

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 14/MP/2021**

**Coram:**

**Shri I.S. Jha, Member  
Shri Arun Goyal, Member  
Shri P.K. Singh, Member**

**Date of order: 4<sup>th</sup> June, 2023**

**In the matter of**

Petition under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 read with Regulation 111 and Regulation 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 of this Commission for adjudication of the dispute with the Respondent regarding payment of tariff considering the period from 16.12.2015 to 31.3.2016 as the first contract year in terms of Schedule 8 of the Power Purchase Agreement dated 27.11.2013 read with Addendum No.1 dated 20.12.2013 and for extension for expiry date under the Power Purchase Agreement.

**And**

**In the matter of**

**Dhariwal Infrastructure Limited,  
CESC House, Chowringhee Square,  
Kolkata – 700 001**

**.....Petitioner**

**Vs**

**Tamil Nadu Generation and Distribution Corporation Limited,  
6<sup>th</sup> Floor, Eastern Wing,  
144, Anna Salai  
Chennai – 600 002**

**....Respondent**

**The following were present:**

Shri Gopal Jain, Sr. Advocate, DIL  
Shri Avijeet Lala, Advocate, DIL  
Ms. Aparna Tiwari, Advocate, DIL  
Shri Shamik Das, DIL  
Shri Aveek Chatterjee, DIL  
Ms. Anusha Nagarajan, Advocate, TANGEDCO  
Ms. Aakanksha Bhola, Advocate, TANGEDCO

## ORDER

The Petitioner, Dhariwal Infrastructure Limited ('DIL'), has filed the present Petition under clauses (b) and (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as "the Act") read with Article 4 of the Power Purchase Agreement (PPA) dated 27.11.2013 with the following prayers:

*“(a) Hold and declare that the delay in grant and operationalisation of Long-term Access as a Force Majeure event in terms of Article 9.3 of the TANGEDCO 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 TANGEDCO PPA to the Respondent are 16.12.2015 and 15.12.2030 respectively;*

*(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) Direct the Respondent to pay the amount of Rs. 68.15 crores towards difference in Tariff for the period 16.12.2015 to 31.03.2020 subject to adjustment with applicable Carrying Cost on the above receivables from the date of accrual till the date of actual payment, based on the Order passed by this Hon'ble Commission in the instant Petition;*

*(e) Grant ad interim ex-parte order directing the Respondent to forthwith pay Tariff stipulated for the sixth Contract Year (i.e., FY 2018-19) mentioned in Schedule – 8 of the TANGEDCO PPA for the current Contract Year (i.e., FY 2020-21) commencing from 01.04.2020 and continue to pay the tariff on the same principle for the subsequent years; and*

*(f) Pass such other order(s) and grant relief(s) that this Hon'ble Commission deems fit in the interest of justice and equity.”*

### Background

2. The Petitioner has established a 2x300 MW coal based thermal generating station (in short, "the Generating Station") at Tadali, Chandrapur in the State of Maharashtra. The Petitioner on 27.11.2013, pursuant to a Case-1 competitive bidding

conducted by the Respondent, signed PPA with TANGEDCO for supply of 100 MW Net Contracted Capacity from Unit 2 of the generating station. TNERC (Tamil Nadu Electricity Regulatory Commission) vide order dated 29.7.2016 in P.P.A.P. No. 03 of 2014 had approved the PPA and adopted the tariff discovered under the competitive bidding process in terms of Section 63 of the Act. The Petitioner had commenced supply of power to TANGEDCO with effect from 16.12.2015 subsequent to operationalization of Long-Term Access (“LTA”) by the Central Transmission Utility India Limited (CTUIL). The Petitioner is also supplying 170 MW power from the same unit to Noida Power Company Limited under Section 62 of the Act.

3. Pursuant to competitive bidding process conducted by the Respondent for procurement of power under case-1 bidding process in order to meet its base load power requirements, the Petitioner was selected as successful bidder. The Petitioner and the Respondent entered into a long-term Power Purchase Agreement (PPA) dated 27.11.2013 for supply of 100 MW power commencing from 1.6.2014. The Petitioner and the Respondent signed Addendum to the PPA on 20.12.2013. The Scheduled Delivery Date under the PPA was 1.6.2014 and the expiry date was 30.9.2028.

4. Prior to execution of the PPA, on 7.2.2011, the Petitioner was granted LTA to the Western Region and Northern Region by Power Grid Corporation of India Ltd. (CTUIL) for transmission of 100 MW power from its generating station. Subsequently, on 25.11.2013, the Petitioner requested CTUIL to modify the LTA granted on 7.2.2011 and grant LTA in the Southern Region in lieu of equivalent quantum from the Western Region. On 19.12.2013, the Petitioner informed the Respondent that the generating

station was connected to the CTUIL`s system through LILO of one circuit of 400 kV power Grid Bhadravati-Parli transmission line at DIL Chandrapur and that the inter-connection point and injection point shall be the same.

5. CTUIL informed the Petitioner to file a fresh LTA application for change in region. Accordingly, on 21.12.2013 the Petitioner made a fresh application to CTUIL for grant of LTA in Southern Region as per TANGEDCO PPA. On 22.7.2015, CTUIL granted LTA to the Petitioner for supply of 100 MW power. The Petitioner entered into an LTA Agreement with CTUIL on 20.8.2015 i.e. after delay of almost 1.5 years from the date of the application.

6. CTUIL vide its letter dated 15.12.2015 intimated the Petitioner regarding operationalization of LTA granted to the Petitioner from Maharashtra to Tamil Nadu and commissioning of the Narendra-Kolhapur 765 kV D/C transmission line, enhanced Available Transmission Capacity (ATC) being utilized for operationalization of LTA granted notionally to December, 2013 application, w.e.f. 16.12.2015. Accordingly, the Petitioner commenced supply of power from the generating station to the Respondent w.e.f. 16.12.2015.

7. Tamil Nadu Electricity Regulatory Commission vide its order dated 29.7.2016 approved the PPA entered into with the TANGEDCO and adopted the levelized tariff of Rs. 4.91/kWh.

### **Submissions of the Petitioner**

8. The Petitioner has mainly submitted as under:

(a) PPA defines "Delivery Date" as the date on which the Petitioner commences supply of aggregate contracted capacity to the Respondent/TANGEDCO. As per Article 4.1.1 of the PPA, the Scheduled Delivery Date for supply of aggregated contracted capacity of power from the Petitioner's generating station to the Respondent/TANGEDCO was 1.6.2014. Further, TANGEDCO PPA also defines "Expiry Date" as the date which is the 15<sup>th</sup> Anniversary of the delivery date. Thus, it is clearly provided in the PPA that the supply of power, commencing from the delivery date, shall be for a period of 15 years.

(b) While the Scheduled Delivery Date (in short 'SDD') was revised and postponed to 1.6.2014, Schedule 8 of the PPA which stipulated the quoted tariff provides for commencement of first contract year from 1.10.2013 and the last contract year ending on 30.9.2028. Article 4.1 of the PPA expressly provides for the SDD as 1.6.2014.

(c) As per RfP, the 15-year operating period of the PPA was to expire on 30.9.2028 based on the SDD i.e. 1.10.2013. Hence, when the SDD was revised to 1.6.2014, the Petitioner was left with a reduced operating period. The expiry date ought to have been extended suitably so as to provide an operating period of total 15 years as was originally proposed in the RfP.

(d) Though as per Article 4.1.1 of the TANGEDCO PPA, the date of commencement of supply of power to the Respondent/TANGEDCO was to be affected from the revised SDD, i.e., 1.6.2014, the actual supply of power could

only be commenced from a later date i.e., 16.12.2015, owing to delay in operationalization of the LTA in Southern Region by CTUIL for evacuation of 100 MW capacity of power, thereby delaying the commencement of supply of power. Since the Petitioner could only commence supply of power to the Respondent/TANGEDCO w.e.f. 16.12.2015, the effective first contract year now works out to financial year 2015-16 instead of financial year 2014-15.

(e) Shifting of the SDD from 1.6.2014 to 16.12.2015 is due to delay in operationalization of the LTA in Southern Region by CTUIL. The LTA granted w.e.f. 1.11.2013 was sought to be amended by the Petitioner vide its application dated 21.12.2013 i.e. well before the revised Scheduled Delivery Date of supply to the Respondent/TANGEDCO. However, LTA was operationalized by CTUIL w.e.f. 16.12.2015 which is beyond the control of the Petitioner. Therefore, the revised Scheduled Delivery Date as per the provisions of the TANGEDCO PPA would have to be considered as 16.12.2015 instead of 1.6.2014. Delay in commencement of supply of power from 16.12.2015 due to delay in operationalization of the LTA squarely falls under Force Majeure event as per Article 9.3 of the TANGEDCO PPA.

(f) Article 4.7.1 of the PPA provides that in the event of occurrence of Force Majeure event(s) affecting the Petitioner, the Scheduled Delivery Date and the expiry date shall be deferred to permit the Petitioner to overcome the effects of the Force Majeure events. Further, Article 4.7.5 of the TANGEDCO PPA expressly provides that as a result of such extension (deferment), the Scheduled

Delivery Date and the expiry date newly determined shall be deemed to be the Scheduled Delivery Date and the expiry date for the purpose of the TANGEDCO PPA.

(g) Article 9.3 of the TANGEDCO PPA provides that a Force Majeure means an event or circumstances or combination of events and circumstances that wholly or partly prevents or unavoidably delays an affected party in performance of its obligations under the PPA, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with Prudent Utility Practices.

(h) In view of the above, it is evident that the delay in grant of LTA by PGCIL for supply of 100 MW power from the Petitioner's generating station to the Respondent squarely qualifies as a Force Majeure event under Article 9.3 of the TANGEDCO PPA. Further, as per the provisions of the PPA, the date 16.12.2015 should be treated as the delivery date. Accordingly, financial year 2015-16 to be treated as the first contract year and the date 15.12.2030 as the expiry date.

(i) Since the total duration of supply of power under the TANGEDCO PPA is for fifteen years, the applicable tariff for each contract year is separately provided for in Schedule 8 of the TANGEDCO PPA on the basis of the said levelised tariff for the said fifteen years. There is no provision in the TANGEDCO PPA which 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 of the TANGEDCO PPA shall be re-evaluated or revised. In as much as the supply of power is for a definite and ascertained period comprising of 15 years (16 contract years), the said tariff as stipulated in Schedule 8 of the TANGEDCO PPA has to apply throughout the said period. The tariff applicable for the first contract year beginning from 16.12.2015 and ending on 31.3.2016 shall be tariff which was initially applicable for the original first contract year, i.e. from 1.10.2013 to 31.3.2014. The tariff for the subsequent contract years would be applicable in the similar manner, i.e., the tariff for the second contract year commencing from 1.4.2016 and ending on 31.3.2017 shall be the tariff stipulated for the contract year commencing from 1.4.2014 and ending on 31.3.2015 (original second contract year) in Schedule 8 of the TANGEDCO PPA for the second contract year and so on.

(j) The Respondent, TANGEDCO has been paying the tariff applicable for the third contract year as mentioned in Schedule 8 of the TANGEDCO PPA, for the first contract year commencing from 16.12.2015 as if the original Scheduled Delivery Date of 1.10.2013 as mentioned in the RfP document is unaltered. Likewise, the tariff for the second contract year commencing from 1.4.2016 and ending on 31.3.2017 has been paid on the basis of tariff applicable for the fourth contract year mentioned in Schedule 8 of the TANGEDCO PPA.



(k) The payment of tariff by the Respondent, TANGEDCO is contrary to the terms of the TANGEDCO PPA and is based on wrong interpretation of the provisions of the PPA. In view of the above submissions, it is evident that considering financial year 2015-16 as the first contract year, the expiry date of the TANGEDCO PPA would lie in financial year 2030-31. In case tariff for the third contract year as per the bid submitted by the Petitioner based on the RfP document and mentioned in the PPA is made applicable to the actual first contract year, financial year 2015-16 which commenced from 16.12.2015 (delivery date), there would be no tariff applicable for the period after 30.9.2028. This would result in an absurd situation.

(l) It is evident that as the effective first contract year is financial year 2015-16, the first contract year tariff (Non-Escalable component) of Rs 1.805/unit (Quoted Non-Escalable Capacity Charge- Rs 1.580/unit + Quoted Non-Escalable Energy Charge- Rs 0.225/unit) must be made applicable to the Petitioner with tariff (Non-Escalable component) of Rs 1.806/unit (Quoted Non-Escalable Capacity Charge – Rs 1.560/unit + Quoted Non-Escalable Energy Charge – Rs 0.246/unit) applicable for second contract year of financial year 2016-17 and, tariff (Non-Escalable component) of Rs. 1.51/unit (Non-Escalable Capacity Charge) applicable for third contract year of financial year 2017-18 and so on. The total financial claim on account of adjustment as proposed above works out to Rs 68.15 crore, subject to adjustment with applicable carrying cost on the above receivables from the date of accrual till the date of actual payment, based on the order passed by this Commission in the instant Petition.

(m) The Petitioner, vide its letter dated 6.10.2020, has requested the Respondent, TANGEDCO to apply the tariff (non-escalable component) for the first contract year i.e. financial year 2013-14, Rs.1.805 per unit (Quoted Non-Escalable Capacity Charge-Rs 1.580/unit + Quoted Non-Escalable Energy Charge-Rs 0.225/unit) to financial year 2015-16 and revised tariff (Non-Escalable component) for respective contract years thereafter as per Schedule 8 of the TANGEDCO PPA as well as to suitably extend and revise the expiry date under the PPA to 15.12.2030 in order to have an operating period of 15 years in compliance with the provisions of the RfP and the TANGEDCO PPA. However, no response was received from the Respondent in this regard.

**Hearing Dated 28.5.2021:**

9. Notice was issued to the parties to file their reply and rejoinder. Reply and rejoinder has been filed by the Respondent and the Petitioner respectively.

10. The Respondent, TANGEDCO vide its reply dated 28.6.2021, has submitted as under:

(a) The present claim is hit by laches and conduct of the Petitioner. After commencement of supply of power i.e. 16.12.2015, the Petitioner raised bills indicating fixed and variable charges strictly in terms of Power Purchase Agreement and through this Petition, extraneous issues were raised stating that the Power Purchase Agreement provides for extension of Scheduled Delivery Date /expiry date.

(b) The prayer sought for in the instant Petition for treating the 1<sup>st</sup> year capacity charges as set out in Schedule 8 of Power Purchase Agreement 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 change of 1<sup>st</sup> year tariff through the instant Petition is clearly an afterthought and barred by the principles of estoppels.

(c) PGCIL accorded transmission corridor to the Petitioner from 16.12.2015 and the Petitioner commenced the supply of 100 MW power from 16.12.2015 itself. The Petitioner has filed the Petition on 22.12.2020 i.e. after a period of 5 years claiming revision of Scheduled Delivery Date /expiry date. In terms of the order of the Commission dated 22.7.2018 in Petition No.117/MP/2017, the limitation period prescribed for money claims in the Limitation Act, 1963 (in short 'Limitation Act') i.e. 3 years will be applicable, in the absence of any period of limitation for filing the application before the Commission. Since the period of claim exceeds the limitation period of three years prescribed for money claims in the Limitation Act, the present Petition is hit by delay and laches.

(d) The Petitioner vide letter dated 10.2.2014 while making reply to the Respondent letter dated 21.1.2014 requesting confidence level for power flow to TANGEDCO in case open access granted, had informed that it will be in a position to supply power from 1.6.2014 (Scheduled Delivery Date as per Power Purchase Agreement) provided open access is granted from 1.6.2014. However,

in the absence of any notice of Force Majeure by the Petitioner in terms of Article 9.5.1, no relief can be claimed by the Petitioner under Force Majeure event.

(e) While floating the tender, the expected date of delivery was mentioned as 1.10.2013 and expiry date as 30.9.2028. The Respondent on the request from the bidders, revised the Scheduled Delivery Date from 1.10.2013 to 1.6.2014 considering the time limit allowed in Open Access Regulations to make the application for Medium Term Access well in advance i.e. five months as per 3.1.1(i) of Power Purchase Agreement.

(f) The Respondent, as per the provision of RfP and using the escalation parameters, evaluated the bid submitted by the bidders quoting the tariff for the period from 1.10.2013 to 30.9.2028 in Schedule 8, calculated the levelized tariff and bidders were ranked. Accordingly, L1 tenderer was called for negotiation and others were requested to match the L 1 tariff. While filing the tariff Petition, all the generators were impleaded as respondents and notice were served on them. The generator even during signing of Power Purchase Agreement and also before the Commission never represented for change of expiry date and only through this Petition has prayed for extension which is an afterthought and cannot be accepted.

(g) The period of non-availability of corridor as per Article 9.3.1 of Power Purchase Agreement is treated as Force Majeure without any liability on both sides. The definition of contract year is very clear and indicates 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.

(h) There is no privity of contract between the TANGEDCO and PGCIL. The TSA is exclusively between the Petitioner and PGCIL. The Power Purchase Agreement entered into between the Petitioner and TANGEDCO does not have provision for compensation or change in contract year or tariff to be adopted by the TANGEDCO in the event of delay in getting LTA by the Petitioner from PGCIL.

(i) PGCIL and the Petitioner should have an Indemnity Agreement to indemnify each other's loss. TANGEDCO is not responsible and liable to the Petitioner for any loss which is not due to any act or omission of the TANGEDCO.

(j) If the Petitioner has incurred a loss due to delay in grant of open access by PGCIL, the Petitioner is required to claim damages from PGCIL. The Petitioner had quoted both tariff, capacity and energy charges from the bid dead line, i.e. 6.3.2013.

(k) As per the provision of Power Purchase Agreement, capacity charges are to be paid from Scheduled Delivery Date i.e. date of commencement of supply which means the date on which the plant capacity was utilized for scheduling power to TANGEDCO. However, the initial energy charges quoted was based on the prevailing rate of coal at the time of bid dead line i.e. 6.3.2013. As per the

provision of Power Purchase Agreement, when the part supply commenced on 16.12.2015, quoted capacity charge for the applicable year as noted in the definition of contract year with escalation index notified by CERC was considered.

(l) Though the supply commenced from 16.12.2015, the energy charges were escalated from 6.3.2013 to 16.12.2015 and the resultant tariff on the date of commencement was considered and paid to all the generators. The capacity charges are paid from the Scheduled Delivery Date and energy charges from the bid dead line. By way of this method of calculation, there is no loss to the Petitioner. As far as the energy charge is concerned, the Petitioner is getting the benefit from the bid dead line.

(m) Article 4.7.1 (c) of the PPA is applicable only when performance of the seller is affected by contractor's performance and not due to delay in allocation of LTA. There is no Force Majeure event which would entitle any relief to the Petitioner under the above clause of Power Purchase Agreement.

(n) As per the above provisions, 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 time extension is allowed for 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 (6) months. Since the Petitioner commenced supply of power from 16.12.2015, the question of extension of Scheduled Delivery Date beyond 16.12.2015 as per Article 4.7.5 does not arise.

(o) Article 4.7.1(c) of the PPA clarifies that only Force Majeure event affecting the performance of the seller's contractors constitute "the event of Force Majeure affecting Seller". Hence, the Petitioner cannot categorize Force Majeure event occurred due to non-availability of corridor under Article 4.7.1 (c) to claim extension of Scheduled Delivery Date.

(p) There is no event of Force Majeure as pleaded by the Petitioner. Articles 3.1.1, 3.4.3 and 3.4.6 of the PPA state that if Force Majeure event affects the seller in non-fulfillment 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 16.12.2015 (allocation of corridor) and no tariff adjustment is allowed on account of extension of period. As per Article 3.1.1 of the PPA, the extension of time period is allowed only for Scheduled Delivery Date and not for expiry date. As a result of extension of Scheduled Delivery Date, the seller's liability to commence supply of power starts from the date of allocation of corridor (16.12.2015).

(q) The Petitioner has availed the escalations as provided in Schedule 6 for each of the applicable contract year from 6.3.2013. Having availed the escalation and invoiced as per the terms and conditions of the Power Purchase Agreement, from 2015, the Petitioner cannot maintain the plea sought for in the present Petition.

(r) Issue of change of first year contract was never in issue when the tender of the Petitioner was selected as lowest tender, execution of agreement and before the Commission for approval of adoption of tariff.

(s) As per Article 3, only SDD could be extended without any tariff adjustment. Further, the Petitioner commenced supply of power on 16.12.2015 i.e. extended scheduled delivery date of 16.12.2015 pursuant to Article 3 of the PPA. Article 4 and Article 4.7.1 of the PPA are not applicable to the Petitioner.

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

11. The Petitioner, in its rejoinder dated 22.7.2021 to the reply of TANGEDCO, has mainly submitted as under:

(a) The reliance placed by the TANGEDCO on the judgment of the Hon'ble Supreme Court in the case of *Andhra Pradesh Power Co-ordination Committee v. Lanco Kondapalli Power Limited*, [(2016) 3 SCC 468] ("Lanco Kondapalli") is incorrect and misplaced. Ruling in *Lanco Kondapalli*, rendered by a two Judges Bench of Hon'ble Supreme Court, is not a binding precedent. A contrary view has been taken by the Hon'ble Supreme Court in the case of *Tamil Nadu Generation & Distribution Corporation Ltd. v. PPN Power Generating Company*, [(2014) 11 SCC 53]; *MP Steel Corporation v. CCE*, [(2015) 7 SCC]; and *Ganesan v. Commissioner, Tamil Nadu Hindu Religious & Charitable Endowments Board*, [(2019) 7 SCC 108]. The Hon'ble Supreme Court has acknowledged in its judgment in the case of *MP Steel* that '*the Kerala SEB is an authoritative pronouncement by a three-Judge*



*Bench that the Limitation Act applies only to courts and not to quasi-judicial tribunals.'*

(b) A two-Judges bench of the Hon'ble Supreme Court in the case of Ganesan v. Commissioner, Tamil Nadu Hindu Religious & Charitable Endowments Board (supra) *inter alia* has held that '*operation of Section 29(2) of the Limitation Act is confined to the suits, appeals and applications referred to in a special or local law to be filed in court and not before statutory authorities like Commissioner under the 1959 Act*'. In view of the ruling of larger bench/benches of co-equal strength of the Hon'ble Supreme Court in the aforesaid judgments, it is evident that the Limitation Act will have no applicability to proceedings before quasi-judicial tribunals or statutory bodies, including the present proceedings before the Commission herein. Reliance of the Respondent on the contrary ruling in Lanco Kondapalli is therefore misplaced and incorrect.

(c) The said legitimate relief claimed by the Petitioner cannot be said to have been waived off by the Petitioner for not having expressly raising the same at the time of commencement of supply of power in December 2015, as sought to be averred by the Respondent.

(d) The claim of the Petitioner towards payment of Rs. 68.15 crore towards difference in tariff for the period from 16.12.2015 to 31.3.2020 subject to adjustment with applicable carrying cost on the above receivables from the date of accrual till the date of actual payment is not barred by limitation on account of being a "continuing cause of action" within the meaning of Section 22 of the

Limitation Act which provides that 'in the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.

(e) Fresh limitation begins on every day the Respondent paid tariff applicable for the third contract year mentioned in Schedule 8 of the TANGEDCO PPA for the first contract year commencing from 16.12.2015 as if the original Scheduled Delivery Date of 1.10.2013 as mentioned in the RfP document was unaltered.

(f) The Petitioner's claim pertains to an ongoing dispute with the Respondent and the same cannot be barred by limitation. Section 3 of the Limitation Act which relates to "Bar of Limitation" is subject to Section 22 of the Limitation Act which specifically provides breach of a continuing nature as an exception to the rule of limitation. In this regard, reliance has been placed on the judgment of the APTEL in the case of *Power Company of Karnataka Limited v. Udupi Power Corporation Ltd.* (Appeal No. 10 of 2020) with respect to "running accounts". TANGEDCO has been regularly paying monthly energy bills to the Petitioner as per the quoted tariff of third contract year, i.e., financial year 2015-16 while ignoring the tariffs of first and second contract year. TANGEDCO has treated the present arrangement for supply of power from the Petitioner as running accounts wherein the demands raised by the Petitioner through bills / invoices issued on monthly basis could be satisfied by payments made by TANGEDCO.

(g) The dispute presently raised and the prayers sought by the Petitioner herein in effect can be split into two distinct reliefs, viz: (i) application of correct tariff rate to the corresponding contract year as per Schedule 8 of the PPA; and (ii) consequent recovery of past dues in the nature of differential tariff basis the first relief. Correction in application of Schedule 8 of the PPA is in the nature of declaratory relief arising out of a continuing cause of action. The right to seek such correction is preserved under Article 15.5.2 of the PPA, and it is a settled law that if the agreement specifically provides for preservation of rights or that rights would remain unaffected, then it gives right to continuing cause of action under the agreement (*Lata Construction v. Rameshchandra Ramniklal Shah*, [(2000) 1 SCC 586]).

(h) The Petitioner does not stand to have been benefitted by filing the accompanying Petition at a belated stage, and is only claiming its legitimate financial rights under the PPA spanning tenure of 15 years. In any event, it is a settled position of law that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred as the other side cannot claim to have been vested with undue advantage because of a delay.

(i) In terms of Article 4 of the PPA, the expiry date of the same can be extended due to conditions of Force Majeure. As per the bidding documents initially circulated, the Scheduled Delivery Date was 1.10.2013 and the same was revised to 1.6.2014 vide the Letter of Intent (“LOI”) dated 14.11.2013 issued by the

TANGEDCO. However, even though the Scheduled Delivery Date was shifted, the expiry date of the PPA remained the same as 30.9.2028, i.e., 14 years and 4 months instead of the 15 years period stipulated in the bidding documents.

(j) The Petitioner has submitted its financial bid under the tender with the legitimate expectation that the Petitioner shall be supplying power to the TANGEDCO for a period of 15 years on a particular quoted tariff for each contract year as per Schedule 8 of the PPA. Any reduction of operating period is not just arbitrary and without basis, but also against the express provisions of the TANGEDCO PPA which clearly states that the expiry date would be the date which is the 15<sup>th</sup> anniversary of the delivery date, i.e., 16.12.2015 and that the operating period would be the period commencing from the delivery date until, the expiry date.

(k) The Respondent's contention that extension of time period is allowed only for Scheduled Delivery Date and not for expiry date is baseless and is devoid of any merit. Article 4.7.5 of the PPA stipulates the provision of extension of the expiry date. Similar relief had already been granted by this Commission in Petition No. 222/MP/2017 vide Order dated 23.07.2019 and in Petition No. 117/MP/2017 vide order dated 22.07.2019 wherein this Commission had allowed extension of the expiry date of the PPA.

(l) The aspect of escalation is independent of the issues raised and reliefs sought for in the present Petition.

(m) There is no escalation or revision of tariff. There is no extension of the term of the PPA sought by the Petitioner, inasmuch as the contract year itself commences from 16.12.2015 and the term of the PPA shall remain 15 years. Further, there is also no alteration in the power procurement plan in as much as the term (duration) of the PPA remains the same.

**Hearing dated: 22.12.2022**

12. During the course of hearing, the matter was argued at length. Based on the request of the learned senior counsel and learned counsel, the Petitioner and the Respondent were permitted to file their written submissions. The Petitioner and the Respondent in their written submissions have reiterated the submissions made in the pleadings and the same have been considered in subsequent paragraphs.

**Analysis and Decision**

13. We have considered the submissions of the Petitioner and the Respondent and perused materials on record. The Petitioner, DIL has filed the present Petition, *inter alia*, to hold and declare that the delay in grant and operationalization of long-term access is Force Majeure event in terms of Article 9.3 of TANGEDCO PPA and adjustment of the delivery date and expiry date for supply of 100 MW RTC power under the said PPA to 16.12.2015 and 15.12.2030 respectively. The Petitioner has also prayed for declaration that 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 TANGEDCO PPA and consequently the direction to TANGEDCO to pay the tariff for the entire term of the PPA including the difference in tariff for the period from 16.12.2015 to 31.3.2020 on the

said basis. Indisputably, these latter prayers i.e. 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 is entirely premised upon/ consequent to the former prayers i.e. delay in grant of operationalization of LTA be held as Force Majeure event and the delivery date be considered as 16.12.2015 in lieu of 1.6.2014.

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 23.7.2029 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?

15. The Respondent, TANGEDCO has vehemently submitted that the Petitioner's plea for extension of Scheduled Delivery Date is solely premised upon a delay in

operationalization of the LTA being a Force Majeure event. It has been submitted that the cause of action for the above clearly arose upon the commencement of supply, on which date, the Force Majeure ceased to operate i.e. 16.12.2015 and the present Petition has been filed only on 22.12.2020 i.e. much beyond the period of 3 years from accrual of cause of action. It has been submitted that in the earlier orders dated 22.7.2019 and 23.7.2019, the Commission had held that the said Petitions did not suffer from delay and laches as they were not hit by limitation on account of generators having approached the Commission within 3 years of commencement of supply. Whereas, the Petitioner in this case continued to raise invoices as per the Schedule 8 of the PPA from 16.12.2015 until October, 2015 when for the first time, the Petitioner raised any dispute in this regard. Accordingly, the present Petition is time-barred and the period of limitation cannot be extended merely by virtue of other generators having secured reliefs from the Commission. It has been further submitted that the contention of the Petitioner that the cause of action is continuing, is entirely misconceived inasmuch as any continuing effect of delay in commencement of supply neither constitutes a fresh cause of action nor a continuing cause of action. It is reiterated that relief sought under clause (d) of the prayer hinges around the reliefs prayed in clauses (a) to (c).

16. *Per contra*, the Petitioner has submitted that whether or not the present Petition is barred by limitation has to be decided with reference to the facts as to when the cause of action for filing the Petition arose and the cause of action for the purpose of limitation would coincide with when the right to sue accrued or arose for the Petitioner. It has been submitted that Article 14 of the TANGEDCO PPA contains the provision with respect to raising of dispute by a party and does not set any time limit for raising a

dispute under the PPA and therefore, it is open to the parties to make a claim or agitate a grievance under the contract at any time as long as the grievance is of a continuing nature. Only once a dispute validly raised under Article 14 of TANGEDCO PPA is rejected and ignored by the other party, the right to sue accrues to the affected party in order to enforce a claim through a court of law. It has been submitted that in the present case, the Petitioner raised dispute vide its letter dated 6.10.2020 and upon getting no response to its claim and after waiting for a reasonable period of time, it decided to approach the Commission invoking its adjudicatory jurisdiction and as such the present Petition is well within the period of limitation. It has also been submitted that TANGEDCO has treated the present arrangement for supply of power from the Petitioner as running accounts wherein the demands raised by the Petitioner through bills/invoices issued on monthly basis could not be satisfied by payments made by the Respondents and therefore, there is a continuing cause of action due to the arrangement of supply of power being running account and as such the Petition is not time barred. The Petitioner has further 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 financial year and the injury caused itself is also continuing since the Petitioner till date has not received the tariff as per the correct financial year for which corresponding tariff was determined in Schedule 8 of the PPA. Thus, 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 said PPA.



**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 Co-ordination 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.

24. The Petitioner has also contended that since the Respondent has treated the arrangement for supply of power from the Petitioner as running account wherein the demands raised by the Petitioner through bills/invoice on monthly basis could be satisfied by payments made by the Respondent, there is a continuing cause of action and the petition is not barred by limitation as held by the APTEL in its judgment in Power Company of Karnataka Ltd. v. Udupi Power Corporation Ltd. in Appeal No. 10 of 2020 and Ors. However, we do not find any force in the said contention as well. In the said judgment, the APTEL, in reference to the running account, observed as under:

*“185. The expression “running account” is defined (by Black’s Law Dictionary) as “an open unset-tied account, as distinguished from a stated and liquidated account”. It further explains that “running accounts mean mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled”. It is also described as “revolving credit facility offered by a seller under which an approved buyer may continually obtain goods or services up to the agreed limit ... amount paid by the buyer makes the same sum available again for purchases” .....*

*191. Be that as it may, even from the details submitted by PCKL/ESCOs, it is clear that there have been numerous and continuous defaults by ESCOMs in making payment of monthly and infirm power charges of Udupi Power on time or in full. The range of such delays, as shown by data submitted by the appellants themselves, extends from a period of one month to even a year in some instances. In fact, defaults seem to be the rule, timely payments an exception.*

*192. The details submitted by the appellants demonstrate that the ESCOMs have treated their respective arrangement for procurement of electrical supply from the respondent Udupi Power as running accounts wherein the demands raised by the seller through bills/invoices issued on monthly basis could be satisfied by payments made, on account, for reconciliation/adjustment in due course, such part payments/instalments/tranches*

being piecemeal and in sums unilaterally decided as per convenience or sweet will of the procurer(s), the drawal of electricity having continued unabated despite such defaults consistently indulged in.

193. The above can be illustrated by reference to various instances. The details pertaining to CESCO show that against the invoice amount of Rs. 10,77,80,583/- for the month of May 2011 issued on 03.06.2011 with due date of 03.08.2011, payments were made in three parts on 01.07.2011, 26.07.2011 and 03.10.2011 in the amounts of Rs. 30,81,367/-, Rs. 30,00,000/- and Rs. 19,79,363/- respectively. Similar is the pattern of payments for several months including December 2010, March 2011, April 2011, December 2011, January 2012, April 2012, July 2012, September to December 2012, January to April 2013, June 2013, April to August 2014, October to December 2015, January 2016, March 2016, June 2016 to April 2017, March to June 2018. So much so, that the CESCO took liberties to pay the invoice for July 2016 in as many as ten instalments starting with 17.12.2016 and ending with the last on 13.1.2017 even though the amount claimed by the Bill was same as admitted liability and the due date of payment was 03.10.2016. The mode of payment against the invoices for August 2016, November 2016, January and February 2017 consistently reveal a similar pattern. The billing and payment details of other ESCOMs (HESCOM, GESCOM), as furnished by the appellants themselves, reveal a similar picture. It is wholly unnecessary to make a mention of the specific instances at length since the data furnished is replete with them to create the impression noted above. Just as a sample, reference can be made to the pattern of payments made by HESCOM. It made the payment through thirty-five instalments (from 11.09.2018 to 17.12.2018) against the invoice for September 2017 issued on 03.10.2017, the payment where against was due on 06.12.2017, the procurer having admitted liability to pay substantial part of what was billed. Likewise, the same procurer made the payment through fifteen instalments (from 17.12.2018 to 13.03.2019) against the invoice for October 2017 issued on 02.11.2017, the payment where against was due on 07.01.2018, the procurer having again admitted liability to pay substantial part of what was billed.

194. The pattern shown by the above-mentioned details of billing and payments is clearly indicative of the procurers having understood the arrangement with seller to be such as obliged running accounts to be maintained. This being the sequitur, the argument of the respondent Udupi Power that it is a case of "continuing cause of action" gets validated and strengthened rendering the plea of limitation bar superfluous. But the appellants contest invocation of section 22 Limitation Act by referring to provisions of PPA. ....

202. In our view, the doctrine of estoppel by conduct is attracted against the appellants. As noticed above, by treating the financial obligations as those pertaining to "running accounts", these government companies (procurers), their cause having been espoused by PCKL and the Government of Karnataka, making a clear, concerted, consistent and regular departure from the contractual norms relied upon by them, have persuaded the seller (second respondent) to believe and accept the arrangement to be such as that of "running accounts" foregoing its rights to take action to cover up losses correspondingly suffered and thus detrimental to its lawful interests. The principle of waiver, as explained in *W. J. Alan & Co. v. El Nasar Export (supra)* also leads to same conclusions since the seller has been led by the appellants to believe "that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that behalf" in the matter of timely payments, month by month, and the Seller acted upon it accepting annual reconciliation of accounts, it would be unjust and inequitable now to permit the defaulting



procurers to plead or argue to the contrary. We thus hold that the parties had been maintaining "running accounts" for sale and purchase of electricity under the PPA."

Perusal of the above quoted paragraphs clearly indicate that the decision of the APTEL regarding the Karnataka Discoms having treated the arrangement of supply with Udupi Power therein as running account was based on the specific conduct of Karnataka Discoms and only after examining such conduct based on the details furnished on the record therein. However, in the present case, the Petitioner has not produced any such details demonstrating conduct of the Respondent in treating the arrangement of supply as running accounts between the parties. Thus, in absence of the Petitioner having failed to substantiate its contention about the existence of running account, the said contention cannot come to any aid to the Petitioner. Moreover, even assuming that the Respondent has treated the arrangement of supply between the parties as running account, the monetary claims of the Petitioner regarding the adjustment of the tariff for the first contract year and thereafter as made in the Petition, as we noted above, is premised upon the revision of delivery date to 16.12.2015, which cannot be considered by the Commission on account of such prayer being time barred.

**RE: Rectification in the PPA**

25. During the course of final hearing, the learned senior counsel for the Petitioner, alternatively, also prayed for correction of an error apparent in Schedule 8 of the TANGEDCO PPA. He further submitted that it is beyond the reasonable doubt that Scheduled Delivery Date was changed from 1.10.2013 to 1.6.2016 at the behest of Respondent itself and the same was adequately recorded under Article 4.1.1 of the PPA, which categorically states the Scheduled Delivery Date to be 1.6.2014. However,

due to clerical / typographical mistake, the same was not reflected in the Schedule 8 of the TANGEDCO PPA where the first year tariff still starts from 1.10.2013 and accordingly, the Petitioner seeks rectification of this typographical error. The learned senior counsel further submitted that no separate pleadings are needed for such rectification when the same is based on the facts which is not at all contested by the Respondent throughout the proceedings and is a fact which is established beyond the reasonable doubt that the Scheduled Delivery Date is 1.6.2014 as per the TANGEDCO PPA and this Commission has the power to allow such correction in light of the ratio laid down in the case of Ram Sarup Gupta v. Bishun Narain Inter College [(1987) 2 SCC 555] and Ladha Singh v. Munshiram Agarwalla, [1927 SCC On Line Cal 61].

26. The Respondent in its written submissions has, however, objected to the above prayer and submitted that there is not a single plea in the Petition seeking declaration of the year commencing from 1.6.2014 as first contract year and such plea being raised for the first time in oral arguments deserves to be rejected. The Respondent has further submitted that PPA defines the tariff payable by TANGEDCO on the basis of charges quoted for the specific years in Schedule 8 of the PPA and the parties consciously agreed to the aforesaid schedule governing the tariff payable under the PPA despite the Schedule Delivery Date having being stipulated to be 1.6.2014. It has been submitted that allowing the prayer of the Petitioner would amount to amendment of Schedule 8 of the PPA, which can only be carried out by mutual consent. The Respondent has also submitted that grievance with respect to implementation of the Schedule 8 of the PPA is also hit by delay and laches and is time barred.

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.

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 Petition No. 14/MP/2021 is disposed of in terms of the above.

Sd/-  
**(P.K. Singh)**  
Member

sd/-  
**(Arun Goyal)**  
Member

sd/-  
**(I.S. Jha)**  
Member