



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

E.P.No. 3 of 2018

in

I.A.No. 211 of 2018

in

Appeal No. 41 of 2018

Date: 14-06-2018

Present

Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member

Between:

M/s. Hinduja National Power Corporation Limited ... Petitioner

A N D

APSPDCL & APEPDCL ... Respondents

This Execution Petition has come up for hearing finally on 08-06-2018 in the presence of Sri Abhishek Sharma & Sri P. Ravi Charan, learned counsel for the petitioner, Sri P. Shiva Rao, learned Standing Counsel for the respondents and Sri M. Venugopala Rao & Sri M. Thimma Reddy, learned objectors. Other objectors are not present. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties and the learned objectors, the Commission passed the following:

ORDER

The present determination arises in obedience to and in compliance with the directions of the Hon'ble Appellate Tribunal for Electricity in Execution Petition No.3 of 2018 in I.A.No.211 of 2018 in Appeal No.41 of 2018 dated 31-05-2018.

2. This Commission by its common order dated 31-01-2018 in I.A.Nos.1, 2 and 3 of 2018 and O.P.Nos.19 of 2016 and 21 of 2015, dismissed I.A.No.3 of 2018 and allowed I.A.Nos.1 and 2 of 2018, consequently dismissing O.P.No.19 of 2016 and closing O.P.No.21 of 2015, while giving liberty to M/s. Hinduja National Power Corporation Limited (hereinafter referred to as “**HNPCL**”) to pursue all remedies available to it under law for fixation and payment of a reasonable price for electricity supplied by it to both the Distribution Companies of Andhra Pradesh, which in the meanwhile were bound to continue to pay the interim tariff fixed by the Commission for such electricity received.

3. The HNPCL filed Appeal No.41 of 2018 and I.A.No.211 of 2018 against the order of this Commission and the Hon’ble Appellate Tribunal for Electricity passed an order on 16-03-2018 in I.A.No.211 of 2018 filed for an interim relief. The Hon’ble Appellate Tribunal for Electricity directed that *status quo* as prevalent before 31-01-2018 be maintained, without prejudice to the rights and contentions of the parties in the main Appeal and without any vested right due to scheduling of power on adhoc basis by both the Distribution Companies during the pendency of the Appeal at the provisional rate of Rs.3.82 / kWh. It is for the Distribution Companies to decide the Merit Order Despatch of the said power and the Hon’ble Appellate Tribunal for Electricity ultimately to adjust the equity between the parties.

4. This Commission in the order on Tariff for Retail Sale of Electricity during FY 2018-19 dated 27-03-2018 referred to the chronology of events, noted that this Commission has to give effect to the order of the Hon’ble Appellate Tribunal for Electricity dated 16-03-2018, which continues to be operative and in force and that scheduling of power at the provisional rate of Rs.3.82 / kWh was directed by the

Hon'ble Appellate Tribunal for Electricity to be subject to the Distribution Companies proceeding to decide on the Merit Order Despatch on the above quantum of power . Both the Distribution Companies were therefore directed by the Commission to decide on the Merit Order Despatch on the quantum of power to be procured from the HNPCL and forthwith communicate their decision to the Commission. On receipt of such communication, which is a precondition for the Commission to faithfully give effect to the interim order dated 16-03-2018, it was stated that this Commission will include the HNPCL for scheduling power from it in the power procurement for FY 2018-19 as per the Merit Order Despatch, through an appropriate amendment to the order on tariff for Retail Sale of Electricity during 2018-19, subject to any further or final orders that may be passed by the Hon'ble Appellate Tribunal for Electricity or in any Appeal or Writ Petition against the orders of the Hon'ble Appellate Tribunal for Electricity.

5. The Hon'ble Appellate Tribunal for Electricity was pleased to observe in its orders dated 31-05-2018 that the State Commission has correctly considered the order of the Hon'ble Appellate Tribunal for Electricity and both the Distribution Companies did not communicate the breakup of the tariff of Rs.3.82 / kWh between the fixed charges and the variable charges till today. The Hon'ble Appellate Tribunal for Electricity noted the contention of the HNPCL that for implementing the provisional tariff of Rs.3.82 / kWh for the purpose of Merit Order Despatch, the same breakup as was decided by the Commission in the order dated 30-03-2016 determining the Tariff on Retail Sale of Electricity during FY 2016-17 can be considered, as comprising Rs.1.84 / kWh as fixed charges and Rs.1.77 / kWh as variable charges out of Rs.3.61 / kWh, the original provisional tariff.

6. The Hon'ble Appellate Tribunal for Electricity referred to the letter from the Distribution Companies dated 16-05-2018 and the letter from the HNPCL dated 18-05-2018. The letter of the HNPCL confirmed the proposal of the HNPCL to the Distribution Companies and the Commission to consider Rs.2.68 as variable cost for the purpose of Merit Order Despatch. The HNPCL specifically requested the Distribution Companies to make an application to the Commission to split the adhoc tariff of Rs.3.82 taking Rs.2.68 as variable cost component for the Merit Order Despatch and in implementation of the Hon'ble Appellate Tribunal for Electricity order dated 16-03-2018, schedule the plant as per the declared availability. The Hon'ble Appellate Tribunal for Electricity concluded that the State Commission had correctly interpreted and complied the order of the Hon'ble Appellate Tribunal for Electricity dated 16-03-2018, in its order dated 27-03-2018 and if the Distribution Companies have not complied with the directions of the State Commission, the State Commission is empowered to determine the fixed charges and variable charges. The Hon'ble Appellate Tribunal for Electricity observed that scheduling the power plants on Merit Order Despatch is based on variable charges due to which the bifurcation of the provisional tariff has become important and urgent and the fixed charges / variable charges so determined by the Commission will be provisional subject to the final Judgment / Order of the Hon'ble Appellate Tribunal for Electricity. Consequently the matter was remanded to the Commission to immediately determine the fixed charges and variable charges based on the provisional tariff not later than 15 days from the date of receipt of a copy of their order. The Distribution Companies were directed to schedule the power declared available from the project so long as the variable cost determined / accepted by the State Commission is within the Merit Order Despatch, if the power is not so

scheduled, the Distribution Companies will be liable to pay fixed charges to the petitioner on a provisional basis again subject to the final decision in the Appeal.

7. The order of the Hon'ble Appellate Tribunal for Electricity was immediately acted upon and a notice was issued to both the parties and all the objectors in O.P.No.21 of 2015 and O.P.No.19 of 2016 to appear before the Commission on 08-06-2018 for hearing. The notice was also placed on the web site of the Commission for information to all the stakeholders and interested persons. On 08-06-2018, the learned counsel for both parties and Sri M. Venugopala Rao & Sri M. Thimma Reddy, two of the objectors were heard and no other objectors or stakeholders or interested persons were present.

8. With the above factual background, the Commission "based on its provisional tariff order of the project determines the fixed charges and variable charges so that scheduling from the project could be started immediately" as directed by the Hon'ble Appellate Tribunal for Electricity.

9. In O.P.No.21 of 2015 filed for approval of the capital cost in the background of the HNPCL quoting a levelised tariff of Rs.3.84 ps per unit in the Case-I bidding held by the then AP Discoms in FY 2010-11 for supply of power from April, 2016 onwards and the AP Discoms themselves estimating the purchase cost to be about Rs.3.96 ps in respect of the HNPCL in their ARR filings, an interim order was passed as under,---

"The determination of tariff for supply of electricity by a generating company to a distribution licensee and purchase of electricity by a distribution licensee is governed by Regulation No.1 of 2008 of this Commission made under

Sections 62 and 86 (1) (b) of the Electricity Act, 2003. While the regulation lays down the defined scientific parameters for fixing tariff, as per Clause 21 of the said regulation, the powers of the Commission to make such orders as may be necessary to meet the ends of justice were left unlimited and unaffected. As the generator has admittedly started supply of power from COD dated 11-01-2016 to both the distribution companies and as it claims about its liability to discharge heavy financial commitments even in the meanwhile, which need not be doubted, there will be every justification for providing for payment of an interim tariff to help the financial survival of the petitioner while at the same time not compromising the interests of the public utilities and the consumers. Taking into account the additional burden likely to be imposed by the budgetary proposals for the FY 2016-17 by the Government of India and considering that a levelized tariff of ₹3.48 ps., has been agreed to be the minimum level at which such interim tariff can be fixed, taking the pass-through indication in the Retail Tariff Order for the FY 2016-17 as the basis for such payment appears to be just and reasonable. As any such interim measure will be in operation only for a limited period, the rights and interests of either party remain unaffected and it can be a matter of practical knowledge that the ultimate tariff to be fixed in the main petition may not be likely to be less than ₹3.61 ps per unit in the overall scenario of the matter. Section 94 (2) of the Electricity Act, 2003 and Regulation 55 of the APERC (Conduct of Business) Regulations, 1999 also give the jurisdiction to the Commission to pass such interim orders as may be considered appropriate and expedient.

Therefore, for the power supplied by the petitioner to the respondents 1 and 2 from the COD dated 11-01-2016 upto 30-04-2016, the respondents 1 and 2 may pay an interim tariff of ₹3.61 ps., per unit, proportionately for the power respectively received by them. The direction to pay such interim tariff is without prejudice to the rights and contentions of both parties in the main petition O.P.No.21 of 2015 and the interim direction shall not be the basis for any contention or decision in the main petition finally on merits on any aspect or issue in controversy”.

Subsequently, on 06-08-2016 after hearing both parties, it was noted that reasonableness of the interim tariff fixed earlier was not the subject matter of challenge before any Court or Forum and the subsequent calculations of two Distribution Companies themselves show an increase of Rs.0.21 ps per unit due to revision of coal price by the Ministry of Coal, Government of India through its Notification dated 29-05-2016. Therefore, it was ordered that without prejudice to the rights and contentions of both parties it will be in the interests of justice to increase the interim tariff by the said sum per unit. The Distribution Companies were accordingly directed to pay the interim tariff of Rs.3.82 per unit from 01-08-2016 for the power received by them until any further orders by this Commission.

10. The Tariff Order for Retail Sale of Electricity during FY 2013-14 of the erstwhile Andhra Pradesh Electricity Regulatory Commission shows that the Commission has not considered the availability of energy from HNPCL during FY 2013-14 since the project was not expected to attain the commercial operation during that year. As such there was no assessment of what would have been the reasonable fixed charges or variable charges to be considered in that year.

11. However, in the Tariff Order for Retail Sale of Electricity during FY 2015-16 of this Commission, HNPCL was under consideration, as Unit-I of HNPCL was expected to be commissioned by June, 2015 and Unit-II was expected to be commissioned by October / December, 2015. While HNPCL projected the fixed and variable costs for the 1st year of their operation at Rs.2.86 and Rs.2.13 (2.31?) per unit respectively, the ARR of the Discoms projected them at Rs.1.79 and Rs.1.86 per unit respectively. The Commission approved the average cost per unit at Rs.3.61.

12. The Tariff Order for Retail Sale of Electricity during FY 2016-17 of this Commission shows that HNPCL projected Rs.2.67 and Rs.2.89 as fixed and variable costs per unit for FY 2016-17, while the Discoms projected in their ARR Rs.2.16 and Rs.1.80 per unit as the fixed and variable costs respectively. The Commission noted that pending adjudication of O.P.No.21 of 2015, an interim tariff of Rs.3.61 per unit was fixed.

13. In the Tariff Order for Retail Sale of Electricity during FY 2017-18 of this Commission, it was noticed that HNPCL claimed a fixed cost of Rs.2.66 and a variable cost of Rs.2.78 for H2 of FY 2016-17 and a fixed cost of Rs.2.56 and a variable cost of Rs.2.91 for FY 2017-18 and the Distribution Companies pointed out that the original adhoc tariff was subsequently revised to Rs.3.82 kWh. An average cost of Rs.3.68 per kWh (Rs.4.01?) was approved by the Commission for HNPCL.

14. In the Tariff Order for Retail Sale of Electricity during FY 2018-19 of this Commission, the power from HNPCL was not projected to be available by the Distribution Companies in their ARR and the Commission after recalling the sequence of events and noting that the order of the Hon'ble Appellate Tribunal for

Electricity dated 16-03-2018 continues to be operative and in force, directed the Distribution Companies to communicate their decision on the Merit Order Despatch on the quantum of power to be procured from HNPCL, which did not happen, leading to the present directions of the Hon'ble Appellate Tribunal for Electricity in Execution Petition No.3 of 2018.

15. The HNPCL filed an affidavit during the hearing in which it referred to W.P.Nos.10814 and 13689 of 2018 filed by the Distribution Companies against the orders of the Hon'ble Appellate Tribunal for Electricity dated 16-03-2018 on the maintainability of Appeal No.41 of 2018 and dismissal of the same by the Hon'ble High Court. The affidavit also referred to an Appeal filed by the Distribution Companies before the Hon'ble Supreme Court in C.A.No.5772 of 2018, which came to be dismissed on 04-06-2018. The HNPCL therefore requested that the provisional tariff of Rs.3.61 per unit was earlier split into fixed and variable components of Rs.1.84 and Rs.1.77 respectively and adding Rs.0.21 ps allowed subsequently, the fixed and variable costs may be fixed at Rs.1.84 and Rs.1.98 respectively. It also stated that Rs.2.68 per unit projected as variable cost by it for FY 2018-19 for consideration in the Tariff Order for Retail Sale of Electricity during FY 2018-19 can be used solely for the purpose of merit order as informed in the letter dated 18-05-2018. A copy of the letter dated 18-05-2018 filed as Annexure P-11 along with the affidavit on behalf of the petitioner shows that the HNPCL itself projected Rs.2.68 as variable cost per unit subject to any revision in the cost of coal and GCV for the specific and limited purpose of reckoning their plant under Merit Order Despatch. Sri Abhishek Sharma, learned counsel for HNPCL therefore submitted that the breakup of Rs.3.82 ps originally adopted may be considered for the tentative breakup to be determined as per the directions of the Hon'ble Appellate

Tribunal for Electricity and otherwise the amount of Rs.2.68 projected as variable cost by the HNPCL itself for the FY 2018-19 may be adopted for the purpose leaving the balance to be considered as fixed cost per unit.

16. The respondents / Distribution Companies filed a copy of letter from HNPCL for the year 2017-18 and the year 2018-19 for their two units respectively showing the variable cost as Rs.2.68 ps. They also filed a copy of the submissions of the HNPCL on interim tariff made in I.A.No.5 of 2016 in which they requested for a variable cost of Rs.2.92 and fixed cost of Rs.2.56 making a total of Rs.5.48. The HNPCL requested that at least a minimum of Rs.4.51 per unit divided commensurately may be given. As already stated, the Tariff Order for Retail Sale of Electricity for FY 2017-18 already recorded the same request made by the HNPCL (of-course mentioned the variable cost as Rs.2.91 / kWh). A copy of the letter from the HNPCL dated 29-09-2016 to the same effect was also filed. The Memo filed by the HNPCL in I.A.No.5 of 2016 in O.P.No.21 of 2015 was also filed stating that the energy cost calculated as per the Memo will be Rs.2.47 kWh. Sri P. Shiva Rao, learned Standing Counsel for the Distribution Companies also filed a copy of the Price Notification issued by Coal India Limited dated 08-01-2018 showing the increase in coal price for all grades of non-coking coal with effect from 09-01-2018.

17. Thus, for the purposes of this determination, *status quo* regarding provisional tariff was directed to be maintained without prejudice to the rights and contentions of the parties and the bifurcation of the provisional tariff notionally into fixed charges and variable charges is for the purpose of determining the placement of HNPCL in the Merit Order Despatch. Through the adhoc tariff of Rs.3.82 was claimed to have been divided differently earlier, by its very nomenclature, variable cost is understood

to be variable, which variability should be taken into account in fixing two part tariff from time to time accordingly. If so, it is seen from the record that the HNPCL in its objections before the Commission concerning the ARR of the Discoms for FY 2018-19 has specifically pleaded that the adhoc tariff of Rs.3.82 should be taken as composite tariff and the calculation of variable charges by the HNPCL in their earlier letters for FY 2017-18 and 2018-19 arrived at the energy charges at Rs.2.68 / kWh, which were stated to be including the landing cost of MCL coal and operational parameters as per the Andhra Pradesh Electricity Regulatory Commission Regulations.

18. The letter dated 18-05-2018 from the HNPCL subsequent to the order of the Hon'ble Appellate Tribunal for Electricity dated 16-03-2018 referred to a meeting between the parties in respect of Merit Order Despatch of the plant in pursuance of a letter from the Distribution Licensees dated 14-05-2018 and it was specifically requested by the HNPCL that the Discoms should apply to the Commission for approval of the split of current adhoc tariff of Rs.3.82 by application of Rs.2.68 as the variable cost component. The HNPCL further made the variable cost subject to any revision in the cost of coal and the GCV and as already stated, in the affidavit sworn in on 07-06-2018 the HNPCL specifically requested the Commission to consider using the projected variable cost at Rs.2.68 per unit solely for the purpose of the merit order, so as to be compared with the current variable cost of the other generators in the merit order as already communicated in the letter dated 18-05-2018. On the very contentions of the HNPCL, the question of going back to any notional fixed or variable cost considered in the earlier years prior to FY 2018-19 may be neither relevant nor dependable and acceptable for FY 2018-19. Though the distribution licensees did not express their concurrence to

the calculation of variable cost by HNPCL at Rs.2.68 for FY 2017-18 and FY 2018-19, still in the absence of any other acceptable data to discredit the calculations of HNPCL at this stage, the same can be taken as a reasonable basis for the division of the provisional tariff.

19. In the Tariff Order for Retail Sale of Electricity during FY 2018-19 of this Commission dated 27-03-2018, the Commission has accepted the proposal of the licensees for 3% escalation of variable cost over the approved variable rates in the Tariff Order for Retail Sale of Electricity during FY 2017-18 and the basis for such escalation was also including the increase in coal price effected by M/s. Mahanadi Coal Limited vide Price Notification dated 08/09-01-2018 now relied on by the licensees again. Noting that hike in coal price is a pass through, such escalation was permitted and if the same escalation were to apply to the variable cost of Rs.2.68 suggested by HNPCL for FY 2017-18 and FY 2018-19, the same comes to between Rs.0.08 and Rs.0.09 ps per kWh. If so, the variable cost comes to Rs.2.76 per unit leaving a balance of Rs.1.06 as fixed charges on the provisional / interim tariff of Rs.3.82 per unit which may remain undisturbed till the finality of the proceedings (Appeal No.41 of 2018 before the Hon'ble Appellate Tribunal for Electricity).

20. It is true that the capital cost, either as per the Power Purchase Agreement dated 09-12-1994 at Rs.4628.11 crores or as per the subsequent claims of HNPCL varying between Rs.5545 crores, Rs.6998 crores and Rs.8087 crores, if taken as the basis for calculating the fixed cost, the fixed cost would have been anywhere between Rs.1.56 and Rs.2.45 for FY 2018-19, but the same would have no bearing on the interim determination herein within the limits of the provisional tariff pending

adjudication. As the variable cost determines priorities between power producers in the Merit Order Despatch, the same should conform to the actuals as far as possible, so as to leave a level playing field for all the power producers. The HNPCL can have no grievance when its own calculations for FY 2017-18 and FY 2018-19 along with admitted escalation in coal price were to form the basis for calculating the variable cost for this determination. In fact what was taken into account is only 3% escalation notionally and not the actual escalation as per the Price Notification dated 08-01-2018. This determination is of-course without prejudice to the claims of HNPCL or the distribution licensees about the quantum of fixed cost and variable cost that has to be fixed for different years from 2016-17 ultimately on merits.

21. In respect of two thermal power plants of AP Genco which had no Power Purchase Agreements approved by the Commission and three gas power plants whose Power Purchase Agreements have expired with pending requests for renewal, the tariffs proposed by the distribution licensees were subjected to reasonable variation and approval in the Tariff Order on Retail Sale of Electricity for FY 2018-19 and the proportion between the fixed and variable charges so approved varied between 26% to 29%. If the approved tariff of Rs.3.82 herein is split into Rs.1.06 as fixed charge and Rs.2.76 as variable charge, the proportion comes to 27.7%. The ratio between the fixed charge and the variable charge thus at 2.6 times is broadly similar to the ratio adopted in similar cases in the Tariff Order of this year. The present consideration has to be concluded accordingly.

22. Therefore, in compliance with the directions of the Hon'ble Appellate Tribunal for Electricity in E.P.No.3 of 2018 in I.A.No.211 of 2018 in Appeal No.41 of 2018

dated 31-05-2018, the fixed charges are determined at Rs.1.06 / kWh / unit and the variable charges are determined at Rs.2.76 / kWh / unit based on the provisional tariff of Rs.3.82 / kWh / unit. The other directions of the Hon'ble Appellate Tribunal for Electricity in the above referred to order have to be given effect to by both the parties accordingly and this determination is purely provisional subject to any further or future order or judgment or direction of the Hon'ble Appellate Tribunal for Electricity.

This order is corrected and signed on this the **14th day of June, 2018.**

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman