

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

I.A No.15/IA/2018
in
Petition No. 92/MP/2018

Coram:

Shri P.K. Pujari, Chairperson
Shri P.K. Singh, Member

Date of order: 08.12.2021

In the matter of:

Application under Section 79(1)(f) read with Section 158 of the Electricity Act, 2003 seeking a direction to refer the disputes raised in Petition No. 92/MP/2018 to arbitration.

And in the matter of:

Shiga Energy Pvt. Limited,
5th Floor, DLF Building No. 8,
Tower-C, DLF Cyber City, Phase-II, Gurugram,
Haryana - 122002.

....Applicant/Petitioner

Verses

1. Power Grid Corporation of India Limited,
Saudamini, Plot No.2, Sector 29,
Near IFFCO Chowk,
Gurugram, Haryana-122001.
2. Government of Sikkim,
Energy & Power Department,
Kazi Road,
Gangtok-737101, Sikkim.

.....Respondents

For Applicant/Petitioner : Shri Deepank Yadav, Advocate SEPL
Shri Bimal Aggarwal, Advocate, SEPL
Shri Vijay Kumar, Advocate, SEPL

For Respondents : Ms. Suparna Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Ms. Soumya Singh, Advocate, PGCIL
Shri Mohd. Shahzeb, Advocate, PGCIL
Shri Raghvendra Kumar, Advocate, State of Sikkim



ORDER

The Applicant, Shiga Energy Private Ltd. (SEPL), has filed the present Interlocutory Application (IA) No. 15/IA/2018 in Petition No. 92/MP/2018 seeking a direction under Section 79(1)(f) read with Section 158 of the Electricity Act, 2003 (in short, “the 2003 Act”) to refer the disputes raised in the Petition No. 92/MP/2018 to arbitration.

2. SEPL, a generating company, has filed Petition No.92/MP/2018 filed claiming compensation of ₹112.39 crore from PGCIL towards the financial loss suffered by SEPL on account of delay in implementation of the transmission system under the scope of PGCIL and the consequent delay in commencement of the Long Term Access (LTA) granted to SEPL along with interest till the date of payment. In the alternative, SEPL has claimed a sum of ₹101.59 crore towards IDC charges, preliminary and post-operative expenses and additional claims of the contractors on account of delay in the commencement of the LTA.

3. SEPL has filed the instant I.A. No.15/IA/2018 seeking directions to refer the disputes raised in the petition to arbitration. SEPL has made the following prayers in the IA:

“a. Pass an Order referring the disputes raised in the present Petition to arbitration under Section 79(1)(f) read with Section 158 of the Act;

b. Pass such other or further orders as the Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case.”

Background

4. The brief facts in the matter are as follows:

(a) SEPL had entered into an Implementation Agreement on 3.9.2008 with the State of Sikkim for the setting up of a Hydro Electric Project of 2x48.5 MW in Tashiding on Rangit River (hereinafter referred to as ‘the THEP Project”).



(b) PGCIL granted Long Term Open Access (in short "LTA") to SEPL on 26.5.2009 for evacuation of Power from the THEP Project in accordance with provisions of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009, (hereinafter referred to as "the 2009 Connectivity Regulations"). Thereafter, on 19.10.2011, SEPL and PGCIL entered into Long Term Access Agreement (hereinafter referred to as "LTAA") for the transmission of power from the THEP Project to the Inter-State Transmission System (ISTS) through the use of open access and the date of commencement of LTA was the date of commissioning of the generating units. SEPL and PGCIL had also entered into a Transmission Service Agreement dated (TSA) 30.1.2014 governing the provisioning of the inter-State transmission services.

(c) The implementation and execution of the THEP Project was affected by court cases. As a result, the commissioning of the THEP Project got extended beyond its scheduled date. The dry execution of generating units of the THEP Project was completed by SEPL in December 2016. However, the transmission system was completed by PGCIL on 10.10.2017. SEPL achieved commercial operation of the THEP Project on 6.11.2017 and PGCIL operationalized LTA on 23.2.2019.

(d) SEPL has contended that the delay on the part of PGCIL in completion of the transmission system had delayed the evacuation of power from the THEP Project leading to financial losses to SEPL to the tune of ₹112.39 crore. Accordingly, SEPL had sent a Demand Notice/ Letter dated 27.11.2017 to PGCIL claiming compensation of ₹112.39 crore from PGCIL as reasonable compensation for actual loss suffered. However, PGCIL failed to respond to the same. Therefore, SEPL has filed Petition No.92/MP/2018 seeking adjudication of the dispute and for claiming compensation and interest.

(e) The matter was admitted by the Commission on 7.8.2018 and notice was issued to the Respondents on the petition and IA.



(f) SEPL filed IA No.9/IA/2019 for impleading Government of Sikkim which was allowed by the Commission and Government of Sikkim was impleaded as Respondent No.2 and notice was issued to the Government of Sikkim.

(g) SEPL filed IA No.28/IA/2020 seeking listing of the Petition before a Bench not comprising Member (Technical) which was rejected by the Commission. Thereafter, SEPL filed Writ Petition (C) No.4537/2021 before Hon'ble Delhi High Court, which vide order dated 20.5.2021 allowed the Writ and directed to list Petition No.92/MP/2018 before a Bench not comprising the Member (Technical).

(h) Accordingly, the matter was listed on 25.6.2021 and after hearing SEPL and PGCIL, the Commission reserved its order in I.A. PGCIL has filed its reply to the IA vide affidavit dated 10.9.2021 and SEPL has filed its rejoinder to the reply of PGCIL vide affidavit dated 17.9.2021.

(i) SEPL has claimed that PGCIL has failed to complete the transmission system, under its scope, for evacuation of power from the THEP Project. This delay led to delay in evacuation of power from the THEP Project and financial loss to SEPL. PGCIL, on the other hand, contended that it has implemented the transmission system on consultancy work basis as an agent of Government of Sikkim under the MoU dated 22.4.2015 and, thus, no claim can be raised against it for alleged breach and financial losses.

Submissions of SEPL in I.A No. 15/IA/2018

5. Gist of the submissions made by SEPL in I.A No.15/IA/2018 are as follows:

(a) The IA is filed for direction to PGCIL to pay a sum of ₹112.39 crore, being the financial loss suffered by the Petitioner, or in the alternative a sum of ₹101.59 crore, being IDC charges of SEPL payable to its lenders, on account of delay in commencement of LTA granted to SEPL due to delay in implementation of the transmission system under the scope of PGCIL along with interest till the date of payment.



(b) PGCIL has failed to fulfil its obligation of completing the transmission system under its scope within the time period agreed and it has not matched with COD of the THEP Project as per LTA. The delay in completion of the transmission system was solely attributable to PGCIL. Breach of the obligations on the part of PGCIL resulted in loss to SEPL for which it needs to be compensated by PGCIL.

(c) The delay in completion of the transmission system under the scope of PGCIL delayed the evacuation of power from the THEP Project from beginning of January 2017 up to 10.10.2017 leading to financial loss. If the transmission system was completed by December 2016 matching with the completion of the THEP Project, SEPL could have sold power. SEPL does not have a long term Power Purchase Agreement for the THEP Project. Therefore, SEPL has considered the rates prevailing at the Power Exchange for the relevant period i.e. from 1.1.2017 to 10.10.2017 to work out the compensation.

(d) SEPL is financed by consortium of lenders and it has availed loan facility of ₹804.15 crore and cumulative redeemable preference share (CRPS) facility of ₹25.00 crore. Accordingly, SEPL is required to pay IDC to the lenders which increased to an amount of ₹101.59 crore due to the delay. To pay the said IDC in order to prevent the account from being declared Non-Performing Asset (NPA) by the lenders, the Petitioner was compelled to obtain additional loans. The difficulties being faced by the Petitioner to service the lenders' dues is solely on account of the breach committed by PGCIL.

(e) The dispute between the parties in Petition No. 92/MP/2018 centres around the breach of obligations on the part of PGCIL. It requires adjudication of the respective cases of each party on merits, which may require leading and recording of evidence. Therefore, the Petitioner has prayed to refer the matter to arbitration in terms of Section 79(1)(f) read with Section 158 of the 2003 Act.

(f) During the course of hearing on 25.6.2021, the learned counsel for the Petitioner reiterated submissions made in IA and submitted that in order to prove its claim for the losses and damages incurred/ caused to the Petitioner



due to delay in implementing the transmission system for the THEP Project of the Petitioner, oral and documentary evidence are required in the instant case. Accordingly, the IA has been filed for referring the present dispute to arbitration.

Reply by PGCIL to submissions of SEPL

6. PGCIL in its reply to the IA has raised issues as follows:

(a) SEPL has chosen not to press the IA during the last two years and was pursuing its claims raised in Petition No. 92/MP/2018. When PGCIL raised objection regarding non-impleading of Government of Sikkim as a necessary party to the present proceedings, SEPL filed IA No.9/IA/2019 for impleading Government of Sikkim which was allowed by the Commission and notice was issued to the Government of Sikkim. Both the Respondents have filed their respective replies to Petition No. 92/MP/2018 and SEPL has also filed rejoinders thereto. When the pleadings in the matter have been completed in Petition No. 92/MP/2018, SEPL filed IA No.28/IA/2020 seeking listing of the Petition before a Bench not comprising Member (Technical) which was rejected. Thereafter, SEPL filed Writ Petition (C) No.4537/2021 before Hon'ble Delhi High Court, which vide order dated 20.5.2021 directed to list Petition No.92/MP/2018 before a Bench not comprising the Member (Technical).

(b) Though SEPL has filed the present petition before the Commission, SEPL has never desired the matter to be heard by the Commission under the 2003 Act and has, therefore, sought change in the Bench and, thereafter, pressed the present IA for taking the matter away under a different jurisdiction.

(c) Referral of a matter to arbitration under the provisions of the 2003 Act is not as per the wishes of the appearing parties but is a statutory function to be performed by the Commission in accordance with the provisions of the 2003 Act. As the IA is pressed after more than three years of its filing, it is liable to be dismissed.

(d) The requirement to lead and record the evidence is the sole ground on which the dispute has been sought to be referred for arbitration.



(e) All the documents filed by the parties, like Minutes of Meetings, executed Agreements and correspondences between the parties, have already been admitted. As such, there is no need to lead or record evidence. The mismatch between the generating station and associated transmission systems has been raised before and adjudicated by the Commission in various petitions and there is no compelling reason demonstrated by the Petitioner which requires the present dispute to be removed from the regulatory purview of the Commission and be entrusted to arbitration.

(f) The law is well settled through the judgments of the APTEL and the Hon'ble Supreme Court that issues regarding money claims arising out of interplay of statutory rights and obligations, even if complex and intricate, may be decided by the Commission. Therefore, the Petitioner's plea for referring the present dispute to arbitration is liable to be rejected.

(g) It was held in Himachal Pradesh State Electricity Regulatory Commission Vs. Himachal Pradesh State Electricity Board [2014 (5) SCC 219] that referring the parties to arbitration has serious consequences of taking them away from the stream of civil/ statutory courts and subject them to the rigors of arbitration proceedings.

(h) An order passed by the Commission is appealable before APTEL under Section 111(1) of the 2003 Act from where a further Appeal under Section 125 of the 2003 Act lies before the Hon'ble Supreme Court. A reference to arbitration, though a statutory option available under Section 79(1)(f) of the 2003 Act, removes a party before it from the statutory Appellate Forums and restricts its grounds of raising objections to an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996.

(i) When SEPL has not shown any ground for referring a dispute under an on-going proceedings to arbitration may result in taking away the vested right of Appeal in the parties to their grave prejudice.

(j) The Hon'ble Supreme Court in the matter of Afcons Infrastructures Ltd. Vs. Cherians Parkey Construction Co. (P) Ltd. [(2010) 8 SCC 24] held that



representative suit which involve public interest or interest of numerous persons who are not parties before the Court are normally not considered to be suitable for alternate dispute redressal process. PGCIL is a revenue neutral entity that discharges its statutory duty of billing, collection and disbursement of transmission charges under the PoC mechanism. The transmission charges liability and payment directly affects the rights and obligations of the various Designated ISTS Customers and transmission licensees who are participants in the PoC pool. However, they are not arrayed as parties to various proceedings before the Commission regarding mismatch of commissioning of generating stations and their associated transmission systems. The issues underlying the subject matter of the instant petition is non-arbitrable and as such may not be liable to be referred to arbitration.

Rejoinder of SEPL to the reply of PGCIL

7. Gist of the submissions made by SEPL in its rejoinder to the reply of PGCIL in IA is as follows:

(a) Section 79(1)(f) of the 2003 Act read with Section 158 of 2003 Act vests the Commission with the power, jurisdiction and discretion to refer and determine the disputes arising in the petition to arbitration proceedings. The Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. [(2008) 4 SCC 755]* and *Madhya Pradesh Power Management Company Ltd. vs. Nuclear Power Corporation of India Ltd. and Ors. [2020 SCC On Line CERC 282]* held that where a dispute falls under the adjudicatory jurisdiction of the Commission, the Commission may refer the same to arbitration. It is the discretion of the Commission to refer the dispute to arbitration and that there may be various reasons for referring a dispute to arbitration.

(b) The issue regarding exercise of discretion for referring a dispute to arbitration was also considered by the APTEL in its judgment in the case of *Haryana Vidyut Prasaran Nigam Ltd. vs. Haryana Electricity Regulatory Commission and Anr. [2016 SCC On Line APTEL 72]*, wherein APTEL had rejected the appeal against the order of State Commission referring the dispute to arbitration. It was argued on behalf of the State Commission that it had taken



into account the long pendency of the dispute and had decided that an arbitral tribunal was better equipped to decide the matter in an expeditious manner.

(c) Mindful of the delay in resolution of disputes, provisions regarding arbitration are incorporated in various statutes to promote resolution of disputes which has proven to be an effective mode of resolution of disputes. Section 79(1)(f) of the 2003 Act is one such provision which empowers and enables the Commission to refer any dispute before it to arbitration. The instant case has remained pending since 2018 and has pushed SEPL into severe financial crisis.

(d) The delay in the execution of the transmission system and the delay in adjudication are solely attributable to the Respondents and it is a major factor for declaring SEPL as NPA by its lenders and financiers. Any further delay would cause irreparable harm and injury to SEPL and the financial interests of its lenders and financiers. Therefore, the present petition may be referred to arbitration for an expeditious determination.

(e) The present case involves monetary claims for compensation/damages involving the contractual and tortious liability of the Respondents and has no relationship or involvement with tariff and do not strictly relate to the regulatory functions of the Commission. Therefore, the petition is a fit case to be referred to arbitration under Section 79(1)(f) read with Section 158 of the 2003 Act. No prejudice will be caused to the Respondents if the disputes raised in the present petition are referred to arbitration for expeditious determination.

(f) Though the present IA was filed in the year 2018 and notice was issued to the Respondents, the Respondents had failed to file any reply for over three years thereby delaying the decision on the IA.

(g) SEPL had pursued the IA before the Commission regularly but it could not be decided because of the misconceived objections of PGCIL and other reasons.



(h) Filing of I.A. No.28/2020 before Commission and Writ Petition (C) No.4537 of 2021 and judgment dated 20.5.2021 are matters of record and have no bearing on SEPL's legal rights in respect of the present IA. SEPL has consciously chosen the Commission for redressal of its grievances and approached the Hon'ble High Court for listing of the petition before a particular Bench.

(i) The matter was not taken up for final hearing on 25.6.2021. The petition and IA were listed before the Bench constituted in terms of the judgment dated 20.5.2021 and SEPL is within its legal rights for pressing for a decision on the instant I.A.

(j) It is denied that SEPL never desired the matter to be heard by the Commission and/ or the redressal machinery provided under the 2003 Act.

(k) The Government of Sikkim has sought to contend that the Petitioner is not entitled to make claims in respect of the bottled-up energy, as its own portion of the transmission line was not ready in January 2017 and it had not been able to get the system and clearances put in place. Therefore, there is requirement for leading and recording of oral and documentary evidence, vis-a-vis the disputed stance of the parties.

(l) The Commission may have dealt the issues raised in the instant petition in multiple cases but the same does not in any manner restrain or prevent the Commission from referring the disputes raised in the Petition No. 92/MP/2018 to arbitration.

(m) The Commission can decide money claims but this assertion cannot be read to render the jurisdiction of the Commission under Section 79(1)(f) read with Section 158 of the 2003 Act to refer the disputes to arbitration wholly otiose.

(n) SEPL has denied that referring the parties to arbitration would take them away from the stream of civil/ statutory courts and subject them to the rigors of arbitration. The reference to the Judgment of the Hon'ble Supreme



Court in the case of Himachal Pradesh State Electricity Regulatory is misconceived as it does not deal with the issue of referring disputes to arbitration and has no application to the facts of the present case.

(o) Arbitration is a statutorily prescribed mode of resolution of disputes under Section 79(1)(f) of the 2003 Act. Further, adequate safeguards have been prescribed under the Arbitration and Conciliation Act, 1996 for protection of the rights and interests of the parties.

(p) APTEL in the case of Haryana Vidyut Prasaran Nigam Ltd. vs. Haryana Electricity Regulatory Commission and Anr. had expressly rejected the argument that if the dispute is referred to an arbitral tribunal, the right of appeal would get prejudiced.

Analysis and Decisions

8. We have considered the submissions of SEPL and PGCIL. At the outset, we would like to deal with certain preliminary issues related to referring the matter for arbitration raised by the parties.

9. PGCIL while placing reliance on Himachal Pradesh State Electricity Regulatory Commission Vs. Himachal Pradesh State Electricity Board [2014 (5) SCC 219] has contended that referring a matter to arbitration takes the matter away from the stream of civil/ statutory courts. Per contra, SEPL has submitted that reference to the aforesaid judgment of the Hon'ble Supreme Court is misconceived as it does not deal with the issue of referring disputes to arbitration and has no application to the facts of the present case. We have considered the arguments of the parties and note that the referred judgement of the Hon'ble Supreme Court does not bar a matter from being referred for arbitration. Since the 2003 Act itself provides for referring disputes to arbitration besides adjudication of disputes by the Commission, argument of PGCIL that matters cannot be referred for arbitration is not acceptable.



10. Further, referring to Hon'ble Supreme Court judgement in Afcons Infrastructures Ltd. Vs Cherians Parkey Construction Co. (P) Ltd. [(2010) 8SCC 24], PGCIL submitted that suits which involve public interest or interest of numerous persons are not suitable for alternate dispute redressal process. The said judgement is also not applicable to the present case as the issue involved is of commercial nature related to compensation between a generating company and a transmission licensee/ CTU and there is no public interest involved in the matter. The Applicant has itself submitted that its claims are simply monetary claims for compensation/ damages involving the contractual and tortious liability of PGCIL and have no relationship or involvement with tariff. The contention of PGCIL is, therefore, rejected.

11. In support of its prayer to refer the matter for arbitration, SEPL has contended that there is a need to lead and record evidence in the matter and that the same may not be possible in the adjudication proceedings before the Commission. Therefore, the Applicant has submitted that the matter may be referred to arbitration. PGCIL has submitted that the documents filed by the parties, like Minutes of Meetings, executed Agreements and correspondences between the parties have already been admitted and pleadings in the main petition are complete. Further, the Respondent PGCIL has submitted that the Commission has already dealt with the issue of mismatch in the commissioning of generation and COD of the associated transmission system in many cases and the principles in this regard have already been laid down by the Commission on the basis of the regulations specified by the Commission. We have considered the submissions. The Applicant has not brought out any credible or compelling reason for referring the dispute raised by it in Petition



No.92/MP/2018 to arbitration. Therefore, contention of the Applicant on this ground is rejected.

12. SEPL has also submitted that on account of delay in adjudication by the Commission, it would be appropriate to refer the matter for arbitration. SEPL has submitted that there was delay on the part of PGCIL to file its reply to the Petition No. 92/MP/2018. On the other hand, PGCIL has submitted that the Applicant itself is responsible for the delay in adjudication of the matter. The Applicant initially sought the main Petition No. 92/MP/2018 to be heard before a bench of the Commission not consisting of Member (Technical). The Commission did not agree to the request of the Applicant and a Writ was filed before the Hon'ble Delhi High Court challenging the decision of the Commission. On direction of the Hon'ble Delhi High Court, the matter is to be heard now by a coram not consisting of Member (Technical). We have considered the submissions. We do not find force in arguments of the Applicant that since there is delay in deciding the matter, the same should be referred for arbitration.

13. As per the LTAA between SEPL and PGCIL, any dispute under the LTAA has to be resolved as per provisions of the 2009 Connectivity Regulations. The relevant clause of the LTAA dated 19.10.2011 is as follows:

"4.0 All differences /disputes between the parties arising out of or in connection with this Agreement shall be resolved in terms of the Redressal Mechanism provided under Regulation 32 of the CERC (grant of Connectivity, Long term Access and Medium-term Open Access in inter State Transmission and related matters) Regulations, 2009 and under Electricity Act, 2003".

14. As per the TSA dated 30.1.2014 between SEPL and PGCIL, any dispute arising out of the TSA has to be adjudicated by the Commission. Further, the TSA



provides for referring any dispute to arbitration by the Commission. The relevant provision of the TSA is extracted hereunder:

“18.3 Dispute Resolution

“18.3.1 Where any dispute arises from a claim made by any Party regarding any provisions of this Agreement, such Dispute shall be submitted for adjudication by the CERC.

18.3.2 The obligations of the DICs under this Agreement towards the CTU or ISTS Licenses shall not be affected in any manner by reason of Inter-se disputes amongst the DICs or ISTS Licensees.

18.3.3 Where any dispute is directed by CERC to be determined by Arbitration , the matter shall be determined by such persons as the CERC may nominate in that behalf on the application by the Party. In respect of all other purpose of the Arbitration proceeding, the provisions of Arbitration and Conciliation Act, 1996 shall be applicable.

18.3.3.1 The place of Arbitration shall be New Delhi. The language of the Arbitration shall be English.”

15. Further, as per Section 79(1)(f) of the 2003 Act, the Commission shall adjudicate disputes involving generating stations and transmission licensees and also refer any dispute for arbitration. Section 79(1) of the 2003 Act reads as follows:

“Section 79. (Functions of Central Commission): --- (1) *The Central Commission shall discharge the following functions, namely:-*

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.”



16. The provisions of TSA and LTAA between SEPL and PGCIL provide for the Commission to adjudicate any dispute/ difference arising out of or in connection with the Agreements. As per the clause 18.3.1 of TSA, the parties are required to submit the dispute arising from the claim in respect of the provisions of Agreement before the Commission and as per clause 4 of the LTAA, all the disputes/ differences between the parties arising out of or in connection with this Agreement shall be resolved in terms of the redressal mechanism provided under Regulation 32 of the 2009 Connectivity Regulations. Regulation 32 of the 2009 Connectivity Regulations provides that “*all disputes arising out of or under these regulations shall be decided by the Commission on an application made in this behalf by the person aggrieved*”. Further, under Section 79(1)(f) of the 2003 Act, the Commission is vested with powers to adjudicate upon disputes involving generating companies in respect of matters connected with 79(1)(a) to 79(1)(d) of the 2003 Act. Hon’ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. vs Essar Power Limited [(2008) 4 SCC 755] observed that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute. The relevant portion of the judgement dated 13.3.2008 is extracted hereunder:

“58. In the present case we have already noted that there an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under



Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)

59. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003, there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.”

17. Thus, in terms LTAA, TSA, the Connectivity Regulations, provisions of the 2003 Act and above-mentioned judgement of Hon'ble Supreme Court, the Commission can adjudicate the matter. SEPL has prayed for referring Petition No.92MP/2018 to arbitration on two grounds, viz. to lead and record of evidence and speedy disposal resolution of the dispute. We have already dealt with these issues in earlier part of this order and found that there is no merit in these contentions of the Applicant. We note that the pleadings in the matter are almost complete and the matter is ripe for final arguments. Referring the matter to arbitration at this stage would delay the resolution of the dispute further. In the main petition, SEPL has contended that delay in implementation of the transmission system by PGCIL has caused financial losses as it was not able to evacuate power from its generating project and, thus, has made monetary claim against PGCIL. PGCIL has contended that it was only acting as an agent of Government of Sikkim and, therefore, no claim can be made against for it for alleged financial losses. Government of Sikkim, on the other hand, has contended that SEPL did not complete the transmission line under its scope for evacuation of power from its generating project and interim



arrangements as agreed by CEA, CTU and STU were made for evacuation of power from SEPL's generating project. In our view, these are issues that can be dealt with when the matter is heard on merit and, therefore, we are not dealing with these as of now.

18. In view of the above, we do not find it appropriate to refer the dispute/ issue to arbitration as prayed by SEPL in the IA.

19. The Petition No. 92/MP/2018 shall be listed for hearing in the month of January 2022 for which separate notice shall be issued to the parties in due course.

20. This order disposes of IA No. 15/IA/2018 in Petition No. 92/MP/2018 in terms of the above discussions and findings.

sd/-
(P. K. Singh)
Member

sd/-
(P. K. Pujari)
Chairperson

