

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 265/MP/2022 along with IA No. 58/IA/2022

Subject : Petition under Section 79(1)(c) and (f) of the Electricity Act, 2003 for adjudication of disputes.

Date of Hearing : 10.11.2022

Coram : Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Petitioner : Arunachal Pradesh Power Corporation Pvt. Ltd. (APPCPL)

Respondents : Saranyu Power Trading Private Ltd. (SPTPL) and 2 Ors.

Parties Present : Ms. Swapna Seshadri, Advocate, APPCPL
Ms. Ritu Apurva, Advocate, APPCPL
Ms. Surbhi Gupta, Advocate, APPCPL
Shri Arjiti Maitra, Advocate, IPCL
Shri Akshat Jain, Advocate, SPTPL
Shri Aditya Dubey, Advocate, SPTPL
Ms. Sonia Madan, Advocate, HPPC

Record of Proceedings

Learned counsel for the Petitioner submitted that the present Petition has been filed, *inter-alia*, for adjudication of disputes related to return of supply of 286 MUs (balance as on 9th September, 2022) due to the Petitioner from the Respondent Nos. 1 & 2, Saranyu Power Trading Pvt. Ltd. (SPTPL) – a trading licensee and Indian Power Corporation Limited (IPCL) – a distribution licensee, as per the terms of the Energy Banking Agreement signed between the Petitioner and SPTPL, on behalf of IPCL, on 10.1.2022. Learned counsel mainly submitted the following:

- (a) SPTPL/IPCL, vide its letter dated 12.10.2021, authorized the Petitioner for arrangement of power under banking for SPTPL/IPCL & its obligated entities, which, *inter-alia*, also stated that it may also be considered as an authorization for participation in banking tenders floated by various utilities including Respondent No.3, HPPC for supply of power during period from 1.11.2021 to 31.3.2022 and return of power from 16.7.2022 to 30.9.2022.
- (b) Based on the above Letter of Authorization, the Petitioner participated in a bid in Tender No. 91 of HPPC and was declared as successful bidder. Consequently, a firm banking arrangement vide Letter of Intent dated 29.10.2021 was issued by HPPC to the Petitioner for onward supply of banking power to IPCL & its obligated entities.
- (c) Pursuant to the above, an Energy Banking Agreement was executed by and between SPTPL/IPCL and the Petitioner on 10.1.2022 (EBA 1) and the Petitioner also signed an agreement (EBA 2) with HPPC on 17.3.2022 capturing the Lols and the arrangement for supply and return of power on behalf of SPTPL/IPCL & its obligated entities. EBAs 1 & 2 were back-to-back contracts.

(d) In terms of the above arrangement, SPTL/IPCL was required to return the power to HPPC (against the power supplied by HPPC from 1.11.2021 to 1.3.2022 through the Petitioner) during the period from 16.6.2022 to 30.9.2022.

(e) However, upon SPTPL/IPCL's failure to return the power to HPPC in the month of June, 2022, the Petitioner repeatedly urged SPTPL/IPCL to remedy the default and arrange for the power to be returned to HPPC. Despite the Petitioner having continuously followed up the above issue with SPTPL/IPCL, SPTPL/IPCL has failed to return the power to HPPC. Against the total obligation of 307 MUs, SPTPL/IPCL has only returned 21 MUs whereas the balance 286 MUs are yet to be returned by SPTPL/IPCL.

(f) In the meanwhile, on account of non-supply/short-supply of power, HPPC raised penalty invoices onto the Petitioner as per EBA 2. Consequently, the Petitioner also raised the penalty invoices onto SPTPL/IPCL as per the EBA 1.

(g) In the Petition, while the Petitioner has also stated that it is entitled to seek specific performance of EBA 1, the concerned period for returning the power to HPPC (i.e. from 16.6.2022 to 30.9.2022) has already elapsed. Accordingly, the Petitioner has, *inter-alia*, sought direction upon SPTPL/IPCL for payment of penalty invoices (along with surcharge) as raised by HPPC/the Petitioner as per the agreements.

(h) IA No.58/IA/2022 has been filed by the Petitioner seeking direction to HPPC not to take any coercive action against the Petitioner including encashment of Bank Guarantee (BG). However, HPPC, vide its communication dated 27.10.2022, has already invoked the BG of Rs. 1.80 crore furnished by the Petitioner and accordingly, the Petitioner is now praying for direction to SPTPL/IPCL to pay an amount of Rs. 1.80 crore to the Petitioner pending disposal of the present Petition.

2. In response to the specific query of the Commission with regard to jurisdiction of the Commission to adjudicate a dispute emanating from an agreement between two trading licensees, learned counsel for the Petitioner submitted that the transaction involved in the instant case qualifies to be inter-State transmission of electricity and only this Commission has jurisdiction to regulate the inter-State transmission of electricity under Section 79(1)(c) of the Electricity Act, 2003 ('the Act') and to adjudicate upon the dispute connected thereto under Section 79(1)(f) of the Act. Learned counsel further added the banking transactions have been recognized under the Trading Licence Regulations of this Commission.

3. Learned counsel for the Respondent No.2, IPCL objected to the admissibility of the Petition and mainly submitted as under:

(a) All the concerned agreements are independent agreements (Principal to Principal) and there is no privity of contract between IPCL and the Petitioner.

(b) Further, all the agreements have an arbitration clause and the dispute involved is an arbitral dispute. Section 8 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act') provides that a judicial authority before which an action is brought in matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting its first statement on the substance of the dispute, refer the parties to arbitration.

(c) Since the agreements between the parties have an arbitration clause, the dispute ought to be referred to the arbitration. The Respondent may be

permitted to make a necessary application accompanied by original/duly certified copy of arbitration agreement as per Section 8(1) of the Arbitration Act.

(d) Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited v. Essar Power Limited [(2008) 4 SCC 755] has clearly held that except for the Section 11 (Appointment of Arbitrators) of the Arbitration Act, all other provisions of the Arbitration Act will apply to the arbitration under e Section 86(1)(f) of the Act which includes the Section 8 of the Arbitration Act.

(e) Appellate Tribunal for Electricity vide judgment dated 23.2.2011 in Appeal No. 200 of 2009 in the case of Pune Power Development Pvt. Ltd. v. KERC and Ors. has held that any dispute between the distribution licensee and inter-State trading licensee is excluded from Section 79(1)(f) of the Act and only the State Commission is vested with the power to adjudicate such dispute under Section 86(1)(f) of the Act. The said case also involved the dispute arising out of the banking transaction/arrangement as in the present case.

4. Learned counsel for the Respondent No.1 submitted that in view of HPPC having already encashed BG of the Petitioner, its IA No. 58/IA/2022 has been rendered infructuous. Learned counsel further submitted that the prayer seeking direction upon SPTPL to pay Rs. 1.80 crore to the Petitioner pending disposal of the present Petition has been sought by the Petitioner only vide another IA filed on 7.11.2022, which was yet to be listed and no such relief has been prayed by the Petitioner in the main Petition. Learned counsel referred to the letter dated 12.10.2021 and submitted that in the said letter it was specifically stated that SPTPL/IPCL shall not provide any payment security for the banking transaction in question, which was agreed to by the Petitioner on its own volition.

5. *In rebuttal*, learned counsel for the Petitioner vehemently denied that the EBAs/agreements are independent contracts and referred to the letter of IPCL dated 21.2.2022. Learned counsel submitted that in the said letter, IPCL has clearly stated that liability accrued on account of power banking as well as other contractual obligation between SPTPL and other trader/utility/generator will lie with IPCL as all correspondences with other trader/utility/generator has been done by SPTPL on back-to-back basis with IPCL. Learned counsel submitted that the judgment of APTEL as relied upon by IPCL is of prior to the judgment of Hon'ble Supreme Court in Energy Watchdog v. CERC and Ors. [2017 (4) SCALE 580] pursuant to which the Commission has adjudicated the disputes involving the trading licensee in various cases. Learned counsel, accordingly, sought liberty to file the relevant decisions of the Commission in this regard. She added that the letter dated 12.10.2021 stood superseded by the EBA 1 entered into between the parties and further relied upon the clause 21 of the said EBA.

6. Considering the submissions made by the learned counsel for the parties, the Commission directed the Respondents to file their written notes/submissions on the aspect of admission, if any within three weeks with copy to the Petitioner, who may file its response thereof, within three weeks thereafter.

7. Subject to the above, the Commission reserved the order on 'admission' of the matter.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Law)**