ORDER
OF
WEST BENGAL ELECTRICITY REGULATORY COMMISSION
IN THE MATTER OF
In Case No. WBERC/OA-252/17-18


PRESENT:
SRI RABINDRA NATH SEN, CHAIRPERSON
SRI AMITAVA BISWAS, MEMBER
SRI DURGADAS GOSWAMI, MEMBER

DATE: 27.11.2017

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**ORDER**

1.0 India Power Corporation (Haldia) Limited {IPC(H)L} (hereinafter referred to as ‘petitioner’) submitted a petition on 18th May, 2017 seeking approval of the Commission under section 86(1)(f) of the Electricity Act, 2003 with respect to the arbitration proceedings undertaken by the Arbitral Tribunal consisting of Justice Ashim Kumar Banerjee (Retd.), Justice Narayan Chandra Sil (Retd.) and Justice Sailendra Prasad Talukdar (Retd.) for the dispute arisen between IPC(H)L and West Bengal State Electricity Distribution Company Limited (WBSEDCL) in the matter of cancellation of the power purchase agreement entered into by and between IPC(H)L and WBSEDCL on 28.12.2010. IPC(H)L also submitted supplementary petitions on 05.08.2017 and 14.06.2017.

2.0 The petitioner has submitted that a formal Power Purchase Agreement (PPA) was executed between the petitioner and WBSEDCL on 28.12.2010 for purchase of 300 MW of power from the petitioner’s proposed 3 x 150 MW Thermal Power Project at Haldia and the PPA was approved by the Commission vide its order dated 08.04.2011.

3.0 The petitioner has further submitted that in view of the dispute arisen between the petitioner and WBSEDCL due to termination of the PPA by WBSEDCL before
commencement of purchase of power from the power project, both petitioner and WBSEDCL agreed to the arbitration process and proceeded to have the matter adjudicated by the mutually appointed Arbitral Tribunal as stipulated in the PPA.

4.0 The petitioner further submitted, inter-alia, that it was evident from a judgement of the Hon'ble Supreme Court of India in Gujarat Urja Vikas Nigam Limited - vs - Essar Power that dispute between a generating company and a licensee has to be decided by the Commission or referred to arbitration by the Commission. Accordingly, the petitioner made the submission on 18th May, 2017 before the Commission under section 86(1)(f) read with section 158 of The Electricity Act, 2003.

5.0 The petitioner prayed before the Commission to nominate such person/persons to arbitrate the dispute arisen between the petitioner and WBSEDCL in exercise of its power under section 158 read with section 86(1)(f) of The Electricity Act, 2003.

6.0 The Commission, after due consideration of the relevant aspects of the matter and on perusal of records/documents placed passed an order dated 16.06.2017 nominating Justice Narayan Chandra Sil (Retd.) and Justice Sailendra Prasad Talukdar (Retd.) as the Arbitrators in exercise of its power conferred under section 158 read with section 86(1)(f) of The Electricity Act, 2003 for arbitration in the dispute as aforementioned in the manner prescribed under the provisions of relevant law.

7.0 The petitioner further submitted application on 21.09.2017 which inter-alia state that the Arbitral Tribunal
consisting of Mr. Justice Ashim Kumar Banerjee (Retd.)
Mr. Justice Narayan Chandra Sil (Retd.) and Mr. Justice
Sailendra Prasad Talukdar (Retd.) heard the formal
application of the petition and after having heard the
submission of WBSEDCL in the matter passed an order
dated 16.08.2017 terminating the existing reference
before them and granting liberty to the parties to proceed
with the subject matter in accordance with law.

8.0 The petitioner further submitted that the order of the
Commission dated 16.06.2017 cannot be proceeded with
even after termination of the existing reference as the
said order had nominated only two (2) Arbitrator to
decide the disputes namely Hon'ble Mr. Justice Narayan
Chandra Sil (Retd.) and Hon'ble Mr. Justice S.P.
Talukdar (Retd.). It is further submitted that section 10 of
the Arbitration & Conciliation Act, 1996 mandates that
while the parties can decide the number of arbitrators,
such number should not be an even one. The relevant
section of the Arbitration & Conciliation Act, 1996 as set
out and reproduced by the petitioner in their submission
is as below:

"10. Number of arbitrators - (1) The parties are free to
determine the number of arbitrators, provided that
such number shall not be an even number.

(2) Failing the determination referred to in sub-
section (1), the arbitral tribunal shall consist of a sole
arbitrator."

9.0 With the above submission, the petitioner prayed before
the Commission to pass an order appointing a third
Arbitrator to the panel of Hon'ble Mr. Justice Narayan
Chandra Sil (Retd.) and Hon'ble Mr. Justice S. P.

Talukdar (Retd.) already nominated vide order dated 16.06.2017 for expeditiously deciding the existing dispute between the parties.

10.0 The Commission after due consideration of the relevant aspects of the matter, nominate three (3) Arbitrators viz. Hon’ble Mr. Justice Narayan Chandra Sil (Retd.), Hon’ble Mr. Justice S. P. Talukdar (Retd.) and Hon’ble Mr. Rakesh Nath, Ex-Member, Appellate Tribunal for Electricity in exercise of its power conferred under section 158 read with section 86(1) of The Electricity Act, 2003 for arbitration in the dispute as aforementioned in the manner prescribed under the provisions of relevant law.

Sd/-
(Durgadas Goswami)
Member

Sd/-
(Amitava Biswas)
Member

Sd/-
(R. N. Sen)
Chairperson

Dated: 27.11.2017