

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

**IA NO. 211 OF 2018 in
APPEAL NO. 41 OF 2018**

Dated: 16th March, 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
C/o Gulf Oil Corporation Limited
Post Bag No.1, Kukatpally,
Shanthnagar I.E., Hyderabad 500 108
Telangana**

... Appellant

Versus

- 1. Andhra Pradesh Electricity Regulatory
Commission
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. Shubham Arya
Mr. Abhishek Sharma
Ms. Purva Kohli**

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

Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Prerna Singh
Mr. P. Shiv Rao
Mr. Prashant Mathur for R.2 & 3

Mr. Geet Ahuja

ORDER

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

1. The present Appeal is being filed by M/s Hinduja National Power Corporation Limited (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 against the Order dated 31.01.2018 (hereinafter referred to as the “**Impugned Order**”) 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. 19 of 2016 was filed by the Respondent No. 2 and 3, the Distribution Licensees under Section 86(1)(b) of the Electricity Act, 2003 seeking approval of the Continuation Agreement dated 28.04.2016 to the Restated and Amended PPA dated 15.04.1998 entered into between the Appellant and 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**”). The OP No. 21 of 2015 was filed by the Appellant for determination of capital cost for the Appellant’s generating station as well as for determination of multi-year tariff.

2. The Appellant, M/s Hinduja National Power Corporation Limited is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Gulf Oil Corporation Limited, Post Bag No.1, Kukatpally, Shanthnagar I.E., Hyderabad, Telangana. The Appellant has established 1040 MW power project (2x520 MW) at Visakhapatnam in the State of Andhra Pradesh.
3. The Respondent No. 1, Andhra Pradesh Electricity Regulatory Commission is the State Commission for the State of Andhra Pradesh exercising powers and discharging functions under the provisions of the Electricity Act, 2003 ("The Act").
4. The Respondent No. 2, Southern Power Distribution Power Company Limited of Andhra Pradesh and the Respondent No. 3, Eastern Power Distribution Company of Andhra Pradesh are the Distribution Licensees in the State of Andhra Pradesh.
5. By the Impugned Order dated 31.01.2018, the State Commission has decided as follows;
 - (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 Appellant being aggrieved by the Impugned Order dated 31.01.2018 filed IA No. 211 of 2018 in Appeal No. 41 of 2018 before this Tribunal praying for the following reliefs-
- (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. The matter relates to the agreement reached between the Appellant and the Respondents 2 and 3 concerning the generation and sale of electricity from the 2 x 520 MW Project established by the Appellant and more particularly the approval sought by the Respondents 2 & 3 from the State Commission in terms of the provisions of the Electricity Act, 2003. The State Commission is the Regulatory Authority vested with the statutory functions to regulate the power purchase and procurement by the Respondents 2 & 3 including the price under the Power Purchase Agreements in terms of section 86(1)(b) of the Electricity Act, 2003.
8. The petition OP No. 21 of 2015 was filed by the Appellant 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 Respondents 2 and 3. Petition OP No. 19 of 2016 was filed by the Respondents 2 and 3 on 11.05.2016 for approval of the Continuation Agreement dated 28.4.2016 entered into between the Appellant and Respondents 2 and 3 for continuation of the Amended and Restated PPA between the said parties dated 15.4.1998. The said two OPs were heard by the State Commission over a period of time and finally orders in both the OPs were reserved on 15.5.2017. The orders were to be pronounced by 14.8.2017. The time for pronouncement of the orders was extended by the Orders passed by this Tribunal in another proceedings being IA No. 619 of 2017, IA No. 1100 of 2017 and IA No. 34 of 2018 in Appeal No. 153 of 2017

to the end of October 2017, 16.12.2017. 15.01.2018 and finally to 31.1.2018.

9. In the meanwhile, on 4.1.2018, the Respondents 2 and 3 had filed two Interim Applications, namely, IA Nos 1 and 2 of 2018 before the State Commission. IA No. 1 of 2018 was in regard to the withdrawal of OP No. 19 of 2016 sought by the Respondents 2 and 3, namely, to withdraw the petition by which Respondents 2 and 3 sought for approval to the Continuation Agreement dated 28.4.2016. The IA No. 2 of 2018 was for rejection of OP No. 21 of 2015 filed by the Appellant for determination of capital cost and tariff consequent to the withdrawal of OP No. 19 of 2016. In the proceedings, before the State Commission the Appellant filed the application being IA No. 3 of 2018 seeking transposition of the Appellant as a Petitioner in place of Respondents 2 and 3 in view of the decision taken by the Respondents to withdraw OP No. 19 of 2016. All the three applications have been heard by the State Commission and has been decided by the Impugned Order dated 31.1.2018.
10. The Appellant has filed the Appeal 41 of 2018 challenging the decision of the State Commission in the Impugned Order and interim orders are being sought through this application pending the hearing of the Appeal.
11. The issue for consideration is whether the Appellant should be granted interim order during the pendency of the Appeal and if so,

of what nature and extent. This will have to be considered in the light of the settled principles of prima facie case, the balance of convenience and the consideration of what would be the implication of the grant of an interim order as compared with the refusal of the interim order.

12. Briefly stated the relevant factual aspects which seem to be undisputed as per the documents filed is that initially the Appellant had offered part of the capacity of the generating station proposed to be established by the Appellant to Respondents 2 and 3 and was desirous to keep the balance capacity as merchant capacity. A PPA was entered into between the Appellant and erstwhile Andhra Pradesh State Electricity Board in the year 1994 and the same was followed by the Amended and Restated PPA entered on 15.4.1998. Vide communication dated 26.12.2012, the Government of Andhra Pradesh (GoAP) had sought from the Appellant to supply the entire capacity available from the power project to the distribution companies in the then State of Andhra Pradesh. By letter dated 14.1.2013 the Appellant agreed to supply the entire available capacity to the distribution companies of the Andhra Pradesh.

13. In terms of the above, on 17.5.2013, a Memorandum of Agreement (MoA) was signed between the Appellant and the Respondents 2 and 3. The MoA refers to the Amended and Restated PPA, the agreement reached between the parties for generation, sale and purchase of the entire available capacity and also provided for the

project to be commissioned during the financial year 2013-14 besides other terms.

14. In terms of the above, the Appellant had established the project and the Commercial Operation Date (COD) of the first unit of the project was achieved on 7.1.2016 and the COD of the second unit of the project was achieved on 3.7.2016.

15. On 12.3.2014 the Appellant filed Petition OP No. 21 of 2015 seeking approval of the capital cost and the tariff from the State Commission. At the time of the filing of the petition, the Appellant has estimated the total capital cost to be Rs. 6098 Cr. On 28.7.2015 the Appellant filed an addendum to the capital cost estimation in OP No. 21 of 2015 and claimed the capital cost to be Rs. 8087 Cr. The Appellant stated that this enhancement in the capital cost was solely due to the reasons beyond its reasonable control.

16. After the above and after the COD of the first unit on 11.1.2016, a Continuation Agreement dated 28.4.2016 was signed between the Appellant and Respondents 2 and 3. The Continuation Agreement takes note of the COD of the first unit on 11.1.2016 in place of the COD initially scheduled to be in FY 2013-14. After signing the Continuation Agreement dated 28.4.2016, the Respondents 2 and 3 filed petition OP No. 19 of 2016 before the State Commission seeking approval to the Continuation Agreement from the State Commission. The COD of the second unit was also achieved on 3.7.2016. The Government of Andhra Pradesh vide communication

dated 1.6.2016 gave concurrence to the purchase of the entire available capacity from the power project.

17. The Appellant has also claimed that the GoAP and the Respondents 2 and 3 had been consistently seeking 100% of the available capacity from the time when the Amended and Restated PPA was signed on 15.4.1998, at the time when the Memorandum of Agreement dated 17.5.2013 was signed, at the time of the filing of the two OP Nos 21 of 2015 and 19 of 2016 and at the time of the signing of the Continuation Agreement. It has been claimed that the GoAP and the Respondents 2 and 3 had rejected any approval of the Appellant to sell any part of the electricity to the State of Telangana (in pursuance to the re-organisation of the State of Andhra Pradesh and the claim of Telangana for 54% of the power generation from the Appellant's Project) and also to allow the Appellant to participate in the Competitive Bid Process initiated by Respondents 2 and 3 on the premise that the Respondents 2 & 3 had sought 100% capacity in the power plant of the Appellant .

18. The Appellant has further submitted that from the date of COD of the first unit on 11.1.2016, the Appellant has been supplying power to Respondents 2 and 3 and Respondents 2 and 3 have been scheduling such power from the Appellant's Project consistently till January 2018. The State Commission had also determined a provisional tariff for such sale and purchase of electricity from the Appellant's power project at the rate of Rs 3.61/kWh and thereafter at Rs. 3.82/kWh. The availability of the electricity from the Appellant's power project has been part of the Power Purchase

Plan of Respondents 2 and 3 and considered in the Source of Power Purchase in the Retail Supply Tariff Order passed by the State Commission.

19. The Appellant has submitted that the Respondents 2 and 3 cannot be allowed to withdraw OP No. 19 of 2016 after the Appellant had altered its position significantly based on the firm agreement reached on 17.5.2013 and subsequently followed by filing of the OP No. 21 of 2015, the filing of the addendum to the capital cost on 28.7.2015, completion of the first generating unit and declaration of the COD on 11.1.2016, signing of the Continuation Agreement dated 28.4.2016, filing of OP No. 19 of 2016 for approval of the Continuation Agreement and the GoAP Order dated 1.6.2016 and achievement of the COD of the second generating unit on 3.7.2016.

20. The Appellant had also claimed that it had committed the entire available capacity from the project to Respondents 2 and 3 at the instance of Respondents 2 and 3 and the GoAP. The Appellant was also not permitted to sell any part of the electricity to third parties. Further, it has been claimed by the Appellant that the State Commission exercising regulatory jurisdiction should have proceeded to decide OP No. 19 of 2016 and 21 of 2015 on merits and taking into account the public interest and not on the basis of unilateral decision of Respondents 2 and 3 to withdraw OP No. 19 of 2016.

21. The submissions of Respondents 2 and 3 are that the Continuation Agreement 28.4.2016 initialled by the Appellant and Respondents 2 and 3 was only a proposal filed before the State Commission and until the approval is granted by the State Commission, the same cannot be considered as the concluded agreement and cannot give any vested right to the Appellant to generate and sell the electricity to the Respondents 2 and 3 . The Respondents 2 and 3 are entitled to withdraw the above proposal seeking the approval to the Continuation Agreement at any time. The Respondents 2 and 3 as a Petitioner in OP No. 19 of 2016 have an absolute right to withdraw the petition at any time and the Appellant as Respondent cannot have any claim to not to allow such withdrawal of the petition.
22. Respondents 2 and 3 referred to the decision of the Hon'ble Supreme Court in Hulas Rai Baij Nath v. Firm K.B.Bass and Co., (1967) 3 SCR 886 to claim that the Petitioner in a petition has the absolute right to withdraw the petition filed at any time. On the other hand, the Appellant referring to the later part of the said decision itself and referring to number of other decision has claimed that the right to withdraw is not an absolute right as claimed by Respondents 2 and 3 and the withdrawal will result in prejudice or injury to the Appellant the same is not to be allowed. The Respondents 2 & 3 has also referred to the order dated 27.10.2017 of the Uttar Pradesh Electricity Regulatory Commission in petition no. 1123/2016 wherein it was held that if the distribution licensee is not inclined to purchase power at the tariff agreed in PPA or the revised tariff submitted by the petitioner therein, the commission cannot force the licensee to go ahead with the PPA and rejected the application of the petitioner.

23. In this regard the Appellant has also referred to the decision dated 14.11.2017 of this Tribunal in Appeal No. 285 of 2016 (DANS Energy Pvt. Ltd. v Uttarakhand Electricity Regulatory Commission) and Arjun Singh v Mohindra Singh AIR 1964 SC 993. The Appellant has also cited decisions on the aspect that no interim application should be entertained after the judgement has been reserved in the matter. The Appellant has also placed the relevant extracts from various decisions along with the written submissions. It has also been claimed by the Appellant that the proceedings in Petition OP No. 19 of 2016 was not like a suit where the interest of the Petitioner and the Respondents were conflicting but both were interested in the approval of the Continuation Agreement dated 28.4.2016. These aspects have to be decided on merits in the Appeal.
24. Respondents 2 and 3 have further stated that they entered the Continuation Agreement etc. at the time when there was scarcity of power and as at present there being no scarcity of the power availability, the Respondents 2 and 3 decided not to proceed with the procurement of power from the Appellant's power project. According to the Respondents 2 and 3 the capital cost of the project had doubled and making the power highly expensive. It has also been stated that the Appellant did not incur the entire capital cost of the project based on any representation by Respondents 2 and 3. Any interim order granted will amount to allowing the Appeal itself which cannot be done.

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.

(N K Patil)
Judicial Member

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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