

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

Execution Petition No. 3 of 2018

IN

IA No. 211 of 2018 in Appeal No. 41 of 2018

Dated: 31st May, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. Justice N. K. Patil, Judicial Member

In the matter of :-

**M/s Hinduja National Power
Corporation Limited(HNPCL)
C/o Gulf Oil Corporation Limited
Post Bag No.1, Kukatpally,
Shanthnagar I.E., Hyderabad 500 108
Telangana**

...Petitioner

Versus

- 1. Andhra Pradesh Electricity
Regulatory Commission (APERC)
4th Floor, 11-4-660, Singareni Bhawan
Red Hills,
Hyderabad – 500 004** **...Respondent No.1**
- 2. Southern Power Distribution Power Company
Limited of Andhra Pradesh
Srinivasapuram, Thiruchanoor Road,
Tirupati – 517 503, Andhra Pradesh** **...Respondent No.2**
- 3. Eastern Power Distribution Company
Of Andhra Pradesh
P&T Colony, Seethammadhara
Visakhapatnam – 530 013** **...Respondent No.3**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Abhishek Sharma
Ms. Purva Kohli
Ms. Poorva Saigal

Counsel for the Respondent(s) : Mr. K V Mohan
Mr. K. V. Balakrishnan for R-1

Mr. BasavaPrabhu Patil, Sr. Adv.
Ms. Prerna Singh
Ms. Geeta Ahuja for R-2 & 3

ORDER

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. M/s HNPCL (hereinafter referred to as the “**Petitioner**”) has filed the instant Execution Petition (EP) No. 3 of 2018 under Section 120 (3) of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) for execution and implementation of the Order dated 16.3.2018 passed by this Tribunal in IA No. 211 of 2018 in Appeal No. 41 of 2018.
2. The Petitioner, M/s HNPCL is a company incorporated under the provisions of the Companies Act, 1956 has established 1040 MW (2x520 MW) power project (“**the Project**”) at Visakhapatnam in the State of Andhra Pradesh.
3. The Petitioner has filed the Appeal No. 41 of 2018 and IA No. 211 of 2018 against the Order dated 31.1.2018 passed by the Andhra Pradesh Electricity Regulatory Commission

(hereinafter referred to as the “**State Commission**”) in OP No. 19 of 2016 and OP No. 21 of 2015. The OP No. 21 of 2015 was filed by the Petitioner on 12.3.2014 for approval of the capital cost of the Project and tariff for generation and sale of electricity from the Project to Southern Power Distribution Power Company Limited of Andhra Pradesh (hereinafter referred to as the “**Respondent No.2**”) and Eastern Power Distribution Company of Andhra Pradesh (hereinafter referred to as the “**Respondent No.3**”).

4. The petition OP No. 19 of 2016 was filed by the Respondent Nos. 2 and 3 on 11.5.2016 regarding approval of the State Commission under section 86 (1) (b) of the Act for approval of the Continuation Agreement dated 28.4.2016 entered into between the Petitioner and Respondent Nos. 2 and 3 for continuation of the Amended and Re-stated PPA dated 15.4.1998 between the said parties.
5. The State Commission vide Order dated 31.1.2018 decided the application filed by Respondent Nos. 2 and 3 as under (as recorded at para 5 in the order dated 16.3.2018 of this Tribunal):

- “(a) allowed the Respondents 2 and 3, the Distribution Licensees in the State of Andhra Pradesh to withdraw OP No.19 of 2016 filed for approval of the Continuation Agreement dated 28.4.2016 executed between the Respondents 2 & 3 and the Appellant;*
- (b) Rejected the application filed by the Appellant for transposition as the Petitioner in petition OP No.19 of 2016;*

- (c) *As a consequence of the withdrawal of OP No. 19 of 2016 the State Commission also rejected the petition OP No. 21 of 2015 filed by the Appellant for determination of capital cost and tariff for generation and sale of electricity by the Appellant to Respondents 2 and 3 from its generating station; and*
- (d) *Consequent to the decision in the said interim applications the consequent Order was passed rejecting OP No. 19 of 2016 filed by the Appellant.”*

6. The Petitioner has challenged the legality and validity of the above Order and has prayed for the interim relief in IA No. 211 of 2018 in Appeal No. 41 of 2018 as under:

- “(a) stay the judgement and Order dated 31.01.2018 passed by the Andhra Pradesh Electricity Regulatory Commission, Respondent No.1 herein pending the hearing and decision in the Appeal;*
- (b) direct the Respondents 2 and 3, namely, the two Distribution Licensees in the State of Andhra Pradesh to continue to implement the Power Purchase and Continuation Agreement/ Procurement Process Agreement which was followed prior to 31.1.2018 in the same manner as before and maintain the status quo as was prevalent on 31.1.2018 and restore Petition No. OP 21 of 2015 and OP 19 of 2016 for adjudication by State Commission and pass orders for a two part tariff based on the approved project cost along with approval of Continuation Agreement 2016 in a time bound manner;*
- (c) direct the Respondents 2 and 3 to pay the amount outstanding to the Appellant together with the Delayed Payment Surcharge; and continue to pay fixed charges to the Appellant.*

(d) *pass any such further order or orders as this Tribunal may deem just and proper in the circumstances of the case.”*

7. After hearing the learned counsel and learned senior counsel appearing for the parties in IA No. 211 of 2018, this Tribunal has passed the Order dated 16.3.2018, holding as under:

“25. At this stage, this Tribunal is considering the interim order to be passed pending the hearing and decision in the Appeal. The main Appeal has to be heard and decided on merits. Without going into the merits of various contentions of the Appellant and the Respondents this Tribunal will consider some of the important aspects to decide on the disposal of this IA.

26. The undisputed factual aspects are that the Appellant has since established the Power project of 2X520 MW aggregating to 1040 MW, with COD of the first unit on 11.1.2016 and COD of the second unit on 3.7.2016. The two generating units have been generating and supplying power to Respondents 2 and 3 and the Respondents 2 and 3 have been scheduling the Power until January 2018. The Tariff at which the billing was being done by the Appellant was Rs. 3.82/kWh determined by the State Commission as provisional Tariff. The actual scheduling of power by the Respondents 2 and 3 from the Appellant's power project till January 2018 do show that the procurement power by the Respondents 2 and 3 at the above provisional tariff of Rs. 3.82/kWh has been considered as economical and conducive. The objection of the Respondents 2 and 3 to the estimated capital cost of Rs 8087 crores has been raised when the Respondents 2 and 3 were aware of the said claim of the Appellant when the Addendum to the capital cost was filed far back on 28.7.2015 and there were several events thereafter namely, COD the first unit on 11.1.2016, the fixation of

provisional Tariff by the State Commission dated 1.3.2016 and 6.8.2016, signing of the Continuation Agreement dated. 28.4.2016, the approval of the GoAP dated 1.6.2016 and the COD of the second unit on 3.7.2016.

27. *Further, the orders were reserved by the State Commission on 15.5.2017 after hearing the concerned parties. The State Commission having proceeded in OP No. 21 of 2015 for sufficiently long time and having reserved the judgement on 15.5.2017 should have pronounced the decision on merits after applying prudence on capital cost claimed by the Appellant and the capital cost admissible for the project with reasoning. The State Commission was given number of extensions by this Tribunal to decide on the merits of OP No. 21 of 2015 and OP No. 19 of 2016 and these extensions were sought by the State Commission itself on grounds that it required to consider the matter in detail and could not do so for personal reasons of Chairperson and Members. The course adopted by the State Commission in the matter of not deciding the case on merits but to decide the three interim applications filed after the orders have been reserved on 15.5.2017 and disposing the entire matters based thereon will have to be gone into in the main Appeal. Similarly the sudden shift in the stand of Respondents 2 and 3 to withdraw OP No.19 of 2016 and consequently the rejection of OP No. 1 of 2015 after having proceeded consistently till December 2017 for implementing the purchase of power from the Appellant's project also need to be considered in the main Appeal. At this stage, the Tribunal is stating the above aspects in the light of the consideration of the prima facie and balance of convenience.*
28. *The Respondents 2 and 3 have raised the issue of the Appellant having no vested right till the approval to the continuation Agreement is granted by the State Commission in OP No. 19 of*

2016. While in terms of the provisions of section 86 (1)(b) of the Electricity Act the approval of the State Commission is required for the PPA including the price at which it has to be purchased. The Appellant has the right to expect proper consideration of the matter by the State Commission on merits.

29. The State Commission while exercising regulatory jurisdiction is required to consider the procurement of power from different sources on merits. If the procurement of power from the Appellant's Project is economical and cheaper and in the interest of the consumers at large, there is no reason as to why the State Commission cannot proceed on the basis that the Respondents 2 and 3 are having an absolute right to withdraw the approval sought for the Continuation Agreement. The touchstone of consideration on the procurement of power from the Appellant's power project is to the interest of the consumers. When Respondents 2 and 3 have continuously scheduled the power at the provisional rate of Rs 3.82/kWh till January 2018, there is no reason to proceed on the assumption that the procurement of power from the Appellant's Project is not conducive to the public interest. The State Commission only upon a decision on merits in OP No. 21 of 2015 can decide these aspects. In the Appeal, this Tribunal has to consider all the above aspects on merits.
30. In the meanwhile, allowing the Order dated 31.1.2018 to be maintained as it is, namely, without the continued procurement of power by Respondents 2 and 3 from the Appellant's power project, it would mean that the generating project of 1020 MW established in the State of Andhra Pradesh and connected to State Grid will become stranded, the coal allocation of the Appellant will get affected, the employment provided by the generating company both direct and indirect will get affected and there will be other serious consequences of keeping the

generating station idle. On the other hand, allowing the generating station to function and directing the Respondents 2 and 3 to schedule the power at the provisional rate of Rs 3.82/kWh will mean that the quantum of power as available before can be utilised by the Respondents 2 & 3 for maintaining the retail supply of electricity to the consumers at large. It is not a case of the Respondents 2 and 3 that the provisional tariff of Rs. 3.82/kWh is excessive or not in public interest. Rs 3.82/kWh provisionally determined by the State Commission is a total tariff comprising both the fixed charges and variable charges. If the total tariff is split into two, the Appellant's power project may come well within the merit order. The State Commission is yet to consider whether the project cost as approved by the State Commission in OP No. 21 of 2015 would have resulted in the Appellant's power project within the merit order or otherwise.

31. *Accordingly, we are of the considered view that prima facie we found balance of convenience in favour of the Appellant. No prejudice, as such, should be caused to the Respondent No. 2 & 3 passing the interim order in the interest of justice and equity. Having regard to the peculiar facts and circumstances of the case, it would be appropriate to direct status quo as prevalent before 31.1.2018 be maintained, without prejudice to the rights and contentions of the parties in the main Appeal and further that the Appellant shall not be entitled to claim any vested right or otherwise base any arguments on the basis that the power has been scheduled on adhoc basis by Respondents 2 and 3 at the provisional rate of Rs 3.82/kWh during the pendency of the Appeal. The Respondents 2 and 3 can proceed to decide on the Merit Order Despatch on the above quantum of power. In the Appeal proceedings, it shall be open to this Tribunal to adjust the equity between the parties while deciding finally the Appeal on merits. The*

arrangement of status quo prior to 31.1.2018 is an adhoc arrangement without prejudice to the rights and contentions of the parties until further orders.

32. *With the above direction, interim application for stay is allowed to the extent as directed above. We make it clear that the observations made by us which touch the merits of the case of the parties are prima facie observations and shall not be treated as final expression on the merits of the case.*

33. *Pronounced in the Open Court on this 16th day of March, 2018. List the main Appeal on 09.04.2018.”*

8. In the present Execution Petition, the primary grievance of the Petitioner is that despite the above specific interim Order granted by this Tribunal, the Respondent Nos. 2 and 3 have not scheduled electricity from the Project since 16.3.2018. The Respondent Nos. 2 and 3 have neither given any schedule against the declaration of availability made by the Petitioner nor has taken any steps in regard to the payment of fixed charges in case of non-scheduling of power.
9. The Respondent Nos. 2 and 3 have contended that the tariff which was applicable for procurement of power by the Respondent Nos. 2 and 3 from the Project as on 31.1.2018 with reference to which the status quo ante order has been passed by this Tribunal was a single part tariff of Rs 3.82/kWh and if the said single part tariff is considered for deciding the merit order, the Project does not fall within the merit order. It is the case of Respondent Nos. 2 and 3 that the merit order in

the present case needs to be considered taking into account the entire tariff determined by the State Commission on a provisional basis at Rs 3.82/kWh and, therefore, unless the sale of power by the Petitioner considering Rs. 3.82/kWh comes within the merit order, the Respondent No. 2 and 3 are not obligated to schedule the power.

10. The Petitioner further submitted that after the order dated 16.3.2018 passed by this Tribunal, the State Commission had decided the retail supply tariff for the Respondent No. 2 and 3 for the current FY 2018-19 vide Order dated 27.3.2018. In the said retail supply tariff order, the State Commission has taken note of the order dated 16.3.2018 passed by this Tribunal in regard to the Petitioner's case and had proceeded to decide on the inclusion of the procurement of power from the Project. The relevant portion from the said order is reproduced herein below:

“Commission’s View: The Commission passed orders on 31.01.2018 dismissing O.P. 19 of 2016 for approval of the power purchase agreement as withdrawn and closing O.P.21 of 2015 for determination and fixation of tariff, with appropriate liberty to M/s Hinduja National Power Corporation Ltd., 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. The said order is the subject matter of Appeal No.41 of 2018 on the file of Hon'ble Appellate Tribunal for Electricity and the matter is subjudice. Hence, as a matter of judicial propriety and discipline, no opinion is expressed on the issue.

The Hon'ble Appellate Tribunal for Electricity was pleased to order in I.A.No. 211 of 2018 in Appeal No. 41 of 2018 on 16.03.2018 that “having regard to the

peculiar facts and circumstances of the case, it would be appropriate to direct 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 further that the Appellant shall not be entitled to claim any vested right or otherwise base any arguments on the basis that the power has been scheduled on adhoc basis by Respondents 2 and 3 at the provisional rate of Rs. 3.82/kWh during the pendency of the Appeal. The respondents 2 and 3 can proceed to decide on the Merit Order Despatch on the above quantum of power. In the Appeal proceedings, it shall be open to this Tribunal to adjust the equity between the parties while deciding finally the Appeal on merits. The arrangement of status quo prior to 31.01.2018 is an arrangement without prejudice to the rights and contentions of the parties until further Orders.

The Hinduja National Power Corporation Limited, in addition to their objections filed on 12.01.2018, filed an additional Affidavit on 19.03.2018 before this Commission stating about their submission during public hearing and through their objections to include it in the ARR of FY2018-19 allocation based on normative availability and the subsequent orders of the Hon'ble APTEL in I.A. 211 of 2018 extracted above. The HNPCL, while narrating the background stated that the distribution licensees may be directed to consider scheduling of power from it pursuant to the orders of the Hon'ble APTEL. It also requested that the order of this Commission dated 03.03.2018 on pooled power purchase cost for FY2017-18 also be amended recognizing HNPCL as a long-term power producer. Hence, HNPCL requested for inclusion in the Resource Plan for FY2018-2024 for FY2018-19 and for a direction to the distribution licensees for scheduling of power from HNPCL for power procurement for FY2018-19 as per the order dated 16.03.2018 of Hon'ble APTEL.

The advocate for the respondents (2) and (3) filed a Memo before this Commission on 21.03.2018 to consider their petition dated 21.03.2018 filed in Appeal

No. 41 of 2018 before the Hon'ble APTEL for stay of execution of its order dated 16.03.2018 for a period of 45 days.

The interlocutory application in Appeal No. 41 of 2018 by the two distribution licensees mentioned that they intend to file an Appeal against the status quo order dated 16.03.2018 and the despatch in respect of HNPCL permitted by APERC in the Retail Supply Tariff Order for FY2017-18 was exhausted as on 31.01.2018 and no more power can be or is procured from HNPCL after 31.01.2018 by the two distribution licensees (respondents 2 and 3). As an appeal is intended to be filed, the respondents 2 and 3 requested the Hon'ble APTEL to grant stay of execution / enforcement of the order dated 16.03.2018 under Order 41 Rule 5 (2) of the Code of Civil Procedure, 1908 for a period of 45 days and grant any other Order including an Order to maintain status quo as on 16.03.2018. The respondents 2 and 3 undertook to abide by the final orders that may be passed.

The situation existing as on today is therefore that the Order dated 16.03.2018 of the Hon'ble Appellate Tribunal continues to be operative and in force and an application for interim stay of the said order is pending before the Hon'ble APTEL. No appeal before the Hon'ble Supreme Court and no Writ Petition before the Hon'ble High Court appear to have been filed so far and no Order interim or final on the request for stay is claimed to have been passed by the Hon'ble APTEL or any other forum so far. As mere filing of an application for interim stay or mere intention to file an appeal do not operate as stay on the interim Order in question, the same has to be given effect to by this Commission.

Though the Hon'ble Appellate Tribunal directed status quo as prevalent before 31.01.2018 to be maintained, giving effect to the direction to the respondents 2 and 3, the distribution licensees to schedule the power at the provisional rate of Rs.3.82/kWh is further subject to the respondents 2 and 3 proceeding to decide on the merit order dispatch on the above quantum of power. The Order of the Hon'ble Appellate Tribunal also stated

that Rs. 3.82/kWh provisionally determined by the State Commission is a total tariff comprising both the fixed charges and variable charges and if the total tariff is split into two, the power project of HNPCL may come well within the merit order. The respondents 2 and 3 are also contending before the Hon'ble APTEL in their interim stay application that they are not procuring any power from HNPCL subsequent to 31.01.2018 which may not have any impact on the interim direction dated 16.03.2018 about the status quo being that prevalent before 31.01.2018.

However, as respondents 2 and 3 can proceed to decide on the merit order despatch on the quantum of power to be procured from HNPCL, they shall forthwith communicate their decision to this Commission in compliance with the Order of the Hon'ble APTEL dated 16.03.2018. On receipt of such communication, which is a precondition for this Commission to faithfully give effect to the interim Order dated 16.03.2018, this Commission will include HNPCL for scheduling power from it in the power procurement for FY2018-19 as per merit order dispatch, through an appropriate amendment to this Order on Tariff for Retail Sale of Electricity during FY2018-19, subject to any further or final Orders that may be passed by the Hon'ble APTEL or in any appeal or writ petition against the Orders of the Hon'ble APTEL.”

- (i) Thus, the State Commission had correctly considered the Order of this Tribunal in regard to the manner in which the merit order should be considered and had directed the Respondent Nos. 2 and 3 to forthwith communicate their decision on the fixed cost component and variable cost component to enable the Commission to faithfully give effect to the order dated 16.3.2018 and to include power from the Project for scheduling in the power procurement for FY 2018-19.

(ii) In the said proceedings in reply to the submissions made by the Petitioner and others on the inclusion of the Project for scheduling, the Respondent No. 2 and 3 had only responded as under:

“Discoms Response: APDISCOMS decided to withdraw the HNPCL PPA submitted before APERC. Hence, availability from HNPCL was not projected.”

11. As per the order dated 27.3.2018 of the State Commission, the Respondent Nos. 2 and 3 were to communicate the breakup of the tariff of Rs 3.82/kWh between the fixed charges and variable charges and till date, the Respondent Nos. 2 and 3 have failed to comply with the order of the State Commission seeking such breakup of Rs 3.82/kWh.
12. The Petitioner has submitted that the Respondent Nos. 2 and 3 are deliberately not co-operating in the finalization of scheduling and dispatch of electricity from the Project on the pretext that the tariff of Rs 3.82/kWh is a single part tariff and, therefore, the issue of merit order has to be considered with reference to the entire tariff of Rs 3.82/kWh.
13. The Petitioner has further submitted that the claim of the Respondent Nos. 2 and 3 regarding consideration of merit order only on the basis of the total tariff of Rs. 3.82/kWh and not considering the breakup of fixed charges and variable charges is contrary to the established principles applicable in the electricity industry as well as per the Regulations of the State Commission. The tariff of Rs. 3.82/kWh cannot be

considered for the purpose of deciding the merit order dispatch. There is a need to bifurcate the said tariff of Rs. 3.82/kWh into fixed charges and variable charges, exercise for which was initiated by the State Commission in the order dated 27.3.2018 and directions given by the State Commission for the said purpose have not been complied with by the Respondent Nos. 2 and 3. Prior to the fixation of Rs. 3.82/kWh as a provisional tariff, the State Commission had determined the provisional tariff of Rs. 3.61/kWh which comprises of Rs. 1.84/kWh as fixed charges and Rs. 1.77/kWh as variable charges. For implementing the provisional tariff of Rs. 3.82/kWh limited for the purpose of merit order, the same break up as was decided by the State Commission earlier in the order dated 30.3.2016 determining the retail supply tariff for the FY 2016-17 can be considered. Further, the tariff of Rs. 3.61/kWh as well as the tariff of Rs. 3.82/kWh decided by the State Commission on a provisional basis are subject to determination of the final tariff.

14. During the pendency of this Execution Petition, this Tribunal has directed the parties to deliberate the matters relating to the merit order dispatch. The Respondent Nos. 2 and 3 vide letter dated 16.5.2018 has written to the Petitioner as under:

“It is to inform that, the Hon’ble Appellate Tribunal for Electricity passed interim order dated 16.03.2018 directing APDISCOMs to maintain status quo as prevalent before 31.01.2018 and to decide on the Merit Order despatch on the quantum of power of the HNPCL at provisional tariff of Rs. 3.82 per unit (Relevant Para 31 of said interim order is enclosed).”

During course of time, without prejudice to the contentions made by APDISCOMs in their reply to Execution Petition inter alia stating that the Hon'ble Tribunal has no jurisdiction to pass the said orders, for compliance of said interim order APDISCOMs have examined the Merit Order instructions that was being followed by APSLDC to schedule the power supply from various Generators having long term commitment of purchase of power. It is found that M/s. HNPCL does not qualify under the Merit Order despatch so as to give despatch instructions.

However, M/s. HNPCL has been contending before the Hon'ble APTEL that it would come within the Merit Order to despatch their power.

Therefore, M/s. HNPCL is requested to attend APPCC office at VidyuthSoudha Hyderabad within two days of the receipt of this letter to furnish their views as to how their power would come within the Merit Order Despatch.

If, M/s. HNPCL does not respond to this request it would be deemed that they have no merit in their claim for consideration in respect of Merit Order being followed by APDISCOMs / APSLDC."

15. The Petitioner vide letter dated 18.5.2018 has responded to the Respondent Nos. 2 and 3 as under:

"This has reference to the letter (ref#1) and the meeting held today on the abovementioned subject.

In our meeting we have placed the anomaly of considering the merit order for scheduling electricity from our Power Project based on the total adhoc tariff of Rs.3.82/ unit and as per the accepted and well established principles including those laid down by Hon'ble APERC and other appropriate forum under EA Act 2003 and various regulations, the merit order need to be decided on variable cost only. We had pointed out the directions of APERC in various ARR orders including the recent ARR order of FY

18-19; wherein it has been specifically mentioned that the variable cost is the only determinant for merit order system vis a vis the generating company. The Hon'ble Commission has also directed that while ascertaining the merit order system the adhoc tariffs being paid to generators are required to split into fixed and variable cost components limiting the total to the adhoc tariff approved by the commission. The Distribution licensees have been required to propose a split of the single part adhoc tariff into variable and fixed cost components (ref ARR FY 18-19 para 208).

In this connection we drew your attention to our ARR proposals for FY 18-19 submitted to the AP Discoms and later on before the Hon'ble Commission as part of our objections to the submissions of Discoms, that a variable cost of Rs. 2.68 (subject to any revision in the cost of coal and CGV) has been projected by HNPCL. We confirm that Rs. 2.68 variable cost is to be considered only for the specific and limited purpose of reckoning our plant under unit merit order dispatch in adherence to the APERC norms, since the final two part tariff determination is yet to be done by Hon'ble Commission.

We further request you to make necessary application to the Hon'ble APERC for its approval to the split of current adhoc tariff of Rs. 3.82 by application of Rs. 2.68 as the variable cost component for arriving at the merit order system for HNPCL and make recommendation for inclusion in ARR 18-19 in line with APERC ARR order for FY 18-19 para 81.

In the interim period we request you to kindly implement the order of the Hon'ble APTEL dated 16.03.2018 and schedule the plant at the earliest as per our Declared Availability in the same manner as per the status quo ante as existed on 31.01.2018 granted by the said order of Hon'ble APTEL.

The above submissions are however subject to our rights and contentions in the Appeal No.41 of 2018 and EP No. 3 of 2018 etc.”

16. The Petitioner has contended that in the above circumstances, the variable charges for considering the merit order (not for payment of money at the provisional tariff of Rs. 3.82/kWh) can be taken to be at the maximum of Rs. 2.68/kWh. If Rs. 2.68/kWh is considered for the purpose of scheduling electricity generated by the Petitioner at its Project, the Petitioner's case falls much higher than many of the other generators such as Simhadri, NLC TPS II Stage I and II, Rayalaseema TPS I, II and III, Vallur Thermal Power Project of NTPC Tamil Nadu Energy Company Limited (NTECL), NTPL (NLC Tamil Nadu Power Limited) etc. as per the Merit Order published at the website of Ministry of Power, filed in the Execution Petition by the Petitioner related to the month of May, 2018.

(i) It is, therefore, necessitated that the Project is considered for the merit order based on the variable charges of the maximum of Rs.2.68/kWh and not as per Rs. 3.82/kWh. The stand taken by the Respondent Nos. 2 and 3 that the Project does not come within the merit order is also not consistent with the fact that till January 2018 as per the Statement filed by the Petitioner and not disputed by Respondent Nos. 2 and 3, the Respondent Nos. 2 and 3 have been taking significant quantum of power from the Project. This would be clear from the following table:

Power injected from the Project during April 2017 to Jan. 2018

Period	Net Export (MU)
Apr-17	308.94
May-17	484.68
Jun-17	167.35
Jul-17	41.09
Aug-17	334.63
Sep-17	406.35
Oct-17	421.78
Nov-17	401.31
Dec-17	405.53
Jan-18	302.18
Total	3273.83

(ii) As the Project was falling under the merit order the Respondent Nos. 2 and 3 had regularly scheduled the above quantum of power till the passing of the order dated 31.1.2018 by the State Commission.

(iii) The contention of the Respondent Nos. 2 and 3 that this Tribunal has no power to execute the order dated 16.3.2018 or otherwise the order dated 16.3.2018 should not be considered as an executable order, is not correct. Section 120 (3) and (4) of the Electricity Act, 2003 are special provisions vesting powers in this Tribunal to execute a decree. These provisions read as under:

“3. An order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court.

4. *Notwithstanding anything contained in sub-Section (3), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.”*

(iv) The power to execute has been vested in this Tribunal with reference to any order that is passed by this Tribunal. Section 120 (3) and (4) is not qualified by any expression such as execute the final order or final decree. In terms of section 120 (3) and (4) of the Act every order passed by this Tribunal can be executed by this Tribunal. The Section provides for a deeming effect that every order passed by this Tribunal can be executed as if it is a decree passed by the Civil Court and for this purpose, this Tribunal shall have all the powers of a Civil Court.

17. In our considered opinion, if this Tribunal cannot execute the order, there is also no purpose of vesting the power in this Tribunal the power to grant interim orders as provided under section 120 (2) of the Act read with Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules 2007 notified by Central Government. It cannot be that this Tribunal can make interim orders in order to protect the aggrieved party before it but it cannot enforce the same. Such a course to be adopted will render the provisions of Section 120 (2), (3) and (4) as redundant and meaningless. It is also relevant that the Act though does not specifically provides for a power in the Regulatory Commission to execute its order, a specific provision has been made in Section 120 of the Act

conferring the power in this Tribunal to execute the orders. Accordingly, the plea of Respondent Nos. 2 and 3 that there is no executable order or this Tribunal has no power to execute cannot be countenanced and has to be rejected at threshold.

18. Coming to the core issue, this Tribunal has passed the order dated 16.3.2018 to maintain the status quo i.e. that whatever was existing prior to the passing of the order dated 31.1.2018 by the State Commission should continue pending the decision in the Appeal. The Respondent Nos. 2 and 3 have been procuring electricity from the Project consistently until January 2018. The State Commission in retail tariff order dated 27.3.2018 has also directed the Respondent Nos. 2 & 3 to communicate to the State Commission the breakup of the tariff of Rs. 3.82/kWh in terms of fixed charges and variable charges so that power purchases from the Project could be considered by the State Commission. The same has not been complied by the Respondent Nos. 2 & 3 so far. The same is required for merit order scheduling from the Project. This Tribunal in the order dated 16.3.2018 at para 30 has specifically taken note of the need for bifurcating the total tariff of Rs. 3.82/kWh into fixed charges and variable charges and as mentioned above, the State Commission had correctly interpreted and applied the said order of this Tribunal while passing the order dated 27.3.2018. In this Execution Petition also, this Tribunal is concerned with the scheduling and dispatch of electricity by Respondent Nos. 2 and 3 as was being done prior to 31.1.2018. It is the duty of the State Commission that in case the Respondent Nos. 2 & 3 are not

complying to the directions then the State Commission is empowered to determine the fixed charges and variable charges. The same has become important and urgent in view of the order dated 16.3.2018 of this Tribunal so that the same ought to have been executed without any delay subject to final outcome of the Appeal.

19. The Regulations of the State Commission consider the scheduling of the thermal power plants on merit order despatch which is based on variable charges. Accordingly, the bifurcation of provisional tariff of Rs. 3.82/kWh has become important and urgent. The appropriate authority to accept/decide the same is the State Commission. Accordingly, the State Commission is required to get into details of the tariff of Rs. 3.82/kWh for its bifurcation into fixed charges and variable charges. This issue i.e. bifurcation of the provisional tariff is between the Respondent Nos. 2 & 3, Petitioner and the State Commission needs to be adjudicated/decided first at the level of State Commission. In facts and circumstances of the case the order dated 16.3.2018 of this Tribunal is difficult to execute due to lack of bifurcation of tariff. Accordingly, it would be just and appropriate that the State 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. The fixed charges/variable charges so determined would be provisional and would be subject to the final judgement/order of this Tribunal in the Appeal.

20. In view of our discussions as above and considering all the relevant aspects of the instant Execution Petition, we are of the considered opinion that the matter needs to be remanded to the State Commission and stand remitted back with direction to the State Commission for immediately determining the fixed charges and variable charges of the Project based on the provisional tariff, so that the execution of the order dated 16.3.2018 of this Tribunal is carried out expeditiously.
21. We are of the considered view that, at the first instance the State Commission could have determined the fixed and variable charges of the Project in the same order where it has determined provisional tariff of Rs. 3.82/kWh. Further, even in absence of such bifurcation it was for the parties to swiftly obtain clarity on the same from the State Commission or could have agreed to any settled mechanism if already existed. The Project should not suffer in absence of such clarity/ inaction on part of the parties.
22. Further, this Tribunal directs the Respondent Nos. 2 and 3 to schedule the power declared available from the Project so long the variable cost determined/accepted by the State Commission is within the merit order despatch followed by the Respondent Nos. 2 and 3 for procurement of power from different sources on a provisional basis pending the final decision in the Appeal. In the event the Respondent Nos. 2 and 3 are not scheduling the Power declared available by the Petitioner, the Respondent Nos. 2 and 3 will be liable to pay to the Petitioner fixed charges on a provisional basis again

subject to the final decision in the Appeal. If the Respondent Nos. 2 and 3 fails to implement the order passed by this Tribunal the Petitioner shall have the liberty to approach this Tribunal for remedies available in execution and seek appropriate orders from this Tribunal.

ORDER

For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the present Execution Petition have merits as discussed supra.

Therefore, we hereby direct the State Commission to determine/ accept fixed charges and variable charges of the Project based on the provisional tariff order of the Project passed by the State Commission immediately in any case not later than 15 days from the date of receipt of copy of this Order as the instant Project has already suffered on account of non scheduling in absence of such bifurcation.

The instant Execution Petition stands disposed of as such with directions as above.

No order as to costs.

Pronounced in the Open Court on this **31st day of May, 2018.**

(N K Patil)
Judicial Member

✓

REPORTABLE/NON-REPORTABLE

mk

(I.J. Kapoor)
Technical Member