

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 265/MP/2022
along with IA No. 58 of 2022
and Diary (IA) No. 462/2022**

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

Date of Order: 26th June, 2023

Petition No. 265/MP/2022

In the matter of

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

And in the matter of

Arunachal Pradesh Power Corporation Private Limited,
A-Sector, Legi Complex, Naharlagun,
Arunachal Pradesh-791110

.... **Petitioner**

Vs

Saranyu Power Trading Private Limited,
Plot No X 1-2 &3, Block -EP, Sector V,
Salt Lake City, Kolkata-700091

India Power Corporation Limited,
Plot No X 1-2 &3, Block -EP, Sector V,
Salt Lake City, Kolkata-700091

Haryana Power Purchase Centre,
Shakti Bhawan, Sector -6, Panchkula,
Haryana-134109

.... **Respondents**

Parties Present

Shri Arijit Maitra, Advocate, IPCL
Shri Akshat Jain, Advocate, SPTPL
Aditya Dubey, Advocate, SPTPL



Ms. Swapna Seshadri, Advocate, APPCPL
Ms. Ritu Apurva, Advocate, APPCPL
Ms. Surbhi Gupta, Advocate, APPCPL
Ms. Soniya Madan, Advocate, HPPC

ORDER

The Petitioner, Arunachal Pradesh Power Corporation Private Limited (APPCPL), has filed the present petition under section 79(1)(c) and (f) of the Electricity Act, 2003 against the Respondents 1 & 2 for breach of the Banking Agreements signed between the Petitioner and the Respondents.

2. The Petitioner has made the following prayers:
 - a. Allow the present petition.
 - b. Direct SPTPL/IPCL for payment of penalty invoices (along with applicable surcharge) raised by HPPC/Petitioner as per the Agreement (s).
 - c. Direct HPPC for not taking any coercive action against the Petitioner including forfeiture of EMD as per the Agreement (s).
 - d. Direct HPPC to pay Rs. 13,33,808/- towards Open Access & Trading Margin as per the Agreement (s).
 - e. Direct SPTPL/IPCL for submission of detailed action plan regarding payment of penalty invoices (raised and yet to be raised) by the Petitioner/HPPC since the agreed period for return of power by SPTPL/IPCL ends on 30.09.2022.
 - f. Take cognizance of the conduct of SPTPL/IPCL and award such appropriate compensation to the Petitioner for loss of goodwill due to non-performance of the contract.
 - g. Pass such other further Orders which the Hon'ble Commission may deem just in the facts and circumstances of the present case.

Background

3. The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 having an inter-state category-II trading license issued by the Commission vide License no. 61/Trading/CERC/2012 dated 11.09.2012 for carrying out business activities related to power trading, i.e, power sale/ power purchase/ power banking.

4. The Respondent No.1 – M/s Saranyu Power Trading Private Limited (SPTPL) is a private company, incorporated on 13.01.2011. It is a trading arm of India Power Corporation Limited



(IPCL) and had been initially granted a Category-III inter-State trading license by the Commission in the name of “IPCL Power Trading Company”. By an Order approved by the Commission dated 27.12.2019 in Petition No. 205/TD/2019, the name was changed to ‘Saranyu Power Trading Private Limited’.

5. The Respondent No. 2 - M/s India Power Corporation Limited (IPCL) is a company existing under the provisions of the Companies Act, 2013. IPCL is one of the oldest distribution licensees in the country and off-takes power through banking arrangements from the Petitioner through SPTPL and returns the banked power during subsequent periods with certain premium.

6. The Respondent No. 3 - M/s Haryana Power Purchase Centre (HPPC) is a power procurement agency established for procuring electricity from various sources for the purpose of supply to the distribution licensees in the State of Haryana. HPPC represents the distribution licensees for the purpose of power purchases from various sources within and outside the State of Haryana.

7. The Petitioner had been executing power banking contracts involving IPCL since 2018 wherein IPCL off-takes the power first and thereafter, returns the same with some additional premium in subsequent periods. On similar lines, the Energy Banking Agreements (‘EBA1’) were signed between SPTPL, on behalf of IPCL, with the Petitioner on 10.01.2021.

8. During the period from June 2021-September 2021, the Petitioner had supplied 162 MUs of energy to IPCL from various utilities (i.e. UPCL: Uttarakhand, HPSEBL: Himachal Pradesh, MePDCL: Meghalaya, E&PDS: Sikkim and EDG: Goa) and the same power was supposed to be returned by IPCL, i.e., 170 MUs, during the period November 2021 - March 2022.

9. Since, SPTPL/IPCL has no generating source of its own, therefore, IPCL, during their return period, generally procures the power from market through IPPs and schedule the same to the obligated utilities.

10. However, during 2021, SPTPL/IPCL could not tie up power from the market and requested the Petitioner to arrange power for itself-requirement and its obligated entities from HPPC, by participating in HPPC banking tender published by HPPC during October 2021.

11. SPTPL/IPCL vide its letter dated 12.10.2021 (REF No. SPTPL/ APPCPL/BANKING/21-22/07) to the Petitioner, authorized the Petitioner for arrangement of power under banking for SPTPL/IPCL & its obligated entities (i.e. UPCL: Uttarakhand, HPSEBL: Himachal Pradesh, MePDCL: Meghalaya, E&PDS: Sikkim and EDG: Goa). In the said letter, SPTPL/IPCL stated that the authorization may be considered as an authorization for participation in banking tenders floated by various utilities including HPPC for supply of power during the period 01.11.2021 to 31.03.2022 and return of power from 16.07.2022 to 30.09.2022 through the Petitioner.

12. Based on the Letter of Authorization ('LoA') reference no. SPTPL/APPCPL/BANKING/21-22/07 dated 12.10.2021 issued by SPTPL/IPCL, the Petitioner entered bid in the Tender No. 91 of HPPC and was declared successful. Once HPPC declared the Petitioner as a successful bidder on behalf of SPTPL/IPCL, a firm banking arrangement vide Letter of Intent ('LoI') Memo no. Ch-20/HPPC/STP/21-04 dated 29.10.2021 for onward supply of banking power to IPCL & its obligated entities was issued.

13. In accordance with the LoA dated 12.10.2021 issued by SPTPL/IPCL to the Petitioner and LoI Memo no. Ch-20/HPPC/STP/21-04 dated 29.10.2021 issued by HPPC to the Petitioner, a banking agreement ("EBA2") was executed on 17.03.2022 between the Petitioner and HPPC, as per the following arrangements:

a. Arrangement-I.

Supply of power by HPPC to APPCPL/IPCL and its Obligated Entities:

Period	Duration (Hrs)	Quantum (MW)	Deliver Point
01.11.2021 to 15.11.2021	00:00 to 24:00 Hrs.	56 MW	Regional Periphery of Exporting Utility
16.11.2021 to 31.12.2021		91 MW	
01.01.2022 to 31.01.2022		109 MW	
01.02.2022 to 28.02.2022		91 MW	
01.03.2022 to 31.03.2022		56 MW	

Return of power by APPCPL/IPCL and its obligated Entities to HPPC

Period	Duration (Hrs)	Quantum (MW)	Deliver Point
16.06.2022 to 30.09.2022	00:00 to 24:00 Hrs.	106% of banked power	Regional Periphery of Exporting Utility

b. Arrangement-II.

Supply of power by HPPC to Nagaland

Period	Duration	Quantum (MW)	Deliver Point
01.11.2021 to 31.12.2021	00:00 to 24:00 Hrs.	15 MW	Regional Periphery of Exporting Utility



Return of power by Nagaland to HPPC

Period	Duration	Quantum (MW)	Deliver Point
01.07.2022 to 31.08.2022	00:00 to 24:00 Hrs.	105% of banked power	Regional Periphery of Exporting Utility

c. Arrangement-III.

Supply of power by HPPC to Arunachal Pradesh and its Obligated Entities:

Period	Duration	Quantum (MW)	Deliver Point
01.01.2022 to 28.02.2022	00:00 to 24:00 Hrs.	45 MW	Regional Periphery of Exporting Utility

Return of power by Arunachal Pradesh and its Obligated Entities to HPPC:

Period	Duration	Quantum (MW)	Deliver Point
01.07.2022 to 30.09.2022	00:00 to 24:00 Hrs.	106.8% of banked power	Regional Periphery of Exporting Utility

Submission by Petitioner

14. With regard to the return of supply, the Petitioner started pursuing with SPTPL/IPCL in the month of February 2022 to take appropriate and immediate action to secure the return and confirm the source of supply, while reiterating the penalty clause that the utilities could invoke and impose on SPTPL/IPCL for non-compliance. The Petitioner submitted two letters on 03.02.2022 and 25.02.2022 for confirmation of source for return of power by SPTPL/IPCL. However, no response was received from SPTPL/IPCL. Upon SPTPL/IPCL's failure to return the power to HPPC in the month of June 2022 (16th – 30th June), the Petitioner urged SPTPL/IPCL on several occasions to remedy the default and arrange the electricity to be returned to HPPC.

15. The Petitioner has also followed up with SPTPL/IPCL several times on the overall outstanding return obligation to the suppliers (HPPC & other obligated entities). However, SPTPL/IPCL hasn't taken any action despite several emails and letters asking for it. The Petitioner had no choice but to send SPTPL a legal notice dated 17.05.2022, asking for the return supply of 315 MUs. However, SPTPL/IPCL has yet to respond to the Petitioner on the legal notice of 17.05.2022.

16. During the course of the several correspondences, HPPC also sent emails and letters to the Petitioner on April 22, May 29, June 7, June 15, and July 15, requesting that they return the

power or face penalties under Article 6 of EBA 2. Additionally, on 18 July 2022, 26 August 2022, and 14 September 2022, HPPC sent the Petitioner penalty bills for non-supply/short-supply totaling Rs. 32.53 crores, Rs. 64.81 crores, and Rs. 50.57 crores, respectively, for June 2022, July 2022, and August 2022. The Petitioner brought up the same to SPTPL/IPCL on the same day itself in accordance with EBA.

17. Further, HPPC has held up payment on Open Access & Trading Margin bills submitted by the Petitioner for the electricity returned between June 16, 2022, and the present. The equivalent is Rs. 13,33,808 (Rs. 12,81,008 for Trading Margin bills and Rs. 52,800 for Open Access invoices).

18. Following several requests for clarification from the petitioner, SPTPL/IPCL responded to some of the requests via email or letter dated 15.06.2022, 20.06.2022, 21.06.2022, 30.06.2022, 08.07.2022 and 25.07.2022, citing reasons for the delay in the return of power that were insufficient to explain the non-return of power. SPTPL/IPCL also made a number of promises and asked for time, but did not take any decisive action to address the problem.

19. After a lot of persuasion from the Petitioner, the energy was partly returned by SPTPL/IPCL in the following manner-

RETURN SCHEDULE FROM IPCL TO HPPC (figures are rounded off):

PERIOD	AS PER AGREEMENT		ACTUAL POWER SCHEDULED BY IPCL (TILL 09.09.2022)	
	RTC QUANTUM PER DAY (MW)	ENERGY (MUs)	RTC QUANTUM PER DAY (MW)	ENERGY (MUs)
16-30 June 2022	120	43	0	0
1-31 July 2022	120	88	30	1
1-31 August 2022	120	88	50	20
1-30 September 2022	120	88	0	0
Total		307		21
BALANCE ENERGY TO BE RETURNED BY IPCL (AS ON 09.09.2022)				286 MUs

20. As SPTPL/IPCL has failed to discharge its responsibilities under **EBA1** within the prescribed time frame, the Petitioner has been unable to make good its commitments to HPPC

under **EBA2**. Because time is of the essence, the Petitioner requested for particular performance of the EBAs. The Petitioner participated in HPPC banking tender during October 2021 on the request of SPTPL/IPCL for arranging power for its self-requirement and its obligated entities from HPPC as it failed to tie up power from the market. Having done so now SPTPL/IPCL cannot refuse to perform its obligations under the EBA1.

21. SPTPL/IPCL was aware that this is a back-to-back transaction and that the Petitioner's performance under EBA2 is dependent on SPTPL/IPCL's performance under EBA 1. The Petitioner cannot be expected to execute in such situations where there is a banking transaction since he is a trader. In the present case the monetary compensation cannot be an adequate relief. The nature of the contract necessarily requires specific performance and not mere payment of money compensation / penalties.

22. The current situation meets the criteria established by several superior courts in a variety of its judgements for requesting particular performance. The following judgements have been cited by the Petitioner in support of its argument: - -

a. Judgment dated 18.09.2020 passed by the Hon'ble Supreme Court in Civil Appeal 3574 of 2009 in B. Santoshamma. vs D.Sarala

"68. Section 10 of the S.R.A. as it stood prior to its amendment with effect from 1.10.2018 provided: -

"10. Cases in which specific performance of contract enforceable. - Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

(a)when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done;

or (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation. - Unless and until the contrary is proved, the court shall presume-

(i)that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money;

and (ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases: -

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.”

.....
69. After amendment with affect from 1.10.2018, Section 10 of the S.R.A. provides:

10. Specific performance in respect of contracts. - The Specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.

70. After the amendment of Section 10 of the S.R.A., the words “specific performance of any contract may, in the discretion of the Court, be enforced” have been substituted with the words “specific performance of a contract shall be enforced subject to ...”. The Court is, now obliged to enforce the specific performance of a contract, subject to the provisions of sub-section (2) of Section 11, Section 14 and Section 16 of the S.R.A. Relief of specific performance of a contract is no longer discretionary, after the amendment.”

b. Judgment dated 28.07.2004 passed by the Hon’ble Supreme Court in Civil Appeal 5333 of 2009 in P Dsouza vs. Shondrilo Naidu; (2004) 6 SCC 649

“29. Clause (7) of the agreement of sale would be attracted only in a case where the vendor is in breach of the term. It was for the plaintiff to file a suit for specific performance of contract despite having an option to invoke the said provision. It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable”

c. Judgment dated 06.08.2021 passed by the Hon’ble Appellate Tribunal in Appeal No. 43 of 2020 & batch – UPPCL v UPERC & Bajaj Energy Ltd

274. It is relevant to note that in the said Civil Appeal No. 3574 of 2009, the Hon’ble Supreme Court observed: “69. After amendment with affect from 1.10.2018, Section 10 of the S.R.A. provides:10. Specific performance in respect of contracts. -The Specific performance of a contract shall be enforced by the court subject to the provisions contained in subsection (2) of section 11, section 14 and section 16. 70.After the amendment of Section 10 of the S.R.A., the words “specific performance of any contract may, in the discretion of the Court, be enforced” have been substituted with the words “specific performance of a contract shall be enforced subject to ...”. The Court is, now obliged to enforce the specific performance of a contract, subject to the provisions of subsection (2) of Section 11, Section 14 and Section 16 of the S.R.A. Relief of specific performance of a contract is no longer discretionary, after the amendment.” 275. We hold that R2 is entitled to Specific Performance of the PPA. We observe that even though the Specific Performance of contract was not specifically pleaded by the parties during the initial stages of pleadings, the same have been pleaded by them now.

d. Judgement by the Hon'ble Supreme Court in Rachakonda Narayana v. Ponthala Parvathamma, (2001) 8 SCC 173

*“8. A perusal of subsection (3) of Section 12 shows that the first part of the said provisions mandates refusal of specific performance of a contract on certain conditions. However, the latter part of the provisions permits a court to direct the party in default to perform specifically so much of his part of the contract as he can perform if the other party pays or has paid the agreed consideration for the whole of the contract and relinquishes all claims to the performance of the remaining part of the contract and all the rights to compensation for the loss sustained by him. If a suit is laid by the other party, the court may direct the defaulting party to perform that part of the contract which is performable on satisfying two preconditions i.e. (i) the plaintiff pays or has already paid the whole of the consideration amount under the agreement, and that (ii) the plaintiff relinquishes all claims to the performance of the other part of the contract which the defaulting party is incapable to perform and all rights to compensation for loss sustained by him. Thus, the ingredients which would attract specific performance of the part of the contract, are: (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party.
(emphasis supplied)*

e. Judgement by the Hon'ble Supreme Court in Kamal Kumar V Premlata Joshi & Ors, Civil Appeal No. 4453 Of 2009, 7th Of January 2019.

“It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds. In our opinion, the aforementioned questions are part of the statutory

requirements (See Sections 16 (c), 20, 21, 22, 23 of the Specific Relief Act, 1963 and the forms 47/48 of Appendix A to C of the Code of Civil Procedure). These requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. It is only then the Court is entitled to exercise its discretion and accordingly grant or refuse the relief of specific performance depending upon the case made out by the parties on facts.”

f. Judgement by the Hon’ble Supreme Court in Prakash Chandra Vs. Angadlal 1979 (4) SCC 393:

“9. The ordinary rule that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. In the present case, the conduct of the appellant has not been such as to disentitle him to the relief of specific performance. He has acted fairly throughout, and there is nothing to show that by any act of omission or commission he encouraged Mohsinali and Qurban Hussain to enter into the sale with the first and second respondents. There is no evidence that the Appellant secured an unfair advantage over Mohsinali and Qurban Hussain when he entered into the agreement.

10. It is urged by Learned counsel for the first and second respondents that the contract for sale contains a clause for payment of damages in case of breach of the contract and that, therefore, damages should be awarded instead of specific performance. A perusal of the terms of the contract indicates that the stipulation for damages was made only for the purpose of securing performance of the contract and not for the purpose of giving an option of Mohsinali and Qurban Hussain of paying money in lieu of specific performance. Even if a sum has been named in the contract for sale as the amount to be paid in case of a breach, the appellant is entitled in law to the enforcement of the agreement”.

g. Judgement by the Hon’ble Supreme Court in P.D.’Souza Vs. Shondrilo Naidu 2004 (4) SCC 649:

“39. It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was a landlord of the plaintiff. He had accepted part payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August, 1981, i.e., just two months prior to the institution of suit, he had accepted Rs.20,000/-from the Plaintiff. It is, therefore too late for the Appellant now to suggest that having regard to the escalation in price, the Respondent should be denied the benefit of the decree passed in his favour. Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20”.

h. Judgement by the Hon'ble Supreme Court in M.L Devender Singh Vs. Syed Khaja 1973 (2) SCC 515:

“14. It may be mentioned here that the principles contained in Sec 20 of the old Act are re-enacted in Sec 23 of the Act of 1963 in language which makes it clear that a case where an option is given by a contract to a party either to pay or to carry out the other terms of the contract falls outside the purview of Section 20 of the old Act, but, mere specification of a sum of money to be paid for a breach in order to compel the performance of the contract to transfer property will not do. Section 23 of the Act of 1963 may be advantageously cited here. It runs as follows: “23. (1) A contract, otherwise, proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance. (2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract”.

i. Judgement by the Hon'ble Supreme Court in M.S. Madhsoodhanan & Anr. Vs. Kerala Kaumudi (P) Ltd. & Ors. 2004 (9) SCC 204:

“141..... The Section provides that specific performance of such contracts may be enforced when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. In the case of a contract to transfer movable property, normally specific performance is not granted except in circumstances specified in the Explanation to Section 10. One of the exceptions is where the property is “of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market”. It has been held by a long line of authority that shares in a private limited company would come within the phrase “not easily obtainable in the market”.

23. According to the aforementioned judgements, the petitioner is qualified to request remedy in the form of particular performance of the EBA 1 because: -

- (i) EBA 1 & EBA 2 are back to back contracts which fact is known and acknowledged by all the parties;
- (ii) The Petitioner is incapable of performing its obligations under EBA 2 due to non-performance by SPTPL/IPCL under EBA 1;
- (iii) The Petitioner has demonstrated/proved by its conduct that it is willing to perform the essential terms of the EBA and urged SPTPL/IPCL to perform its related obligations;

24. Time is of the essence in this situation because if SPTPL/IPCL does not return the power within the allotted time frame, HPPC will be obliged to purchase the power from others at a significantly higher cost, which cannot be made up for by financial assistance. The Petitioner would suffer considerable hardship if the precise performance was denied. In the current matter, the Petitioner has an absolute and unequivocal advantage against SPTPL/IPCL in terms of the equitable position for the specific execution of the EBA.

25. A breach of the EBA1 dated 10.01.2022 has occurred as a result of SPTPL/IPCL's failure to restore supply of 286 MUs. The EBA's Clause 13 specifies the fine for a lower return of power, and Clause 9 specifies a surcharge for late payments. Additionally, Clause 4 Sub-Clause (c) mandates that the SPTPL/IPCL must grant the Petitioner the SLDC consent and that the Petitioner must apply to the nodal RLDC for a grant of short-term open access three months before the anticipated date that the supplying utility is supposed to start providing electricity. For reference, the pertinent clauses are reproduced here. -

“4.Scheduling:

.....
(c) SPTPL/importing utility shall provide their SLDC consent to APPCPL.APPCPL shall apply to nodal RLDC for grant of short-term open access three months in advance from the scheduled date of commencement of power by the supplying utility.

9. Surcharge of late Payment:

A surcharge of 15% per annum shall be applicable on all payments outstanding after the due date of relevant bill. This surcharge would be calculated on day to day basis for each day of the delay beyond the due date.

13. Penalty for less return of power:

While returning the power, if SPTPL/IPCL fails to submit the advance application or day ahead application in case of corridor constraints, then it will be treated as denial to return the power and the compensation shall be paid for such quantum of that day(s) by SPTPL @ average IEX rate /kWh of N-1 region for that particular time slots + Rs 2/kWh. Quantum of this energy for which penalty under this clause is paid will be considered as delivered under settlement clause.

26. In terms of the EBA, in case SPTPL/IPCL fails to submit the advance application or day ahead application, in case of corridor constraints, it will be treated as denial to return the power within the specified time and SPTPL/IPCL will be liable for liquidated damages to the Petitioner

as provided in the said Clause.

27. The Petitioner participated in HPPC banking tender on the request of SPTPL/IPCL for arranging power for its self-requirement and its obligated entities from HPPC as SPTPL/IPCL failed to tie up power from the market and had also submitted a Bank Guarantee of Rs 1.80 Crore on behalf of SPTPL/IPCL to HPPC towards banking tender. However, no security was furnished to the Petitioner by SPTPL/IPCL in return but the same was duly covered in the EBA 1 wherein it was agreed that SPTPL/IPCL shall pay the amount to the Petitioner in case the same is forfeited by HPPC.

IA No. 58 of 2022

28. The Petitioner, vide the IA dated 16.09.2022, submitted that since HPPC has raised penalty invoices dated 18.07.2022 amounting to Rs. 32.3 crore, invoice dated 26.08.2022 amounting to Rs. 64.81 crore and invoice dated 14.09.2022 amounting to Rs.50.57 crore for the period June, July and August 2022, the Petitioner is apprehensive that the BG may be encashed by HPPC.

29. Further, the open access and the trading margin invoices raised by the Petitioner for the power returned from 16.06.2022 till date amounting to Rs. 13,33,808 has not been paid by HPPC.

30. The Petitioner submitted that it is only a trading company and has entered the EBA1 for trading margin of 1.98 Paisa/kWh and EBA 2 for margin of 1.44 Paisa/kWh, which cannot cover the non-performance of the contract and the penalties that may arise due to such non-performance.

31. In view of the above, the Petitioner has made the following prayers:

- a. Direct HPPC to not take any coercive action against the Petitioner including encashment of Bank Guarantee.
- b. Pass any such orders as the Hon'ble Commission deems fit

Diary (IA) No. 462/2022

32. I.A No.58 of 2022 was filed seeking stay on the invocation of the Bank Guarantee given by the Petitioner, on behalf of SPTPL/IPCL to the Respondent No.3 – HPPC. Meanwhile, HPPC has also filed a Petition being Petition No. 278/MP/2022 before the Commission, seeking recovery of penalty for less return of power by the Petitioner, i.e, APPCPL, as per the Banking Agreement dated 17.03.2022 and seeking revocation of the inter-state trading license granted to the Petitioner.

33. On 27.10.2022 @ 06:44 PM, the ICICI Bank communicated to the Petitioner/Applicant that, HPPC vide its communication dated 27.10.2022, has invoked Bank Guarantee ('BG') No. 0083NDDG00056922 amounting Rs 1,80,00,000.00 dated 23.09.2021. In receipt of the aforesaid instruction, the ICICI Bank had asked the Petitioner/Applicant to arrange original withdrawal letter from the beneficiary or arrange to fund your account asap, failing which it will be constrained to make the payment as undertaken under the terms of the said BG to HPPC.

34. Thereafter the Petitioner, immediately communicated to SPTPL/IPCL, regarding intimation towards encashment of BG by HPPC for non-supply of return obligation by SPTPL/IPCL, while asking them to credit the same corresponding amount of Rs. 1.80 crores as per the Agreement executed between the Petitioner and the SPTPL/IPCL.

35. However, on 28.10.2022, the ICICI Bank communicated to the Petitioner that the payment in terms of the BG, has been made to HPPC, as per their instructions. In the above background, the prayers sought by the Petitioner in its stay application being I.A No. 58 of 2022 have become infructuous due to the invocation of BG by HPPC.

36. It has been submitted by the Petitioner that even after knowing that due to SPTPL/IPCL's failure to return the power to HPPC, the Petitioner's Bank Guarantee amounting to 1.80 Crore, will be forfeited, no steps were taken by SPTPL/IPCL to mitigate the same. In fact, SPTPL/IPCL did not even respond to the letters of the Petitioner/Applicant sent to SPTPL/IPCL informing them about the invocation of BG. SPTPL/IPCL was aware that this is a back-to-back transaction and the performance by the Petitioner under EBA2 is dependent on the performance by SPTPL/IPCL under EBA1. In such circumstances where there is a banking transaction, the Petitioner, as a trader, cannot be expected to perform.

37. The Petitioner vide Diary (IA) No. 462/2022 dated 07.11.2022, has made the following prayers:

- a. Direct SPTPL/IPCL to pay an amount of Rs 1.80 Crore to the Petitioner/Applicant pending disposal of the main matter
- b. Direct HPPC to not take any further coercive steps against the Petitioner/Applicant.
- c. Pass any such order as the Hon'ble Commission deems fit.

Hearing Dated 10.11.2022

38. The matter was called up for hearing on 10.11.2022. During the hearing, the Commission queried regarding jurisdiction of the Commission to adjudicate the matter. After hearing the learned counsels, the Commission directed the Respondents to file their replies on admissibility and the Petitioner to file rejoinder thereof.

39. During the hearing, the 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 a 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 section 11 (Appointment of Arbitrators) of the Arbitration Act, all other provisions of the

Arbitration Act will apply to the arbitration under 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.

Reply by the Respondent No. 3 - HPPC

40. The Banking Agreement (EBA 1) had been executed between the Petitioner and Respondent no. 1, i.e. Saranyu Power Trading Private Limited. Respondent no. 3, HPPC was not a party to EBA 1. The issue that remains to be adjudicated and consequently, the reliefs sought under the present petition are only against Respondent no. 1.

41. HPPC had invited bids from eligible bidders vide NIT-91 for banking of power wherein it was stated that HPPC will supply power during 01st November, 2021 to 31st March, 2022 and this banked power will be returned to the HPPC during the period from 16th June 2022 to 30th September 2022. The Petitioner-APPCL participated in the said Tender and submitted their offer vide letter dated 27.09.2021. The offer of the APPCL was accepted by the HPPC and the Letter of Intent was issued to the HPPC for power swap arrangement on 29.10.2021. Thereafter, the Energy Banking Agreement dated 17.03.2022 ('EBA 2') was executed between the Petitioner and the Respondent for banking of power. There was no mention of Respondent no. 1, i.e. SPTPL in EBA 2. Clause 2 of the EBA 2 provides that the Scheduling of power shall be as per CERC Open Access Regulation, CTUs Open Access Procedure and IEGC in vogue. The delivery point of Supply was the regional periphery of exporting utility. As per the arrangement stipulated in the EBA 2, APPCL was required to supply 3062.43 LUs to HPPC from 16.06.2022 to 30.09.2022. However, the APPCL committed a breach of the Banking Agreement by supplying only around 212.31 LUs of power against 2203.77 LUs as on 31.08.2022. For such default, HPPC has filed a separate petition before this Hon'ble Commission, i.e. Petition no. 278/MP/2022.

42. The Hon'ble Commission vide Order dated 02.01.2020 in the matter of finalization of CERC Trading Regulations, 2020 after due deliberations and considering the comments of all stakeholders acknowledged the role of traders and the risk assumed by them in banking transactions. Further, considering the transactions involved in the entire banking cycle, the Commission considered it appropriate to include banking transactions within the purview of trading activities undertaken by Trading Licensees. Hence, the definition of '**Banking of electricity**' was incorporated in the Regulations as under:

'Banking of electricity' shall mean and include transactions for inter-State exchange of electricity between two grid connected entities either directly or through a Trading Licensee.

Further, Clause (24) of Regulation 9 was revised as below in order to ensure that the trader completes the banking cycle for every contract:

"(24) Trading Licensee undertaking banking of electricity shall simultaneously enter into contract for supply of power and contract for return of power, with each of the utilities participating in the banking arrangement, as applicable."

43. In view of the notification of the CERC Trading Regulations, 2020, the inter-state transactions for banking of electricity was regulated and governed by the Trading Regulations. The Hon'ble Commission therefore, is the competent and appropriate authority to deal with the matters concerning violations of such regulations by the Trading licensee having its license from the Central Commission.

44. Regulation 9 of the CERC Trading Regulations, 2020 stipulates the obligations of the trading licensee. It is incumbent upon the trading licensee to comply with laws in force, Acts, Rules, Regulations, Grid Code, Orders, and directions issued by the Commission from time to time and has to ensure that there is no omission or negligence in the performance of the trading activity. As per Regulation 13 of the CERC Trading Regulations, 2020, a trading licensee is obligated to report to the Commission any significant change in the circumstances affecting his ability to meet obligations under the agreement or any material breach of the provisions of the agreement.

45. Further, section 52 (2) of the Electricity Act, 2003 read with Regulation 9 of the CERC Trading Regulations, 2020 cast a statutory obligation on the person issued with a trading license by this Hon'ble Commission to discharge such duties in relation to supply and trading of

electricity as may be specified by this Hon'ble Commission. If a trading licensee fails to discharge trading activity in compliance with such obligations, it is liable for action under section 19(1) (a) of the Electricity Act, 2003. Section 52 (2) of the Electricity Act, 2003 is extracted as under: -

“52. (1) Without prejudice to the provisions contained in clause (c) of section 12, the Appropriate Commission may specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader.

(2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.”

46. Regulation 20 of the CERC Trading Regulations, 2020 has been validly incorporated to carry out the purposes of the Act including those provided under section 19 of the Electricity Act, 2003. By virtue of said regulations, wide powers of revocation are vested in the Hon'ble Commission, where the Hon'ble Commission is satisfied with the apparent contraventions/ defaults of the licensee, the action to revoke the license shall be initiated to further the objectives of the Electricity Act, 2003. The CERC Trading Regulations, 2020 therefore, aim to regulate interstate trading of electricity which includes banking of electricity and ensure that there are no willful defaults by the trading licensees.

Rejoinder by the Petitioner

47. The dispute has emanated under two Energy Banking Agreements dated 10.01.2022 between the Petitioner and the Respondent No.1 – Saranyu Power Trading Private Limited (EBA1) and the second between the Petitioner and the Respondent No. 3 – Haryana Power Purchase Centre (EBA 2). The dispute is squarely covered under section 79 (1)(c) of the Electricity Act, 2003 which vests in this Hon'ble Commission, the jurisdiction to regulate interstate transmission of electricity read with Section 79 (1)(f) of the Act which deals with adjudication of disputes connected with matters specified in section 79 (1) (a) to (d).

48. The EBA 1 was entered into by the Petitioner and SPTPL for the purpose of supply of power to IPCL. This gets further clarified by the following documents –

a. Letter dated 12.10.2021 issued by SPTPL to the Petitioner of records stating as under:

“This is in reference to our discussions regarding arrangement of power by APPCPL under banking on behalf of IPCL/ SPTPL and its obligated entities during the period from 01 November 2021 to 31 March 2022.

In this context, we would like to authorise APPCPL for arrangement of power as per the schedule mentioned below:

Return of power by IPCL/ SPTPL/ Other Utility on RTC basis:

Period	Return%
16th June 2022 to 30th September 2022	106%

The above issued authorisation may be considered as an authorisation for participation in banking tenders floated by various utilities including HPPC for supply of power during the above-mentioned period.

SPTPL/IPCL shall pay a trading margin of 1.98 paisa/Kwh while importing power by SPTPL/IPCL or its obligated entities from HPPC.

Further, please note that SPTPL/IPCL shall not provide any payment security for this banking transaction.

You are kindly requested to do the needful.”

b. EBA 1, Relevant extracts (wherever referred that this is the purpose of IPCL)

1. “Detail of power Banking Arrangement:

Supply of Power to IPCL/SPTPL & Obligated entities of IPCL/STPCL through APPCPL:

Supplier	From	To	Duration	Quantum (MW)	Delivery Point
BYPL	01.11.2021	07.11.2021	0000-1800 Hrs.	6 MW	Regional Periphery of Exporting Utility
			1800-2400 Hrs.	56 MW	
HPPC	01.11.2021	15.11.2021	0000-2400Hrs.	56 MW	
	16.11.2021	30.11.2021	0000-2400Hrs.	91 MW	
	01.12.2021	31.12.2021	0000-2400Hrs.	91 MW	
	01.01.2022	31.01.2022	0000-2400Hrs.	109 MW	
	01.02.2022	28.02.2022	0000-2400Hrs.	91 MW	
	01.03.2022	31.03.2022	0000-2400Hrs.	56 MW	
Total (MWh)		310127.14			

*The actual quantum may vary at the time of punching which in any case may not be less than 80% of contracted quantum on monthly basis as mentioned in HPPC NIT No. 91/HPPC dt. 15.09.2021

**Breakup of quantum shall be as per Annexure- I

Return of Power by IPCL/SPTPL:

.....

12. Minimum off take of power:

SPTPL/IPCL has to take minimum 80% of contracted quantum except open access denied by RLDCs on monthly basis. If SPTPL/IPCL take less than 80% of contracted quantum on monthly basis then it shall pay to APPCPL Rs. 2.00 per unit for the quantum less than 80% of contracted quantum.

13. Penalty for less return of power:

While returning the power, if SPTPL/IPCL fails to submit the advance application or day ahead application in case of corridor constraints, then it will be treated as denial to return the power and the compensation shall be paid for such quantum of that day(s) by SPTPL average IEX rate /kWh of N-1 region for that particular time slots + Rs 2/kWh. Quantum of this energy for which penalty under this clause is paid will be considered as delivered under settlement clause.

.....

20. All the terms and condition under this Agreement are binding and any deviation, whatsoever, is not allowed unilaterally. Further, all the terms and conditions of HPPC banking tender no.: 91/HPPC shall also be binding on SPTPL/IPCL. Furthermore, any financial implications levied on APPCPL by other utility on account of default by SPTPL/IPCL shall be passed on to SPTPL/IPCL and must be borne by SPTPL/IPCL.

21. Contract Performance Guarantee (CPG): For this banking contract, APPCPL has submitted an EMD of Rs. 2.65 Crore in the form of Bank Guarantee in HPPC office which has been converted into Contract Performance Guarantee (CPG). Both SPTPL and APPCPL shall remain under contractual obligations as per the said contract till the final successful return of power. The performance guarantee shall be refunded to APPCPL only after completion of this contract as per the Terms and Conditions. Any breach of contract by SPTPL/IPCL shall make APPCPL liable for non-performance of obligations and as such, if CPG is forfeited then the same shall be recovered by APPCPL from SPTPL/IPCL.”

c. Letter dated 21.02.2022 by IPCL to SPTPL states as under:

‘This is with reference to correspondences referred above vide references (1) to (IV) wherein IPCL has authorized SPTPL to arrange power through banking.

In continuation, please note that liability accrued on account of this power banking as well as contractual obligations between Saranyu Power Trading Pvt. Ltd. (SPTPL) and other trader/utility/generators will lie with IPCL as all correspondences with other trader/utility/generators has been done by SPTPL on back to back basis with IPCL as per references (1) to (IV).

Banking Return inability for FY 2021-22 against reference (1) to (IV) is 313.4579574 MUs as per below bifurcation

Forward Banking to obligated entities of IPCL i.e., Goa, UPCL, MePDCL, HPSEBL and Sikkim	183.7267684 MUs
Banking to IPCL	129.731184 MUs
Total Liability	313.4579524 MUs

This is to your information please.”

49. The above documents clearly recognize the nature of the transaction namely that the power being arranged by way of banking by the Petitioner on behalf of SPTPL is for meeting the needs of IPCL. Further, vide letter dated 21.02.2022, IPCL has admitted that any liability on account of power banking as well as other contractual obligations between SPTPL and other traders lie with IPCL and also that the transactions are on back-to-back basis. IPCL cannot now contend that there is no privity of contract between it and the Petitioner. Apart from EBA 1 naming and recognizing IPCL multiple times, IPCL has committed to SPTPL that the banking liabilities for FY 2021-22 are to its account as also any contractual liabilities which may accrue due to SPTPL entering into such banking arrangements.

50. The Petitioner has stated that the submissions made by IPCL are absolutely incorrect. The EBA 1 provides as under with regard to dispute resolution –

“16. Dispute Resolution:

Except where otherwise provided in this general terms & conditions, all question of dispute arising out or relating to this agreement shall be referred to the appropriate Commission under the Electricity Act 2003, within the time frame as applicable under the law. The decision of the appropriate commission shall be binding on both the parties. However, both the parties shall perform their respective contractual obligation under the agreement during the disputed period.

17. Arbitration:

Subject to the statutory provisions for arbitration under the Electricity Act 2003, all other differences or disputes between the parties arising out of or in connection with the banking arrangement shall settled through arbitration subject to the provision of the Arbitration and Conciliation Act, 1996. The venue for arbitration shall be at Panchkula and the Arbitrator shall be M.D./ UHBVN or his nominee. ”

The EBA 2 provides as under with regard to dispute adjudication –

“14. Arbitration

Subject to the statutory provisions for arbitration under the Electricity Act 2003, all other differences or disputes between the parties arising out of or in connection with the banking arrangement shall be settled through arbitration subject to the provision of the Arbitration and Conciliation Act, 1996. The venue for arbitration shall be at Panchkula and the Arbitrator shall be M.D./ UHBVN or his nominee.”

51. The dispute squarely falls under section 79 (1)(c) of the Act and cannot be resolved by arbitration. The Hon’ble Supreme Court in **Gujarat Urja vs Essar Power 2008 (4) SCC 755** has while interpreting sec 86 (1)(f) of the Act, held as under –

“58. In the present case we have already noted that there is 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 the 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 b 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.

60. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section 86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.”

52. The nature of transactions is of power supply from Haryana Power Purchase Centre to IPCL from 01.11.2021 to 31.03.2022 and the return of the same from IPCL to HPPC from 16.06.2022 to 30.09.2022. The distribution companies are on both ends of the transactions while there are two trading companies in between. The entire transaction is on back to back basis and there is no arbitration which can resolve the disputes. Obviously, the valuable observations of the Hon’ble Supreme Court in **Energy Watchdog vs CERC 2017 (14) SCC 80**, settle beyond doubt the jurisdiction of this Hon’ble Commission –

“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter- State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in clauses (a), (b) and (d), and "intra-State" in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we

were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

.....
29. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases."

53. IPCL has relied on the Judgement of the Hon'ble Appellate Tribunal in **Appeal No 200 of 2009 dated 23.02.2022 – Pune Power Development Pvt. Ltd. v. KERC and Ors.** The issue in the said case was whether the jurisdiction to decide the dispute lay with this Hon'ble Commission or with the State Commission of Karnataka. According to IPCL if the disputes have to be resolved by arbitration, there can be no question of relying on Pune Power Judgement since, IPCL would have to approach its State Commission to decide the issue. It cannot be that both arguments are taken by IPCL to avoid the jurisdiction of this Hon'ble Commission, namely that, the issue should be decided through arbitration and at the same time the issue is to be decided under section 86(1)(f) of the Act. Quite apart from the fact that the above judgement was delivered on 23.02.2011 that is prior to the decision of the Hon'ble Supreme Court in Energy Watchdog (supra), even otherwise the Judgement is not applicable.

54. The dispute in Pune Power case (supra) had been raised by the distribution companies and all actions under the contracts had taken place within the territorial jurisdiction of the State Commission. The supply of electricity and return of the same was also to happen at the Karnataka periphery. In the circumstances the Hon'ble Tribunal took a view that the jurisdiction of the Karnataka Commission could not be ousted.

55. The banking in the instant case is between the two distribution licensees with two trading licensees in between. The supply and return of power are at the regional periphery of the exporting utility. Both the trading licensees are granted Licences by this Hon'ble Commission. Above all, the Hon'ble Supreme Court in para 29 of the Energy Watchdog Judgement (supra) *'This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction.'*

56. Therefore, IPCL cannot rely on the Pune Power Judgment (supra) when there is a clear ruling of the Hon'ble Supreme Court on the aspect of jurisdiction of this Hon'ble Commission when interstate sale is involved.

57. The counsel of IPCL repetitively sought liberty to file an application to refer the matter to arbitration under section 8 of the Arbitration and Conciliation Act, 1996. No such liberty is required if IPCL otherwise has a right to file such an application.

58. Further, the dispute has been simmering since June 2022 when IPCL/STPTL failed to return the banked electricity to HPPC. If the IPCL indeed wished to resolve the dispute through arbitration, nothing prevented it from invoking the same for all these months instead of raising the incorrect plea of lack of jurisdiction when the Petitioner has been constrained to approach this Hon'ble Commission by filing the present Petition.

59. The Petitioner is in a precarious position where HPPC is demanding huge penalties from it and has even encashed its EMD for Rs 1.80 Crores and the Respondent Nos. 1 and 2 are opposing the jurisdiction of this Hon'ble Commission on hyper technicalities. The Petition should be admitted, and an interim direction should be given to SPTPL/IPCL to pay an amount of 1.80 crores to the Petitioner, as per clause 21 of EBA1, on an immediate basis pending disposal of the said matter.

Analysis and Decision

60. We have considered the submissions made by all the parties. The question that arises for our consideration at this stage is whether the Commission has jurisdiction to entertain the present petition and thus, to admit the matter. The Petitioner has filed the present petition invoking the provisions of section 79(1)(c) and section 79(1)(f) of the Act for adjudication of the dispute between the parties. The Petitioner has submitted that the Commission has the necessary jurisdiction to deal with the dispute involved as the nature of transaction – arrangement of banking between two distribution licenses with two trading licensees in between that are granted trading Licence by this Commission - qualifies to be ‘inter-state transaction’ and as per decision of the Hon’ble Supreme Court in Energy Watchdog Case (supra), the jurisdiction to regulate the inter-state transactions lies only with this Commission. The Respondent No.3, HPPC has also submitted that this Commission has the necessary jurisdiction as the banking arrangement involves trading licensees who have been granted trading Licence by this Commission and the banking comes within the purview of trading and the matter concerns violations of the Trading Licence Regulations, 2020. On the other hand, the Respondent No.2, IPCL has cited the lack of jurisdiction of this Commission on the grounds that all the agreements have an arbitration clause & the dispute involved is an arbitral dispute, and 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, as per the APTEL judgement in the case of Pune Power Development Pvt. Ltd. v. KERC and Ors., which also involved the dispute arising out of the banking transaction/arrangement as in the present case.

61. However, the Petitioner has submitted that in the said case (Pune Power Development Pvt. Ltd. v. KERC and Ors.) the dispute had been raised by the distribution company and all actions under the contracts had taken place within the territorial jurisdiction of the State Commission including supply of electricity and return of the same was also to happen at the Karnataka Periphery. On the other hand, in the present case, the exporting utility's supply and return of power were to take place at the regional periphery. Such transactions are encompassed by the term "inter-state transaction". The Petitioner, therefore, submitted that the principles established by the Supreme Court of India in the Energy Watchdog Case are applicable to the present inter-state transaction, and this Commission alone has jurisdiction.

62. We have considered the submissions made by the parties. A bare reading of the banking agreement dated 10.1.2022 between the Petitioner and SPTPL and the banking agreement dated 17.1.2022 between the Petitioner & HPPC reveal that delivery point is the regional periphery of the exporting utility for both legs of the banking transaction. On examining the banking agreements, it is apparent that the arrangements for exchange of electricity are inter-state in nature. Given the facts and circumstances of the present petition, we would like to examine and determine whether this Commission has the authority to address the issues raised in these cases due to the inter-state character of the 'banking' arrangement. In the current petition, the Petitioner has invoked section 79(1)(c) and section 79(1)(f) of the Act.

63. Section 79 of the Act provides for the Commission's functions as follows:

"Section 79. Functions of the 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,"

64. We have considered the argument that the jurisdiction of the Commission for adjudication of the dispute involving a trading licensee under Section 79(1)(f) gets activated if the dispute involves a generating company, including inter-alia a generating company making inter-State supply of power to a trading licensee, and the dispute pertains to tariff or tariff related matters. It has been submitted that though the matter pertains to trading licensees, it does not

involve a generating company. Further, being a banking arrangement involving a case of alleged default in supply, it also does not constitute as a tariff matter. However, it is an admitted case of the parties that the entire transaction is inter-state in nature and the trading licensees involved are governed by the provisions of the Trading Licence Regulations, 2020 of this Commission.

65. The Trading Licence Regulations, 2020 not only stipulate the terms and conditions for grant of trading Licence, requirement of net worth & creditworthiness, etc. but also stipulate obligations of the trading licensees, the revocation of the Licence, offences and punishments for the licensee, and so on. Consequently, it is necessary to evaluate the admissibility of the present petitions in light of the Trading Licence Regulations.

66. Regulation 9 of the Trading Licence Regulations 2020 specifies the obligations of trading licensees, including in case of banking of electricity, while Regulations 17, 18, 19, and 20 address contraventions and appropriate penalties, such as Licence revocation, for such violations.

67. Regulation 9(1) of the CERC Trading Licence Regulations 2020 provides as under:

“The Trading Licensee shall comply with the requirements of laws in force, including the Act, the Rules and Regulations, the Grid Code, orders and directions issued by the Commission from time to time, and any of the State Electricity Regulatory Commissions in accordance with the law.”

In addition, Regulation 9(24) stipulates that a trading licensee who engages in the banking of electricity must simultaneously enter into a contract for supply of power and a contract for return of power with each utility participating in the banking arrangement, as applicable.

68. Another leg of the argument being that since there is an arbitration clause in the agreement, it has to be necessarily invoked. We have considered that to refer a dispute to an arbitrator, elements of settlement are sine qua non. We find in the hearings that there is least element of settlement between the parties, hence reference to an arbitrator would have been a futile exercise.

69. In the instant petition, the Petitioner has alleged that the Petitioner has been unable to honor its obligations to HPPC because of the failure on the part of SPTPL/IPCL to perform their

obligations, within the specified time period. Further, in the submissions, violation of the Trading Licence Regulations 2020 has been alleged. Since, both the Petitioner & the Respondent (SPTPL) have been granted trading Licences by this Commission and that violations of the Trading Licence Regulations and terms and conditions of the Licence have been alleged in the petition, the veracity of the allegations made by the HPPC is required to be investigated. Accordingly, the Petition No. 265/MP/2022 is admitted and diary (IA) No. 462/2022 shall also be taken up along with the main Petition No. 265/MP/2022.

70. The parties are directed to file their replies or rejoinder, as applicable, on the merits of the contention made by the Petitioner, within four weeks from the date of this Order. The petition shall be listed on 21.07.2023 along with Petition No.277/MP/2022, 278/MP/2022 and 282/MP/2022.

71. As the Bank Guarantee given by the Petitioner to the Respondent No.3 – HPPC has already been encashed by HPPC, the IA No. 58 of 2022 has been rendered infructuous. Accordingly, the IA No. 58 of 2022, in this petition, is disposed of as infructuous.

Sd/-
(P.K. Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S. Jha)
Member