthly energy billing process based on a wrong tariff creates a continuous cause of action, as each new tariff application leads to a fresh right to seek correction. This justifies seeking rectification to align with Article 4 of the PPA and prevent future discrepancies. A continuing wrong is evident, as the incorrect SDD is yet to be corrected, due to which DIL is getting the incorrect tariff for each new contract year. The legal injury resulting from this error is of an ongoing nature, and the persistence of such a state of affairs gives rise to a continuing wrong, with each passing moment. As elucidated in *M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das* (2020) 1 SCC 1, (para 343) "*What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation.*"
- d) Similarly, in *Khair Mohammad Khan v. Jannat* 1940 SCC OnLine Lah 113 (pg 28), the court explained the distinction between the injury and its effects. It was observed that in cases of continuing wrongs, the injury is not confined to a specific point in time, but instead, generates an ongoing source of injury, which persists so long as the wrongful act or omission continues. This is critical because the incorrect SDD results in a fresh cause of *action de die in diem*, so long as the underlying situation persists. Therefore, in the present matter, as the wrongful state of affairs remains unabated, the injury itself continues to exist, thereby qualifying as a continuing wrong and preserving the cause of action.
- e) The Petition is not barred by limitation, as the impact of the incorrect SDD is not a one-time event, but an ongoing issue that perpetuates with each contract year, giving rise to a new cause of action each year, and that the issue is independent



of the pleas dealt with by the Commission under Petition No.14/MP/2021. Accordingly, the correction sought in the present Petition is timely and necessary to ensure the correct application of the tariff provisions under the PPA.

- f) Further, the prayer in the present Petition is factually and in terms of merit different than the plea raised in Petition No. 14/MP/2021 and therefore, the grounds presented before this Commission has not been dealt with by this Commission in the order dated 4.6.2023 in Petition No. 14/MP/2021. This has also been clarified by the Commission in para 27 of the order dated 4.6.2023.

Written submissions of TANGEDCO

12. TANGEDCO vide affidavit dated 5.11.2024 has mainly submitted the following:

- a) The Commission has dismissed DIL's request for contract year shifting, as per the order dated 4.6.2023 in Petition No.14/MP/2021. DIL has argued that it only discovered the mistake in Schedule 8 when it sent the notice on 6.10.2020. Under Section 17(1)(c) of the Limitation Act, where a suit or application is for relief from the consequences of a mistake, the period of limitation begins to run from the time that the plaintiff discovered the mistake, "*or could, with reasonable diligence, have discovered*" such mistake.
- b) DIL has been supplying power to TANGEDCO on 16.12.2015. The first invoice was raised on December 2015-January, 2016 as per the rate applicable for the 3rd contract year in Schedule 8 of the PPA, and even thereafter, each invoice has been raised as per the rates given for the relevant contract year in Schedule 8, which clearly mentions the start of the first contract year as 1.10.2013. Therefore, any error would have obviously been discovered at the time of commencement of supplies. The contention of the Petitioner, therefore, deserves to be rejected.
- c) The plea of '*continuing cause of action*' is totally misconceived and has already been dealt with by this Commission in its order, wherein, this Commission has held that the wrongful application of the tariff as per Schedule 8 of the PPA, would only amount to continuance of the effects of an injury, and not the injury itself, as 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.

Analysis and Decision

13. From the above submissions of the parties, the question that emerges for consideration is '*Whether the present petition is maintainable*'. While TANGEDCO has submitted that the petition is barred by the principles analogous to Order II Rule 2 of CPC, limitation, and the principles of constructive res judicata, etc., DIL has vehemently



opposed the said contentions of TANGEDCO, stating that it is only seeking an alignment of the provisions of the PPA, when read together, makes it obvious that the SDD should be 1.6.2014 and that TANGEDCO is bound by the doctrine of legitimate expectations and promissory estoppel. We examine the issues raised, as under:

Principle analogous to Order II Rule 2 of CPC

14. TANGEDCO has argued that DIL is not entitled to the grant of any relief in the present petition as it has failed to seek such relief in the earlier petition (Petition No.14/MP/2021). Referring to Order II Rule 2(1) of CPC which provides that a plaintiff is to include the whole of the claim, TANGEDCO has argued that DIL, while filing the earlier petition, intentionally omitted to sue and/or relinquished the claim that on account of an alleged typographical error in Schedule 8 of the PPA, the first contract year ought to be declared to commence from 1.6.2014. It has contended that the relief prayed for by DIL is clearly consumed with the larger relief that was prayed for in the earlier petition and since no alternative relief was raised or prayer made in the earlier petition (that the first contract year ought to be applied for the year commencing from 1.6.2014) and no liberty was also granted by the Commission to raise such plea, the petition is not maintainable on this count. *Per contra*, DIL has pointed out that the principles of Order II Rule 2 bar the subsequent suit on the same cause of action, but do not bar a subsequent suit based on a different and distinct cause of action. Accordingly, it has submitted that the cause of action in the earlier petition (delay in the grant of operationalization of LTA due to Force Majeure event and consequent declaration of 16.12.2015 as SDD) is distinct and separate from the cause of action in the present petition (i.e. correction of obvious error/mistake in the PPA). Referring to the order dated 4.6.2023 in Petition No.14/MP/2021, wherein, the Commission held that the prayer of DIL for correction of date of 1.10.2013 to 1.6.2014 in Schedule 8 of the PPA is entirely independent and is not connected with the underlying subject matter in Petition No.14/MP/2021, DIL has argued



that since the Commission refused to examine the said issue, there was no need to seek liberty and therefore, the prayer in the present petition is maintainable.

15. We have examined the rival contentions. Order II Rule 2 of CPC 1908 provides as under:

2. Suit to include the whole claim. - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. -Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. -A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation. -For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

16. It is evident that the object of Order II Rule 2 of CPC is to ensure that no defendant is sued or vexed twice with regard to the same cause of action and to prevent a plaintiff from splitting the claims and remedies, based on the same cause of action. In *Church of Christ Charitable Trust and Educational Charitable Society V. Ponniamman Educational Trust*, AIR 2012 SC 3912, it was held that “Cause of action” is a bundle of facts, which, taken with the law applicable to them, gives the plaintiff the right to relief against the defendant. Every fact that is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. The effect of Order II Rule 2 is to bar a plaintiff, who had earlier claimed certain remedies with regard to a cause of action, from filing a second suit, with regard to other reliefs based on the same cause of action. In other words, the bar under Order II Rule 2 must be that it operates to preclude a plaintiff from instituting a second suit, on the same cause of action, for a claim, any portion of a claim, or reliefs, which the plaintiff was entitled to avail of at the time of filing of the first suit. In *Petition No.14/MP/2021, DIL*, apart from seeking a declaration that that the delay in the operationalization of LTA was a force majeure event and that the



SDD and Expiry date for the supply of power to TANGEDCO under the PPA, are 16.12.2015 and 15.12.2030 respectively, had sought the following relief:

(c) Hold and declare that the Tariff for the period commencing from 16.12.2015 shall be the Tariff for the First Contract Year, i.e., 01.10.2013 to 31.03.2014 mentioned in Schedule 8 of the TANGEDCO PPA and so on and consequently direct the Respondent to pay tariff for the entire term of the PPA on the said basis;

(d) XXX

17. In the present Petition, DIL, apart from seeking a declaration that the date mentioned in Schedule 8 of the PPA is an inadvertent error, has sought the following relief(s):

a) xxxxx.

b) Declare and allow the date i.e., 01.06.2014 mentioned as the Scheduled Delivery Date in Article 4 of the PPA, to be the commencement of the first Contract Year under Schedule 8.

c) Allow the rectification of all the dates following the date of 01.10.2013 as mentioned under Schedule 8 of the PPA, as per the scheme provided under the definition of Contract Year of the PPA

18. It is therefore evident that the relief prayed for by DIL, in its earlier petition (Petition No. 14/MP/2021), was that the tariff applicable as per Schedule 8 of the PPA to the first contract year (1.10.2013 to 31.3.2014) mentioned therein, ought to be made applicable from 16.12.2015 and consequently the tariff for the entire term of the PPA ought to be paid on that basis. However, the relief sought by DIL in the present Petition is that the tariff applicable for the first contract year under Schedule 8 of the PPA should be applied to the contract year commencing from 1.6.2014. Thus, the identification of the SDD and the period to which the tariff for the first contract year was to be applied were squarely an issue and constituted a part of the cause of action in the earlier Petition. To us, the plea raised in the present Petition, that the tariff stipulated for the first contract year under Schedule 8 of the PPA ought to be applied for the contract year commencing from 1.6.2014 (or 16.12.2015) was available to DIL, at the time of filing the earlier Petition (Petition No.14/MP/2021), but the same was not sought for or claimed by DIL. In other words, DIL, in its earlier Petition, omitted to seek such relief(s) and/or relinquished the



claim that the first contact year under the Schedule 8 of the PPA ought to have commenced from 1.6.2014 (on account of the alleged typographical error/mutual oversight of both parties). Having relinquished such relief, i.e., the first contract year in Schedule 8 of the PPA ought to have commenced from 1.6.2014, which DIL could have pleaded in the alternative, while filing the earlier petition, the principles of Order II Rule 2 gets attracted, and DIL is, therefore, precluded from including the said relief in the present Petition. The prayer of DIL, in the present Petition, cannot therefore be entertained.

19. DIL has contended that the Commission in its order dated 4.6.2023 in Petition No.14/MP/2021, after considering its plea for rectification of the date of 1.10.2013 to 1.6.2014 in Schedule 8 of the PPA, held that the said prayer is entirely independent and is not connected with the subject matter (in Petition No.14/MP/2021) and therefore, the relief sought in the present petition is maintainable. This contention of DIL is also not acceptable. It is pertinent to mention that DIL, in the course of final hearing of Petition No.14/MP/2021, had sought the correction of the SDD from 1.10.2013 to 1.6.2014 in Schedule 8 of the PPA and the Commission, vide its order dated 14.7.2023, refused to consider/examine the request of DIL and disposed of the same as under:

“27. We have noted the submissions of both the parties. Based on the contentions raised by both the parties, we find that there is no mutual agreement between the parties as to mentioning of date i.e.1.10.2013 in the Schedule 8 of the TANGEDCO PPA being a typographical error - which both the parties are inclined to correct. We also notice that the aforesaid prayer of the Petitioner for correction of date of 1.10.2013 to 1.6.2014 in the Schedule 8 of the TANGEDCO PPA is entirely independent from the pleas taken by it in the main matter which are solely based on the declaration of the Force Majeure event and revision of the Schedule Delivery Date to 16.12.2015 in place of 1.6.2014 and no prayer to the above effect has been made by the Petitioner in the Petition. It is well settled that the decision of a case cannot be based on the grounds outside the pleadings of parties. In view of the above, we are not inclined the aforesaid prayer of the Petitioner for which neither any specific prayer has been made in the Petition nor it, in our view, is connected with the underlying subject matter of the Petition”.

20. In terms of Rule 2(3) of Order II Rule 2 of CPC, *supra*, in a situation where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in



the suit, the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit, provided that at the time of omission to claim the particular relief, he had obtained the leave of the Court in the first suit. We note that the Commission had not rendered any decision on the plea of the DIL to correct the typographical error on the ground that it was outside the pleadings of the parties. However, DIL had not obtained the leave of the Commission to claim the said relief later, nor was any such liberty granted by the Commission in its order dated 4.6.2023. In the absence of any liberty being granted to DIL, on this count, the relief sought by DIL is not maintainable.

Limitation

21. TANGEDCO has also contended that any right to sue, if at all, in the present case, accrued to DIL when the PPA was executed during November 2013 and December 2013 (addendum). Pointing out that DIL raised its first invoice for the third contract year in Schedule 8 of the PPA during December 2015-January 2016, TANGEDCO has stated that any error, therefore, would have obviously been discovered by that time/at the time of commencement of supplies. TANGEDCO has accordingly contended that the plea of DIL for correction of the typographical error, after having acted upon the allegedly erroneous Schedule 8 of the PPA, without any demur or protest, for nearly ten years, is hit by the doctrine of limitation, delay, and laches. Referring to the judgment of the Hon'ble Supreme Court in APPCC & ors v Lanco Kondapalli Power Ltd (2016) 3SCC 468) and the judgments of APTEL in Appeal No. 185/2015 (Kalani Industries Pvt Limited vs. RERC) and Appeal No. 75/2017 (MSEDCL vs MERC & ors), TANGEDCO has argued that since the limitation period under Article 58 to the Schedule to Limitation Act, 1963 for instituting any suit or proceedings seeking declaration is three years, from the date when the right to sue first accrued, the present petition is time barred. In response, DIL while pointing out that the correction of SDD would have a direct impact on the tariff, which is determined in terms of Schedule 8 of the PPA independently for each contract



year, has argued that the present petition is not barred by limitation, as a fresh and continuing cause of action exists with the commencement of each new contract year. It has also contended that a continuing wrong is evident, as the incorrect SDD is yet to be corrected, due to which DIL is getting the incorrect tariff for each new contract year, and the legal injury resulting from this error is ongoing in nature, and the persistence of such state of affairs, gives rise to a continuing wrong. Accordingly, DIL has justified its prayer seeking rectification of the SDD in Schedule 8 to align with Article 4.1 of the PPA to prevent future discrepancies.

22. We have examined the rival submissions. As stated, TANGEDCO had initiated a competitive bidding process through RfP dated 21.12.2012, for long-term procurement of power under case-I competitive bidding, for meeting its base load requirements in the State of Tamil Nadu for a period of 15 years from the SDD. Though as per the bidding documents, the SDD was 1.10.2013 and the expiry date was 30.9.2028, the same was revised to 1.6.2014 by TANGEDCO, vide LOI dated 14.11.2013 (along with annexure), and the same was unconditionally accepted by DIL. However, the expiry date in the LOI remained as 30.9.2028. In the PPA (Article 4.1) executed by the parties on 27.11.2013 (including Schedule 8), the period for the supply of power from the project of DIL, commenced from 1.6.2014 to 30.9.2028. However, the annexure to LOI and Schedule 8 to the PPA, which stipulated the quoted tariff, provided for the commencement of the first contract year as 1.10.2013 and the last contract year ending as 30.9.2028. In other words, while the SDD for the supply of power to TANGEDCO was revised to 1.6.2014 (from 1.10.2013), the LOI and Schedule 8 of the PPA signed by the parties indicated the SDD as 1.10.2013. However, in the absence of any mutual agreement between the parties, the same could not be corrected. DIL has now sought a declaration that the date mentioned in Schedule 8 of the PPA (1.10.2013) is a typographical error and has sought rectification of the same as of 1.6.2014. In terms of Article 58 of the Schedule to the



Limitation Act 1963, the limitation period for instituting any suit or proceedings seeking a declaration is three years from the date when the right to sue first accrues. In the present case, the LOI was issued on 14.11.2013, and the same was accepted by DIL on 18.11.2013. The PPA was executed on 27.11.2013, and the addendum to the PPA on 20.12.2013. Thus, the right to sue, if at all, in the present case accrued when the PPA was executed. Further, DIL had raised its first invoice during December 2015-January 2016 as per the rate applicable for the third contract year in terms of Schedule 8 of the PPA. Under Section 17(1)(c) of the Limitation Act, where a suit or application is for relief from the consequence of a mistake, the period of limitation begins to run from the time the plaintiff discovered the mistake, or could, with reasonable diligence, have discovered such mistake. In our view, any error with regard to the applicable contract year /rates could have been discovered by DIL by the time of execution of the PPA and/or at the time of commencement of the supply or at the time of raising the invoices to TANGEDCO. Even in its letter dated 6.10.2020 addressed to TANGEDCO requesting the revision in the applicability of the first contract year tariff for 2015-16 and for a suitable extension of the expiry date in PPA, DIL had not raised any issue on the existence of an error in the date under Schedule 8 of the PPA. Moreover, DIL has also not explained the reasons for the delay in approaching the Commission for such relief. Having not done so and the parties having acted upon the provisions of PPA (including Schedule 8), without any demur or protest, for a period of nearly 10 years, DIL cannot now, after a period of about 10 years, say that the date of 1.10.2013 (instead of 1.6.2014) in Schedule 8 of the PPA, is an inadvertent error committed by both parties and the same needs to be corrected. As pointed out by TANGEDCO and in terms of the judgment of the Hon'ble Supreme Court in APPCC & ors v Lanco Kondappalli Power Ltd (2016) 3 SCC 468, such time-barred claims cannot be entertained. The conduct of DIL, in the present case, shows that the filing of the present Petition is 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. DIL, in the present case, has not been vigilant but has remained dormant for all these years. Thus, the reliefs claimed by DIL, apart from being barred by limitation, are hit by the principles of waiver, estoppel, and acquiescence.

23. DIL has also submitted that in the present case, there is a continuous cause of action since every time the tariff is paid taking into consideration a wrong contract year and the injury caused itself is also continuing since DIL, till date, has not received the tariff as per the correct contract year for which corresponding tariff was determined in Schedule 8 of the PPA. It has been argued that the injury caused was never completed and is still continuing and will continue for the entire period of the PPA, if the tariff is not paid as per the correct application of Schedule 8 of the said PPA. This has been objected to by TNAGEDCO, stating that the Commission had dealt with the same in its order dated 4.6.2023. We note that the aforesaid submissions of DIL was considered by the Commission in Petition No.14/MP/2021, wherein, it was held that the wrongful application of tariff as per Schedule 8 of the PPA, would only amount to continuance of the effects of an injury and not the injury itself, as when the act of a wrongdoer results in an injury which is complete, the wrongful act is not a continuing one even of the damage/effect resulting from the act may continue. The relevant portion of the order is extracted below:

“.... 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.”

24. The above findings of the Commission are squarely applicable to the present case. For a continuing wrong to arise, there must, in the first place, be a wrong that is actionable because, in the absence of a wrong, there can be no continuing wrong. As noted earlier, the prayer of DIL cannot be entertained, on account of their being time-



barred, and therefore, the argument of payment of tariff on a wrong application of tariff as per Schedule 8 of the PPA, cannot hold good. The submission of DIL is accordingly rejected.

25. TANGEDCO has submitted that the plea of DIL is hit by the doctrine of election as DIL has accepted payments under the PPA for the last 10 years and adopted the whole contents of the PPA till 6.10.2020. It has also submitted that DIL has sought to approbate and reprobate, inasmuch as DIL raised invoices and received payments on the basis of the rates mentioned in Schedule 8 of the PPA and has now sought to repudiate the same schedule of rates. Accordingly, TANGEDCO has stated that the petition is hit by the doctrine of election, approbate, and reprobate. We have in this order decided that the present petition is barred by the principles of Order II Rule 2 of CPC. We have also concluded that the payment of the monthly energy bills on the wrong applicable tariff does not give rise to a continuous and recurring cause of action to DIL. The present Petition is therefore not maintainable on this count.

26. Based on the above discussions and findings, we hold that the present Petition is not maintainable.

27. Petition No. 382/MP/2023 is disposed of in terms of the above, at the admission stage.

Sd/-
(Harish Dudani)
Member

Sd/-
(Ramesh Babu V.)
Member

Sd/-
(Jishnu Barua)
Chairperson

