

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

**Appeal No. 76 of 2016 &
IA No. 185 of 2016**

Dated: 21st December, 2018

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of :-

**Chhattisgarh State Power Trading Co. Ltd.
Energy Info Tech Centre
Daganiya, Raipur (CG)
Pin-492013**

...Appellant(s)

Versus

- 1. Bharat Aluminium Company Limited
Aluminium Sadan
Core-6, Scope Office Complex
Lodhi Road
New Delhi – 110 003** **...Respondent no. 1**
- 2. Chhattisgarh State Load Despatch Centre
Danganiya, Raipur (CG)
Pin-492013** **...Respondent no. 2**
- 3. Chhattisgarh State Electricity Regulatory
Commission
Irrigation Colony, Shanti Nagar
Raipur (CG) Pin – 492001** **...Respondent No.3**

**Counsel for the Appellant(s) : Mr. Apoorv Kurup
Mr. A.C. Boxipatro
Ms. Nidhi Mittal
Ms. Isha Mital**

Counsel for the Respondent(s) : Mr. Hemant Singh

**Ms. Jyotsna Khatri
Ms. Ankita Bafna
Mr. Ambuj Dixit for R-1**

Mr. Ravin Dubey for R-2

Mr. Ravi Sharma for R-3

JUDGMENT

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. This present Appeal has been filed by Chhattisgarh State Power Trading Co. Ltd. (hereinafter referred to as the “**Appellant/CSPTCL**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the order dated 21.01.2016 passed by Chhattisgarh State Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Petition No. 41 of 2014 (M) where benefit was granted to the Respondent for planned and forced outage for the period 01.06.2011 to 15.06.2011, in spite of there being no power purchase agreement between the two parties as required under the order dated 30.04.2010 in suo motu Petition No. 05 of 2010 wherein the State Commission held that generating companies are entitled to take into account planned outage of 15 days on an execution of a Power Purchase Agreement (“**PPA**”)
- a) The Appellant, Chhattisgarh State Power Trading Co. Ltd., is a trading company and is engaged in trading in electricity and it procures power to Distribution Licensees in the State of Chhattisgarh as provided under the provisions of the Electricity Act, 2003.

- b). The Respondent No. 1, Bharat Aluminium Company Limited is the generating company in the State of Chhattisgarh.
- c) The Respondent No. 3 is the Chhattisgarh State Electricity Regulatory Commission exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

2. The brief facts of the case in nutshell are as follows:-

- 2.1 Bharat Aluminium Company Limited, the Respondent No.1 via communications dated 09.12.2010 and 19.01.2011 offered to supply 93 MW RTC power (00:00 to 24:00 Hrs per day) for a period of one year starting from 01.04.2011 to 31.03.2012.
- 2.2 The offer for supply of RTC power was accepted by the Appellant vide communication dated 01.02.2011.
- 2.3 Since the terms and conditions of procurement of power on short term basis from the generating station of Respondent No.1 had not been approved by the State Commission and Power Purchase Agreement had not been entered into between the Appellant and Respondent No.1, the Appellant vide communication dated 15.03.2011 informed Respondent No.1 that till the rates and other modalities are decided by the State Commission, terms and conditions of supply including the tariff applicable shall be same as approved by the State Commission for FY 2010-11. The arrangement was to be applied provisionally till a PPA is entered

into and terms and conditions of short term supply for FY 2011-12 are approved by the State Commission.

- 2.4 The Respondent No.1 vide letter dated 13.05.2011 informed the Appellant that unit is proposed to be shut down from 00.00 hrs on 01.06.2011 to 00.00 hrs on 15.06.2011 for scheduled maintenance.
- 2.5 The Appellant issued communications dated 31.05.2011 and 30.06.2011 informing the Respondent No.1 that no power would be purchased for the month of July and August of 2011.
- 2.6 On 23.06.2011, the Respondent No.1 offered to supply additional quantum of power on 24.06.2015 and 25.06.2015 and the same was accepted by the Appellant on the same date.
- 2.7 On 14.07.2011, the Appellant informed the Respondent No.1 that no power would be purchased during September, 2011. Similar correspondence dated 29.07.2011 informed about no purchase in the month of October 2011. Vide letter dated 30.07.2011 the Appellant informed the Respondent No.1 that no power would be required for the months of November 2011 to March 2012.
- 2.8 The Respondent No.1 issued a communication dated 22.05.2012 to the Appellant seeking release of payments for power sale during 31.05.2011 to 30.06.2011 amounting to Rs. 1,61,25,976. The Respondent No.1 had not been given benefit of planned outage during the month of June 2011.

2.9 The Respondent No.1 filed a petition under section 86 (1) (f) of the Electricity Act, 2003, in the year 2015 to claim benefit on planned and forced outage. That via Impugned Order dated 21.02.2016 in Petition No.41 of 2014(M) the State Commission allowed the petition and granted the Respondent No.1 benefit on planned and forced outage and directed that power sale bills needs to be modified.

3. Questions of Law

Following questions of law have been raised in the appeal for consideration:

- A. Whether the Impugned Order overlooked the fact that to avail benefit of forced or planned outage it is a necessary condition that a power purchase agreement is agreed upon for an entire year?
- B. Whether the Impugned Order is directly inteeth with the order of the State Commission passed in suo motu petition No. 5 of 2010 on 30.04.2010?
- C. Whether the Appellant's letter dated 01.02.2011 be recognized to be a concluded Power Purchase Agreement having a term of a year?

4. Submissions of learned counsel, Mr. Apoorv Kurup, appearing for the Appellant are as follows:-

4.1 The present dispute lies in a narrow compass. The Respondent No. 1 ("BALCO") claims that it is entitled to the benefit of the maximum period of 15 days (i.e. from 01.06.2011 to 15.06.2011) in a year (being April 2011 to March 2012) for 'planned and forced outage' in

terms of the Respondent No. 3's, the State Commission order dated 30.04.2010 in Suo Motu Petition No. 05 of 2010 because BALCO, the Respondent No.1 had allegedly executed a one-year PPA with the Appellant ("CSPTCL"). According to BALCO:-

- a. CSPTCL & BALCO, i.e. the parties, did not actually have to execute a Power purchase agreement; such an agreement could be inferred from their letters dated 09.12.2010, 19.01.2011 and 01.02.2011.
- b. The Respondent No. 3, the State Commission has accepted BALCO's claim in its order dated 21.01.2016 in Petition No. 41 of 2014 (M), which is impugned in the present appeal.
- c. Therefore, CSPTCL must now pay BALCO a balance of Rs. 1,29,18,679/- (as against a total of Rs. 1,61,25,976/-) towards "differential units from 12:00 hrs to 24:00 hrs of 30th June'11 and non consideration of shut down benefit while releasing the payment for June'11 power sale," even though BALCO actually supplied power to CSPTCL only in the months of April, May and June 2011 (i.e. for only one-fourth of the year).

4.2. BALCO's claim that it is entitled to the full 15-day period (01.06.2011 to 15.06.2011) for 'planned and forced outage' in terms of the State Commission order dated 30.04.2010 in suo motu Petition No. 05 of 2010 is clearly wrong and misconceived because:-

- a. Firstly, the parties had never executed a one-year PPA as required by the aforesaid order. The letters dated 09.12.2010, 19.01.2011 and 01.02.2011 were only an interim arrangement until the parties actually executed a PPA as envisaged in CSERC's order. In fact, BALCO had itself acknowledged in a letter as late as 15.03.2012 that the parties had not executed a one-year PPA and that the PPA exchanged between the parties was still only a draft.

- b. Moreover, the purpose of the State Commission order dated 30.04.2010 was to lay down the norms according to which generating companies could undertake 'planned or forced outage' without affecting their load factor calculations, and, hence, their payment. A conjoint reading of paras. 5, 6 & 9 of Part-A of the impugned order dated 30.04.2010 will show that the State Commission intended to give generators the benefit of such outage only if they supplied power for at least a year because such a duration of supply would necessarily require the generators to shut-down their equipment for annual maintenance / overhaul. Therefore, the State Commission has consciously and intentionally used the word "supply" throughout the aforesaid paragraphs of the impugned order.

Consequently, the requirement of executing a one-year PPA must be contextually understood to mean that the State Commission intended a generator to supply electricity for a year in order to claim the benefit of 'planned or forced outage' for a maximum period of 15 days in that year. The State Commission certainly did not intend the parties to complete the

paper formality of executing a one-year PPA without corresponding supply because that would defeat the entire purpose of giving the generator the benefit of a shut-down for annual maintenance / overhaul. (In fact, such an interpretation would lead to unintended results. For instance, a generator could execute a one-year PPA and supply power only for 10 days and yet claim planned or forced outage for 15 days towards 'annual' maintenance). CSPTCL was therefore correct in writing to BALCO on 20.05.2014 that:-

“... Clause 6 of CSERC order dated 30.04.2010 for short term power purchase provides 15 days period in a year for planned outage and 240 hours for forced outage for the purpose of calculation of load factor provided power purchase agreement is executed for one year. It means generator has to supply power during one full year for getting the above benefit.”

- c. In this case, BALCO did not supply power to CSPTCL for one year in order to claim the benefit of 'planned or forced outage'. BALCO actually supplied power to CSPTCL only in the months of April, May and June of 2011, for which it was duly and fully compensated. As per CSPTCL's letters dated 31.05.2011, 30.06.2011, 14.07.2011, 29.07.2011 and 30.07.2011, CSPTCL had terminated the interim arrangement for supply of power from July 2011 to March 2012. BALCO accepted such terminations without demur or any claim for costs towards keeping its generating units committed to the supply of power to CSPTCL.

- d. It is settled law that the parties to a contract (assuming, but not admitting, that the correspondences exchanged between CSPTCL & BALCO tantamount to a PPA) can modify/alter that agreement by their conduct. Thus, in *Chrisomar Corp. v. MJR Steels Pvt. Ltd.*, Civil Appeal No. 1930 of 2008 (judgment dated 14.09.2017), reported as 2017 SCC OnLine SC 1104, the Hon'ble Supreme Court observed as follows:-

“36..... When parties to a contract “alter” a contract, the question that has to be answered is as to whether the original contract is altered in such a manner that performance under it is at an end.

...

38..... If the modified contract has no independent contractual force, in that it has no meaning and content separately from and independently of the original contract, it is clear that there is no new contract which comes into being. The original terms continue to be part of the modified contract except to the extent that they are inconsistent with the modifications made.”[Emphasis supplied]

- e. In this case, even if the aforesaid letters dated 09.12.2010, 19.01.2011 and 01.02.2011 resulted in a one-year PPA between CSPTCL & BALCO in terms of the CSERC's order dated 30.04.2010, it is evident that the parties later altered/modified that agreement into a month-to-month power purchase agreement such that CSPTCL could issue letters

dated 31.05.2011, 30.06.2011, 14.07.2011, 29.07.2011 and 30.07.2011, to terminate the interim power purchase arrangement from July 2011 onwards on a monthly basis. In any event, a perusal of CSERC's order dated 30.04.2010 would reveal that the tariff to be paid to the respondent-generator is a single part tariff, and capacity charges and energy charges are not separately paid. Therefore, even if the benefit of the period of outage is given to BALCO, the same cannot lead to a revision of the invoice amount which is based on units of power supplied to CSPTCL.

- 4.3. That the benefit of planned or forced outage can be given to a generator only for a maximum of 15 days in a year. Nowhere does the State Commission order dated 30.04.2010 say that a generator is entitled to the full 15 days of outage. Hence, in a given case, if the generator does not actually supply power for the whole year or for most months of the year, it may be entitled to the benefit of planned or forced outage, but not for the entire 15-day period. In such cases, if at all the generator is held entitled to planned or forced outage, such period of planned or forced outage can only be a pro-rated part of the maximum period of 15 days envisaged in CSERC's order dated 30.04.2010. Giving the generator the benefit of the maximum period of 15 days of planned or forced outage to calculate its load factor in such cases would not only be unfair and unreasonable, but would also unduly benefit a generator who has not actually supplied power for a year and thus does not need 'annual' maintenance / overhaul.

5. Submissions of learned counsel, Mr. Hemant Singh, appearing for Respondent No. 1 – Bharat Aluminium Company Limited (“BALCO”) are as follows:-

5.1 Vide the aforesaid order, certain benefit was granted to generating plants supplying power to the Appellant, for planned and forced outage. For planned outage, a period of 15 days in a year, was provided wherein a power plant could intimate in advance to the Appellant about a planned outage for maintenance of the power plant.

Similarly, for forced outage, which happens in a machine/ power plant on account of some contingency, a relaxation period of 240 hours (10 days) in a year was provided in the impugned order. The present case concerns with the issue of planned outage.

5.2 In other words, within a period of 15 days, which can be availed by a generating plant (such as the Respondent No. 1 herein) in any manner, either consecutively or by breaking the said days, in a particular contractual year, the Appellant will not consider the non-supply of power for the above period, as a default. Hence, vide the Impugned Order, the protocol as to how a distribution licensee/ procurer (Appellant in the present case) shall treat a generator (Respondent No. 1) on account of planned and forced outages, was envisaged. In this context, the relevant extract of the impugned order is provided herein:

“Since the provision of 15 days for planned outage and 240 hours for forced outage has been considered for an

year for the purpose of calculation of load factor, thus to avail these facilities the generator and CGPs are required to execute PPA with CSPDCL for one year. The situation related to force majeure condition shall be in addition to above and relaxation in this respect be considered by CSPDCL on case to case basis.”

5.3 The Impugned Order categorically provides that a short term power procurement means an agreement or contract for supply of power for a period of 1 year. The relevant extract of the same is reproduced herein below:

“The CSPDCL may preferably enter into power purchase agreement with the CGPs/ IPPs of the State for a period of one year from the CGP/ IPP who are desirous to avail benefit related to forced and planned outage condition”

5.4 The Impugned Order provides the procedure for executing a short term agreement for procurement of power, is provided. The same is also setout herein below:

“19. As per the clause 9 of the Commission’s guidelines for power purchase and procurement process, the short-term power procurement procedure shall be as follows:

(a) As long as transparent and prudent bidding or institutional mechanism is adopted and commercial considerations are honoured, the CSPDCL shall be free to procure power at the agreed base rate within the specified limit

(maximum base rate) and the total quantum of purchase shall be as per approved short-term power procurement plan.

- (b) The CSPDCL may undertake short-term purchase by entering into contracts for the same on the above basis. Approval of the Commission will not be necessary for each contract. However, the details of such purchases shall be submitted to the Commission.*
- (c) The CSPDCL shall submit a draft PPA before the Commission within 15 days of issue of the order for approval.”*

5.5 From the aforementioned extracts of the Impugned Order, the following is crystalized:

- a. the benefit of planned outage can be availed by a generating company for a period of 15 days in a contractual year;
- b. for availing the benefit of planned outage, a generating company has to have a Power Purchase Agreement (PPA) for a minimum period of 1 year;
- c. in para 19 (a) of the impugned order, a short term contract (1 year period) can be entered either through a transparent bidding process, or through an institutional mechanism by a distribution licensee (CSPDCL);

- d. in the present case, there was no bidding. However, the agreement to supply power was entered into by the Respondent No. 1 through an institutional mechanism (past practice through exchange of letters);
- e. in para 19(b) of the impugned order it is mentioned that the approval of the Commission (Respondent No. 3 herein) will not be required for short term procurement of power; and
- f. in para 19(c) of the impugned order, a duty is cast upon the Procurer/ CSPDCL to submit a draft PPA to the Respondent No. 3 within 15 days of the approval of a contract. In fact, the Respondent No. 1 vide its letter dated 15.03.2011 categorically asked the Appellant for a copy of the draft PPA for execution, which was never provided by the Appellant.

5.6 The Respondent No. 1 issued a letter dated 09.12.2010 wherein an offer for sale of 93 MW RTC power (00:00 hrs to 24:00 hrs) starting from April, 2011, was made to the Appellant. In this context, reference be made to the subject of the letter, and the last 2 paras of the said letter. The same are setout herein below:

“Sub: Offer for sale of 93 MW RTC power (00:00 hrs to 24:00 hrs) during the month of April, 2011 from BALCO – CPP

,,,,,,,,,,

We are agreeable to continue supply from 1st April 2011 to CSPTCL from BALCO CPP under the present terms and conditions, till fresh/ supplementary PPA is executed based

on rate, terms and conditions and modalities approved by the Hon'ble CSERC for the purchase of power from CPPs/ IPPs of the state for the year 2011-12.

Accordingly, we give our consent to supply 93 MW RTC power (00:00 hrs to 24:00 hrs/ day) for the month of April, 2011 and shall be renewed for a further period on mutual consent and acceptance.”

5.7 The Respondent No. 1 issued another letter dated 19.01.2011 wherein the above offer was reiterated. The relevant extract is setout herein below:

“Sub: Offer for sale of 93 MW RTC power (00:00 hrs to 24:00 hrs) for the period from April, 2011 to March 12 from BALCO – CPP

,,,,,,,,,,

In view of above, we are agreeable to continue supply from 1st April, 2011 to 31st March 2012 to CSPTCL from BALCO CPP under the present terms and conditions, till fresh/ supplementary PPA is executed based on rate, terms and conditions and modalities approved by the Hon'ble CSERC for the purchase of power from CPPs/ IPPs of the state for the year 2011-12.

Accordingly, we give our consent to supply 93 MW RTC power (00:00 hrs to 24:00 hrs/ day) for a period of one year starting from 1st April 2011 to 31st march 2012 and shall be

renewed for a further period on mutual consent and acceptance.

We look forward to your acceptance and confirmation on the purchase of 93 MW RTC power by CSPTCL for the financial year 2011-12 so that necessary arrangement shall be made for continuing supply of power from 1st April 11 onwards for a period of one year.

5.8 Pursuant to the above express offers of the Respondent No. 1, the Appellant herein vide its own letter dated 01.02.2011 accepted the said offer. The relevant extract is reproduced herein below:

“Sub: Sale of Short term power to CSP Trading Co. Ltd. from your Captive Power Plant.

.....

This has reference to your letter cited above, in this connection, this is to convey that your request for sale of short term RTC power on firm basis to CSPTCL, besides availing STOA on RTC basis from SLDC, as per details hereunder has been considered and accepted:

S. No.	Period of Supply	Quantum (MW)
1.	April, 2011 to March, 2012	93

2. It may be mentioned that total injected power shall be proportionately distributed between contracted quantum of purchase by CSPTCL and STOA scheduled quantum.

3. Further, the supply shall be at the rate, terms and conditions and modalities as approved by the CSERC for short term purchase of power from CPPs/ IPPs of the State for the year 2011-12. However, till rate and modalities are decided by CSERC, the same for the year 2010-11 shall be applicable provisionally. It is requested to please intimate the power supply schedule for next month by 23rd of the current month.
4. It is requested that non-judicial paper worth Rs. 100/- may please be submitted within three days so that matter of PPA could be printed and PPA executed immediately.”

5.9 From a reading of the 1st para of the above letter dated 01.02.2011, it is evidenced that the Appellant “considered and accepted” the offer of the Respondent No. 1 to supply 93 MW of power for a period of 1 year, i.e. starting from April, 2011 to March, 2012.

Further, from a reading of the 3rd para of the above letter, the Appellant itself sets out the consideration (commercial terms) for supply of the above power from the Respondent No. 1. The Appellant categorically incorporated the terms of the earlier PPA to the above agreement, till the final rates may be finalized or decided by the Respondent No. 3 Commission.

5.10 In view of the above, a binding agreement was entered between the Appellant and the Respondent No. 1 for a period of 1 year qua 93 MW (April, 2011 to March, 2012). It is a settled principle of law

that an agreement comes into existence on the occurrence of the following:

- (i) offer (in the present case, letters of the Respondent No. 1 dated 09.12.2010 and 19.01.2011);
- (ii) acceptance (in the present case, letter of the Appellant dated 01.02.2011); and
- (iii) consideration (in the present case, as provided in para 3 of the letter of the Appellant dated 01.02.2011).

5.11 It has already been mentioned herein above, that a contract for 1 year means a short-term contract. In para 19(b) of the Impugned Order, it is mentioned that there is no approval required for a short-term contract or agreement by the Respondent No. 3 Commission. Further, in para 19(c) of the Impugned Order, duty is cast upon the Appellant to provide a copy of the Agreement to the State Commission. The Respondent No. 1 through a letter dated 15.03.2011 also fulfilled the condition of para 19(c) by asking for a draft PPA from the Appellant, which was never provided.

5.12 Hence, on account of the above, there was a valid agreement for supply of power between the Appellant and the Respondent No. 1 for a period of 1 year (April, 2011 to March, 2012). As such, the condition precedent required for availing the benefit of planned outage was fulfilled by the Respondent No. 1.

5.13 Based on the above agreement, the Respondent No. 1 vide its letter dated 13.05.2011 intimated the Appellant regarding planned

shutdown/ outage starting from 01.06.2011 to 18.06.2011. It is pertinent to mention that the Respondent No. 1 only claimed the benefit of planned outage from 01.06.2011 to 15.06.2011, and not till 18.06.2011.

5.14 From a reading of the Impugned Order, the requirement is to have an agreement for 1 year, and not a continuous supply of power for 1 year. The entire case of the Appellant is that since power was not availed by the said Appellant for the entire period of 1 year, there was no agreement, and as such the benefit of planned outage ought not to be provided to the Respondent No. 1.

5.15 The above argument of the Appellant is fundamentally flawed, on account of the following:

- a) nowhere in the impugned order, which provides the protocol for grant of benefit for planned outage, it is provided that the Appellant/ CSPTCL has to compulsorily get actual supply of power for a period of 1 year;
- b) what is provided in the impugned order, is that there has to be an execution of an agreement or contract for 1 year, which condition was fulfilled by the Respondent No. 1;
- c) the Appellant has relied upon its letters dated 31.05.2011 and 30.06.2011 in order to argue that the agreement was terminated. This is also completely wrong because of the following:

- i. in the above letters, it is specifically mentioned that the contract is terminated for the month of July, 2011 and August, 2011;
- ii. nowhere it is the case of the Appellant that the entire agreement for 1 year (April, 2011 to March, 2012) stood terminated;
- iii. in fact, the above argument is self-defeating, for the reason that if, as per the Appellant, the agreement for 1 year stood terminated vide letter dated 31.05.2011, then there was no need to issue the letter dated 30.06.2011 by the Appellant seeking termination for the month of August, 2011. This can only mean that the contract or agreement was for the entire year, and that it was the Appellant which did not require actual supply of power in particular months of the entire contractual year;
- iv. the distribution licensees throughout India have contracted various agreements for procurement of power from various generators. Sometimes, the demand in the area of a distribution licensee falls, thereby requiring the said licensees to ask the generators not to supply power for a particular period. However, this never means that the entire agreements, ranging from short term to long term periods of 25 years are terminated;
- v. if the argument of the Appellant is accepted, then it would mean that a distribution licensee has to always take actual

supply of power from the contracted generators, irrespective of the fact as to whether there is demand for the said supply. This will de-stabilise the grid on account of surplus power flowing in the power lines.

5.16 One other argument taken by the Appellant is that as per para 19(c) of the impugned order, a draft PPA was required to be submitted to the Respondent No. 3 Commission within 15 days of the approval qua the agreement with a generator (Respondent No. 1 herein). This argument is also without any basis for the following reasons:

- a) para 19(c) of the impugned order casts the “obligation” to submit a draft PPA on the “Appellant”, and not the generator/ Respondent No. 1;
- b) the Respondent No. 1 vide its letter dated 15.03.2011 categorically asked the Appellant to forward the draft PPA for execution. This was never provided by the Appellant. Hence, the Appellant cannot at all take benefit of its own default in order to deny the benefit of planned outage to the Respondent No. 1, provided in the impugned order on account of the execution of the arrangement/ agreement with the Appellant for a period of 1 year.

6. Submissions of learned counsel, Mr. Ravi Sharma, appearing for Respondent No. 3 – State Commission are as follows:-

6.1 Respondent No.1 has approached the State Commission through its Petition No. 41 of 2014(M) filed under section 86(1)(f) the Act,

2003 due to refusal of CSPTCL to take into account planned outage of 15 days in the payments of bill/invoice raised for the month of June, 2011 for which the Respondent No.1, BALCO is entitled as per order dated 30.04.2010 passed in suo motu petition No. 05 of 2010. The Respondent No.1, BALCO has sought below reliefs from Respondent No.3, the State Commission:

- a) Declare that The Respondent No.1, BALCO and CSPTCL had entered into valid agreement dated 01.04.2011 for purchase of power; and
 - b) Direct CSPTCL to take into consideration the planned outage of 15 days intimated by The Respondent No.1, BALCO to the CSPTCL between 01.06.2011 to 15.06.2011
3. Respondent No. 3, the State Commission vide its order dated 21.01.2016 passed in Petition No. 41 of 2014(M) ("**Impugned Order**") allowed the petition and relief sought by the Respondent No.1, BALCO. The relevant portions of the Impugned Order are reproduced as under:

"Commission's view

The Commission has gone through the submissions and counter submission of the petitioner and Respondent-1.

22. Before analyzing facts submitted by both parties it has to be reminded that order passed in suo-motu petition no 05 of 2010 was for short- term purchase of power by State distribution licensee i.e. CSPDCL. From the facts submitted in this case it appears that the trading company, i.e. CSPTCL has adopted the order passed in suo-motu petition no 05 of 2010 for short-

term power purchase from CGPs/IPPs located in the State. It has been noted that in the past also short-term power sale of CGPs/IPPs of the State for any financial year commenced and started on the basis of mutual consent and CSEB/ State Power companies executed PPA in between a financial year, after the sale of power is commenced. In this petition also CSPTTrCL has submitted that for short-term purchase of power for the year 2010-11 it has executed PPA on 26.11.2010 .Continuing the same practice, for the year 2011-12 also, CSPTTrCL started procuring short term power from petitioner on the basis of an interim arrangement vide letter no. MD/Trading/Tech. Cell/PP/96, dated 01.02.2011, which states that the Petitioner's request for sale of short term RTC power on firm basis was considered and accepted by the Respondent.....”

According to the arrangement and consent the petitioner was required to supply short-term power throughout the year.

- 23. It is submitted by petitioner that they had requested several times to execute PPA but same was not executed before supply for year started. In interim arrangement it was agreed that power will be supplied provisionally as per provisions of order dated 30.04.2010 till any revised order is passed by the Commission. Now according to interim arrangement, the petitioner also identified Units for the purpose of forced and planned outage hours for the year 2011-2012.*
- 24. On 13.05.2011, the petitioner gave intimation that Unit No.1: CPP- 2 Capacity 135 MW is scheduled for statutory shut down from 00:00 Hrs. dated 01.06.2011 to 00:00 Hrs. dated 15.06.2011. The Respondent No.1 was requested to depute a representative for verification and authentication of the same. A*

representative of the respondent No.1 also inspected and verified the same. By letter dated 27.05.2011, the petitioner also informed the respondent No.1 about the tentative quantum of injection of power to be in the range of 150MW - 160MW for this period of statutory shut down. It was further pointed out that 35% of 150MW - 160MW i.e. 52.56MW would be available to CSEB/SEB.

25. *The respondent No.1 vide letters dated 31.05.2011 and 30.06.2011 indicated that power would not be required for the month of July and August respectively. Though Vide letter dated 31.05.2011, CSPTTrCL intimated the petitioner for withdrawal of approval of power requirement for the month of July, nothing was mentioned regarding the termination of permission of short term power purchase approval for the remaining period of the year and about the statutory shutdown. Through letter dated 31.05.2011, 30.06.2011, 14.07.2011 and 29.07.2011 the trading company mentioned that power will not be purchase for the month of July to October 2011, Vide letter dated 30.07.2011 the trading company intimated that power will not be purchase for November 2011 to March 2010. But it will be proper mentioned that in all these correspondences nothing was mentioned regarding the other terms and conditions applicable as per order dated 30/04/2010 passed in suo-motu petition no 5/2010. The respondent started availing (procuring) power without execution of PPA on basis of interim arrangement for supply of power for one year. But it deviated from its position and decided not to procure power from petitioner. As it has been practice of utility to execute PPA after commencement of supply, in this case the request of petitioner*

is required to be considered and Condition related to planned and forced outages as specified in Order dated 30.04.2010 in suo-motu P N 5 of 2010 has to be made applicable. The order reads as:

"Since the provision of 15 days of planned outage and 240 hours for forced outage has been considered for an year for the purpose of calculation of load factor, thus to avail these facilities the generator and CGPs are required to execute PPA with CSPDCL for one year."

XXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXX

"The relaxations for load factor calculations due to forced and planned outage condition can be availed by IPPs/CGPs, only when they have a short-term PPA for the complete period of one year with CSPDCL."

In the view of the above the Commission is of opinion that for benefit on planned and forced outage has to be given to petitioner. And power sale bills needs to be modified accordingly for the settlement of dues. We order accordingly."

6.4 CSPTCL, the Appellant through the present Appeal has challenged Impugned Order.

POWER PURCHASE AGREEMENT HAS BEEN CONCLUDED AND COME INTO FORCE:

6.5 The State Commission in the Impugned Order at Paragraph No. 22, 23, 24 and 25 has duly noted regarding the events concluding the

PPA through the conduct of parties and by correspondence between the parties as stated below:

- a) In past also between the Respondent No.1, BALCO and the CSPTCL short term sale of CGPs/IPPs of the State for any financial year commenced and started on the basis of mutual consent and CSEB/ State Power companies executed PPA in between a financial year, after the sale of power is commenced.
- b) Similarly Appellant for short-term purchase of power for the year 2010-11 it has executed PPA on 26.11.2010. Continuing the same practice, for the year 2011-12 also, Appellant started procuring short term power from Respondent No.1 on the basis of an interim arrangement concluded vide letters dated 09.12.2011 & 19.01.2011 sent by Respondent No.1 and vide letter no. MD/Trading/Tech. Cell/PP/96, dated 01.02.2011, which states that the Respondent No.1's request for sale of short term RTC power on firm basis was considered and accepted by the Appellant.
- c) On 13.05.2011, the petitioner gave intimation that Unit No.1: CPP- 2 Capacity 135 MW is scheduled for statutory shut down from 00:00 Hrs. dated 01.06.2011 to 00:00 Hrs. dated 15.06.2011. The Respondent No.1 was requested to depute a representative for verification and authentication of the same.
- d) Appellant has never disputed or terminated the PPA concluded through correspondence. The Appellant has been availing (procuring) power without execution of PPA on basis of interim

arrangement for supply of power for one year. But it deviated from its position and decided not to procure power from Respondent No 1 when Respondent No.1 has asked for the benefits of Force outage.

This Tribunal in Appeal No. 46 of 2012 decided on 11.10.2012, while appreciating the principals laid down by Hon'ble Supreme Court in its various judgments had held that by the correspondence and conduct of the parties a Power Purchase Agreement can be concluded. Relevant portion of the operative portion the aforesaid judgments are reproduced as under:

“98. As mentioned earlier, the Appellant through its letter dated 15.5.2009, 19.5.2009, 23.5.2009, 25.5.2009, 1.6.2009 and 25.6.2009 has expressed its willingness to continue its efforts for sale of surplus power supplied by M P Trading Company as per the Letter of Intent. In other words, the Appellant admitted in these letters that it was repeatedly making efforts to sell the contracted power based on the Letter of Intent issued by M P Power Trading Company. The Appellant always had the intention of purchasing the surplus power from M P Power Trading Company through its conduct by participating in various tender enquiries on the strength of the Letter of Intent. The Appellant never contested or objected to the Letter of Intent.

99. On the other hand, the Appellant by its actions has consented to the contract between the M P Power Trading Company and the Appellant. The plea of the non existence of

the valid contract was only taken by the Appellant for the first time after almost four months when the first invoice was raised by the M P Power Trading Company. Prior to that, at no point of time, the Appellant ever refuted the existence of the contract.

100. As held by the Hon'ble Supreme Court Section 7 clarifies that acceptance must be absolute and unqualified unless the proposer prescribes the manner in which it is to be accepted by the proposer, the proposer must within a reasonable time after receipt of the acceptance insists that his proposal should be accepted as required by him. If this is not done, the Section says "he accepts the acceptance". Section 8 is a further amplification of the principle where from the conduct of a party the acceptance is inferred. If by way of action on the part of the acceptor the proposer cannot be restored to his former position, then the acceptor cannot be permitted to say that his acceptance should be treated as other than the original proposal."

Hence, it is clear that there was a valid and subsisting agreement between the parties.

FORCE AND PLANNED OUTAGE CONDITIONS ARE FULFILLED:

6.6 Vide order dated 30.03.2010 in Suo-Motu Petition No 05 of 2010 Respondent No.3, the State Commission has laid down the below criteria to avail the benefits of Force Outage and Planned Outage by power generators:

- a. Generators and Discoms (Trading company in present case) are required to execute PPA for one year:
- b. Identification of units for declaration of Force and Planned outage:
- c. Declaration of Force and Planned outage;
- d. Intimation regarding Force and Planned Outage Condition.

The relevant portion of order dated 30.03.2010 is reproduced as under:

“Since the provision of 15 days for planned outage and 240 hours for forced outage has been considered for an year for the purpose of calculation of load factor, thus to avail these facilities the generator and CGPs are required to execute PPA with CSPDCL for one year. The situation related to force majeure condition shall be in addition to above and relaxation in this respect be considered by CSPDCL on case to case basis.”

As discussed hereinabove, Parties have concluded the valid and subsisting agreement through letters/correspondences and by conduct.

It is also not disputed between the parties that Respondent No.1 has identified its Unit No 1 i.e. CPP-2 capacity 135 MW and Unit No.2 i.e. CPP-2 Capacity 135 MW for the purpose of forced and planned outage conditions as prescribed under order dated 30.03.2010 passed in Suo-Motu Petition No 05 of 2010.

Respondent No.1 has given the intimation and subsequently declared the planned and force outage for Unit No.1 CPP-2 capacity 135 MW from 00:00 Hrs dated 01.06.2011 to 00:00 hrs dated 15.06.2011 and also requested to depute a representative of Appellant for verification and authentication of the same.

In view of aforesaid propositions, all the conditions precedents for availing the planned and force outage conditions were fulfilled by Respondent No.1, due to the reasons Respondent No.3 State Commission well with the legal and statutory boundaries granted the benefits to Respondent No.1.

7. We have heard learned counsel appearing for the Appellant and learned counsel appearing for the Respondents at considerable length of time and carefully considered the written submissions and the relevant material on records available in file. On the basis of the pleadings and submissions available, the following only one issue emerges in the instant appeal for our consideration:-

Whether in the facts and circumstances of the case, the State Commission has rightly concluded that the Respondent No.1 (the generator) is entitled for 15 days as planned outage in absence of the signed PPA?

- 7.1 The learned counsel for the Appellant Mr. Apoorv Kurup submitted that the parties had never executed a one year PPA and only exchange of letters had taken place between the Appellant and the Respondent generator. He further contended that the Respondent – BALCO did not supply power to CSPTCL for one year in order to

claim the benefit of planned or forced outage and whatsoever power was supplied in the months of April, May and June of 2011 it was duly and fully compensated. The learned counsel submitted that it is a settled law that the parties to a contract can modify/alter that agreement by their conduct and to support his contentions he cited the judgments of Hon'ble Supreme Court dated 14.09.2017 in the case of Chrisomar Corp. v. MJR Steels Pvt. Ltd., Civil Appeal No. 1930 of 2008, reported as 2017 SCC OnLine SC 1104.

7.2 The learned counsel further contended that as per the order dated 30.4.2010 of the State Commission, the benefit of planned outage can be given to a generator only for a maximum period of 15 days in a year and the order nowhere stipulates that the generators are entitled for full 15 days of outage even if the supply has been made for a part of year. He pointed out that the benefit of complete 15 days in lieu of planned outage given to the generator by the State Commission for calculating its load factor is not only unfair but also unreasonable. The learned counsel for the Appellant was quick to submit that the letters exchanged by the parties cannot be presumed to be a valid agreement for one year and it is evident that the CSPTCL altered the position of the agreement into a month to month power purchase agreement and as such the generator cannot claim the benefit of 15 days planned outage for calculation of the load factor.

8.0 Per contra, the learned counsel for the Respondent No.1 – BALCO Mr. Hemant Singh submitted that the State Commission vide the aforesaid order dated 30.04.2010 has granted certain benefits to the generating plants supplying power to the Appellant for planned and forced outage for maintenance of the power plants. The allowed

period for planned maintenance is 15 days and that for forced outage as 10 days. He further submitted that the 1st Respondent had issued a letter dated 09.12.2010 wherein an offer for sale of 93 MW round the clock power starting from April, 2011 was made to the Appellant followed by the another letter dated 19.01.2011 reiterating the earlier offer. In pursuance of the aforesaid letters of the 1st Respondent, the Appellant vide its letter dated 01.02.2011 duly accepted the offer and confirmed the same for the complete one year i.e. April, 2011 to March, 2012. The learned counsel further contended that a contract for one year means the short term contract and under para 19(b) of the Impugned Order it is clearly mentioned that there is no approval required for short term contract or agreement. Further in para 19(c) of the order, a duty is cast upon the Appellant to provide a copy of the agreement to the State Commission. The 1st Respondent through a letter dated 15.03.2011 asked for a draft PPA from the Appellant which was, in fact, never provided. He reiterated that in view of these facts there was a valid agreement for supply of power between the Appellant and the 1st Respondent for a period of one year and as such the conditions precedent required for availing the benefit of planned outage was duly fulfilled by the 1st Respondent.

- 8.1 In reply to the contentions of the learned counsel for the Appellant that vide letters dated 31.05.2011 and 30.06.2011 the power supply agreement was terminated, the learned counsel for the 1st Respondent vehemently submitted that vide aforesaid letters the contract was terminated for the month of July and August, 2011 and nowhere it was indicated the termination of the agreement for the entire period of one year. The learned counsel further submitted that

the distribution licensees throughout India contract for procurement of power from various generators but sometimes, in line with the demand pattern, the Discoms do not procure power from the generators for a particular period and the same is not considered a termination of the entire agreement. He further contended that if the arguments of the Appellant is accepted then it would mean that a Discom has to always take actual supply of power from the contracted generators irrespective of the fact as to whether there is demand or not.

8.2 Learned counsel for the Respondent State Commission submitted that in past also the 1st Respondent and the Appellant continued sale/purchase of power on short term basis (one year) on the basis of mutual consent and the formal PPA was being executed during the year after the sale of power was commenced. For example for short term power purchase for the year 2010-11 the PPA was executed on 26.11.2010 and continuing the same practice for the year 2011-12 also the Appellant started procuring power from the 1st Respondent on the basis of interim arrangement concluded vide exchange of various letters from both sides. The learned counsel for the State Commission advancing his arguments further relied upon the judgments of this Tribunal dated 11.10.2012 in Appeal No. 46 of 2012. Based on the principals laid down by the Apex Court in various judgments, this Tribunal held that by the correspondence and conduct of the parties a power purchase agreement can be concluded. He was quick to mention that the letters written by the 1st Respondent are duly accepted by the Appellant which clearly concludes that there was a valid and subsisting agreement between the parties. Summing up his arguments the learned counsel

reiterated that the decision of the State Commission allowing 15 days planned outage to the 1st Respondent is in accordance with the settled law and the earlier order of the State Commission dated 30.03.2010.

Our findings

- 9 We have carefully considered the submissions of the learned counsel appearing the Appellant and learned counsel appearing for the Respondents namely the generator (BALCO), the State Commission and also took note of the various judgments relied upon by the parties. It is not in dispute that the offer made by the 1st Respondent to provide 93 MW round the clock power to the Appellant was duly accepted based on the terms and conditions of the previous year. The confirmation of both the parties to sale/procure of power was meant for one year viz. April, 2011 to March 2012. Further, formal agreement could not be executed during the intervening period after commencement of power supply for April, May & June, 2011. The purchase of power was terminated on month to month basis by the Appellant presumably considering the power demand in the State. As rightly pointed by the learned counsel for the 1st Respondent as well as the State Commission that there are a number of judgments of this Tribunal and the Apex Court that by the correspondence and conduct of the parties a power purchase agreement can be concluded which is squarely applicable for the instant case in hand. Moreover, the power purchase agreement was to be provided to the State Commission by the Appellant itself which it failed to do so. We also note that as per the order of the State Commission dated 30.03.2010 the

generator is entitled for 15 days planned outage in a year which the generator availed considering the power supply to continue for the complete year as per exchange of letters between the parties. Accordingly we are of the considered opinion that the State Commission has taken a right decision of allowing 15 days planned outage in calculation of load factor to the 1st Respondent in accordance with the settled principles of law and its own order of 2010 in suo motu Petition No. 05 of 2010. Thus, we hold that there do not appear any legal infirmity or perversity in the Impugned Order of the State Commission which requires interference by this Tribunal.

ORDER

In view of the forgoing reasons, as stated supra, we are of the considered view that the issue raised in the present Appeal No. 76 of 2016 is devoid of merits. Accordingly, the Appeal is dismissed. Accordingly, IA No. 185 of 2016 stands disposed of.

The impugned order passed by Chhattisgarh State Electricity Regulatory Commission dated 21.01.2016 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **21st day of December, 2018.**

(S. D. Dubey)
Technical Member

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REPORTABLE/NON-REPORTABLE
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(Justice Manjula Chellur)
Chairperson