

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. Dr. Pramod Deo, Chairperson
2. Shri R. Krishnamoorthy, Member
3. Shri V. S. Verma, Member

**Petition No. 159/2008
with
IA No. 7/2009**

In the matter of

Power Exchange India Ltd., Mumbai

Petitioner

Vs

1. Multi Commodity Exchange of India Ltd. (MCX), Mumbai
2. Indian Energy Exchange Limited (IEX), New Delhi
3. Forward Markets Commission (FMC), Mumbai

Respondents

And in the matter of

Violation of the provisions of Section 66 of the Electricity Act, 2003 read with para 5.7.1 (f) of the National Electricity Policy and order dated 6.2.2007 in Petition No.155/2006.

Following were present

1. Shri Hemant Sahai, Advocate, PXIL
2. Smt Rupa Devi Singh, PXIL
3. Shri Amit Kapoor, Advocate, MCX
4. Ms. Shobana Masters, Advocate, MCX
5. Shri Vishwanathan Iyer, MCX
6. Ms. Raj Rani Bhalla, MCX
7. Ms. Kavitaq R, MCX
8. Shri R.K. Mendiratta, IEX

ORDER

(Date of Hearing 12.3.2009)

This application has been made by Power Exchange of India Limited (PXIL) with a prayer to restrain the first respondent, Multi Commodity Exchange of India

Limited (MCX) and the second respondent, Indian Energy Exchange Limited (IEX) from introducing, selling, marketing or otherwise dealing in any manner with electricity forward contracts and also restraining them from introducing any products whether termed as forward contracts or any other contracts that involve dealing in, trading of and/or delivery of electricity without approval of this Commission. The applicant has further sought to restrain MCX and IEX from dealing in any manner, or carrying out any transaction of electricity forward contracts. As an interim measure, the applicant seeks appropriate directions to MCX and IEX in terms of substantive prayers as above, till disposal of the application. The application raises certain questions of law of far reaching implications.

Brief Facts

2. The applicant, PXIL, a power exchange set up with the approval of this Commission is presently authorized to conduct day-ahead transactions. MCX is a multi-commodity forward exchange set up by Financial Technologies Ltd. IEX, also a power exchange promoted by Financial Technologies Ltd. is permitted by this Commission for day-ahead transactions in electricity.

3. In the application, it was averred that MCX and IEX were likely to launch electricity forward contracts for which they had approached the Forward Markets Commission (FMC) for approval. It was further averred that electricity forward contracts were within the exclusive jurisdiction of this Commission and therefore, before launching, MCX and IEX were mandatorily required to obtain this Commission's approval. The applicant based its argument on section 66 of the Electricity Act, 2003 (the 2003 Act).

Reply by MCX

4. MCX contested the jurisdiction of this Commission to entertain the present application. It stated that by a notification dated 26.9.2003, MCX had been granted recognition on permanent basis under section 6 of the Forward Markets Contracts (Regulation) Act, 1952 (the 1952 Act) by the Central Government in Department of Consumer Affairs for forward contracts in all commodities to which section 15 was applicable, subject to the condition that MCX would comply with the directions issued by FMC from time to time.

5. MCX stated that Department of Consumer Affairs, by its notification dated 9.1.2006, issued under sub-section (1) of section 15 of the 1952 Act, declared that the provisions of that section would apply to electricity and natural gas. According to MCX, by virtue of the notification issued by the Central Government only FMC had the jurisdiction to regulate the forward contracts in electricity through an association recognized under section 6 of the 1952 Act. Therefore, MCX stated, it was required to seek permission of FMC for launching forward contracts in electricity. After issuance of the notification by the Central Government, the forward contracts for sale or purchase of electricity between members of a recognized association, or through or with any such member only are valid. Accordingly, MCX approached FMC for approval of contract specifications of electricity futures trading and permission to launch forward contracts. The application reportedly underwent several rounds of consultation when the issue of jurisdiction of FMC was also examined. FMC, by letter dated 7.1.2009 finally granted approval to MCX for trading

in daily electricity contracts, weekly electricity contracts and monthly electricity contracts during January to December 2009. MCX launched forward trading in electricity with effect from 8.1.2009.

Reply by IEX

6. IEX in its reply sought to dissociate itself from the acts and activities of MCX. It stated that MCX did not hold any shares in IEX and nor was the former its promoter. IEX and MCX were stated to be independent separate legal entities functioning without any interference from each other in the management of their affairs. IEX attributed the allegations leveled against it by PXIL to the business rivalry between the two since IEX had major share in the business transacted on the two power exchanges.

Reply by FMC

7. FMC in its letter-reply dated 7.1.2009 argued on the line similar to that taken by MCX. It added that spot markets and forward markets in goods could be regulated by two different regulators. According to FMC, regulation of forward trading in electricity by it under the 1952 Act did not take away the jurisdiction of this Commission as regards spot trading in electricity.

Hearing

8. We heard Shri Hemant Sahai, Advocate for the applicant and Shri Amit Kapoor, Advocate for MCX. Learned counsel appearing for the parties raised legal, technical and economic issues and cited a number of judgments of the Hon'ble Supreme Court. We proceed to record the submissions made by learned counsel in some detail.

Submissions On Behalf Of Applicant

9. Learned counsel for the applicant submitted that the issues before Commission were not whether or not electricity forward contracts should be introduced in India since it was an accepted proposition that at one stage or another forward contracts in electricity were needed. According to learned counsel, the real issues raised for consideration and decision of this Commission were -

- (a) Legal framework applicable to the process of introduction of forward contracts in electricity,
- (b) Role and level of involvement of this Commission in the process, and
- (c) Opportune time for the purpose.

10. Elaborating upon the first issue of applicability of the legal framework, learned counsel submitted that electricity forward contracts being derivatives of electricity, their introduction was exclusively within the jurisdiction of this Commission because of the fact that electricity was regulated by this Commission. Accordingly, learned counsel argued, market structure of electricity futures, applicable terms and conditions were necessarily to be regulated by this Commission by virtue of power conferred under section 66 of the 2003 Act. According to learned counsel, FMC could be said to have been conferred jurisdiction only with regard to the financial aspects of the forward contracts and all other aspects of forward trading in electricity were within the regulatory jurisdiction of this Commission. Learned counsel urged that any person intending to deal in electricity, irrespective of its form and manner, was within this Commission's

jurisdiction. Learned counsel sought to emphasise that approval by FMC for the forward trading in electricity did not have any efficacy in the eyes of law and such approval could not oust the jurisdiction of this Commission under section 66 of the 2003 Act.

11. Continuing his argument on the first issue of applicability of legal framework, and developing this argument based on the definition of the term 'forward contract' read with the definition of the expression 'ready delivery contract' given in clauses (c) and (i) respectively of section 2 of the 1952 Act, it was submitted by learned counsel that the forward contracts inherently resulted in physical delivery of goods. To further support his contention that physical delivery of the goods was *sine qua non* in case of every forward contract, learned counsel relied upon clause 3 (ii) of the Forward Contracts (Regulation) Amendment Bill, 2006, pending before the Union Parliament, wherein, according to learned counsel, the concept of 'contract for differences' had sought to be introduced for the first time. He argued that till such time the bill was passed by the Union Parliament, physical delivery of goods, electricity in the case before us, could not be avoided. Relying further upon the report of Abhijit Sen Committee appointed by Central Government, copy placed on record by MCX with its Statement of Rebuttal, learned counsel pointed out that even in case of agro products, physical delivery took place eventually. Accordingly, the argument was made that execution of forward contracts in electricity, was to be accompanied by physical delivery which was regulated by this Commission through the process of scheduling under the 2003 Act. In this manner, learned counsel

argued, introduction of forward contracts in electricity was within the province of this Commission.

12. To strengthen his argument that the legal framework under the 2003 Act governed the forward market in electricity, learned counsel took us through para 5.7.1 of the National Electricity Policy (NEP), which *inter alia* provides that development of power market would need to be undertaken by the Appropriate Commission and that the regulations on power exchange were to be notified by the Appropriate Commission. Learned counsel also referred to the guidelines formulated by this Commission in its order dated 6.2.2007 in the *suo motu* Petition No. 155/2006 for setting up of power exchanges in the country.

13. To rule out application of the 1952 Act to forward contracts in electricity, it was submitted by learned counsel that the 2003 Act was a special legislation governing regulation of electricity, and by virtue of section 174 thereof, this Act had overriding effect over all other laws, in relation to electricity.

14. On the second issue of involvement of this Commission on introduction of forward contracts in electricity, it was submitted that by seeking approval of FMC for forward contracts in electricity, MCX had sought to carve out a distinction between the financial product and the underlying commodity, but such distinction was not legally tenable in the Indian context. It was further submitted that in international jurisdictions, forward contracts were purely financial instruments, but, the position was different in India as here the forward contracts had to result in physical delivery.

Learned counsel argued that whenever more than one regulator were involved, the matters had to be decided through mutual consultation between them. In this context learned counsel alluded to the relationship between the Financial Services Authority (the financial market regulator) and OFGEM (the electricity market regulator) in the United Kingdom and similar arrangements in certain other European countries. According to him, FMC, before allowing MCX to use its platform for trading in forward contracts in electricity ought to have consulted this Commission since under the 2003 Act development of power market was entrusted to this Commission and introduction of derivatives in electricity was part and parcel of market development. Learned counsel greatly emphasised on the need for laying down the procedure for introduction of electricity derivatives in India, and while evolving such a process, this Commission should necessarily be involved, since physical delivery of the electricity and electricity derivative products would form part of the various aspects of the electricity market structure under section 66 of the 2003 Act.

15. On the third issue regarding the timing for introduction of forward contracts in electricity, learned counsel submitted that a decision on this could be taken after due deliberation by this Commission on considering merits and demerits of the proposition, and in consultation with the stakeholders. Learned counsel pointed out that there existed huge mass of economic literature to support the applicant's contention that if the derivatives in goods were not regulated properly, it could result in abuse of the financial contracts, which could prove disastrous for the country's economy. He sought to emphasise that current financial crisis, including sub-prime

crisis in the United States were the result of improper use of derivative products. Hence, according to learned counsel, the issue of introduction of derivatives including timings therefor needed to be carefully considered by this Commission.

16. To sum up, the case of the applicant is that this Commission has predominant role in introducing forward trading in electricity.

Submissions On Behalf Of MCX

17. Learned counsel for MCX took a preliminary objection on maintainability of the application. He submitted that the application was liable to rejection for misjoinder of parties as FMC was improperly arrayed as a respondent. It was submitted that FMC as a statutory regulatory body created under the 1952 Act enacted by the Union Parliament had been functioning since early 1950s. Learned counsel submitted that the constitutional validity of different provisions of the 1952 Act, including those relating to the role and functions of FMC had been upheld by the Hon'ble Supreme Court in a series of judgments. As such, he argued, one regulatory body in the process of discharging its functions could not exercise jurisdiction over the functions assigned to another regulatory body. Accordingly, learned counsel argued, as FMC was not amenable to jurisdiction of this Commission it was not to be impleaded as a respondent. Learned counsel urged that exercise of jurisdiction by FMC over electricity forward contracts could not be questioned before this Commission. Therefore, learned counsel for MCX submitted that for these reasons the application was not maintainable and was liable to be dismissed.

18. Learned counsel further submitted that the Union Parliament had clearly defined the boundaries of two regulatory bodies, namely, those created under the 1952 Act and the 2003 Act. Therefore, according to learned counsel, primary issue for deciding on the maintainability of the application was recording of a finding on the question of jurisdiction of two statutory regulatory bodies, this Commission functioning under the 2003 Act and the FMC functioning under the 1952 Act in relation to contracts for physical delivery of electricity and forward contracts in electricity respectively.

19. Learned counsel for MCX referred to the following provisions of the 1952 Act for a decision on maintainability -

- (a) Clause (c) of section 2, defining 'forward contract' as a contract for delivery of goods and which is not a ready delivery contract.
- (b) Clause (i) of section 2, defining 'ready delivery contract' as contract which provides for delivery of goods and the payment of a price thereof, either immediately or within such period not exceeding 11 days after the date of contract.
- (c) Proviso to clause (i) of section 2, which *inter alia* provides that where any such contract is performed wholly or in part by realization of any sum of money being the difference between the contract rate and the settlement rate or clearing rate or the rate of any offsetting contract, then such a contract shall not be deemed to be a ready delivery contract.

20. Learned counsel, by referring to above provisions of the 1952 Act submitted that on a conjoint reading of those provisions, the conclusion that could be drawn was that forward contract was not necessarily a contract for delivery of goods, and that forward contract could be realized or settled, either wholly or in part, by payment of sum of money on account of the difference between the contract rate or the rate of any offsetting contract. According to learned counsel, forward trading in electricity did not mandatorily result in physical delivery of the goods. It was argued that when any goods were notified by the Central Government under section 15 of the 1952 Act (as electricity was done in the present case), the derivatives of such commodity had to be traded through an association recognized by the Central Government under section 6 thereof and registered with FMC under section 14A.

21. It was further submitted that the electricity forward contracts already introduced by MCX specifically provided that where there was physical delivery of electricity, all rules and regulations notified by the Appropriate Commission (referred to in Section 66 of the 2003 Act) would apply.

22. Learned counsel brought to the notice of this Commission the Government of India (Allocation of Business) Rules, 1961 issued by the Central Government in exercise of its powers under clause (3) of Article 77 of the Constitution, whereby the 2003 Act, and all matters relating to the CEA, CERC etc had been allocated to Ministry of Power. On the other hand, all matters relating to regulation and control of forward trading under the 1952 Act and the FMC were allocated to Ministry of Consumer Affairs. On these facts, it was argued that exercise of jurisdiction by this Commission over the forward contracts in electricity would not be in consonance

with the object and spirit behind the Allocation of Business Rules. In this context, learned counsel also relied upon the correspondence exchanged between Ministry of Power and Ministry of Consumer Affairs wherein the latter conveyed to the former that the scope of “trading” as defined in sub-section (72) of section 2 of the 2003 Act and forward contracts under the 1952 Act was clearly separate and distinct and that the 2003 Act did not have any overriding effect. Shri Kapoor, learned counsel, sought to distinguish between the role of this Commission and that of FMC on the lines similar to those conveyed by the latter in its letter dated 7.1.2009, already on record and taken note of at para 7 above. In such a case, it was submitted, it was either the Union Parliament or the Central Government who had the powers to clarify and decide upon the issue, and not this Commission.

23. Learned counsel next contended that the ‘Futures Market’ was included in List I of Schedule VII of the Constitution at Entry 48. On the other hand ‘Electricity’ was included in List III at Entry 38. Learned counsel argued that under clause (1) of Article 246 of the Constitution in case of any overlapping of the entries in the three lists, law enacted by the Union Parliament under any of the entries in List I prevailed. Further, according to learned counsel, while interpreting the two statutes under List I and List III, it was essential to apply the well settled principles of interpretation of statutes, including the principle *of pith and substance*, which provided for resolution of conflict in case of overlap of subject matter between the two entries. Therefore, he stressed that first of all it was necessary to understand the true nature and character of the legislation and the entry within which subject matter of the legislation would fall. The doctrine of pith and substance was then to

be applied so as to ascertain the entry to which a given piece of legislation related. Thereafter, any incidental trenching or encroachment on the field reserved for the other entry was of no consequence. In view of the general principles of interpretation of statutes and the constitutional provisions enshrined in Article 246, learned counsel argued, laws enacted and executive actions taken pursuant to an entry in List III were subject to the laws enacted and executive action taken pursuant to any entry in List I. Thus, so argued learned counsel, enactment of section 66 of the 2003 Act providing for market development had to be seen in the backdrop of the fact that the field of forward contracts of all notified goods (electricity being one of them) was already an exclusive preserve of FMC under the 1952 Act. Learned counsel vehemently argued that the 2003 Act enacted pursuant to entry 38 in List III could not be interpreted as having an overriding effect over the 1952 Act or encroaching the legislative field reserved under List I and occupied since 1952. He submitted that over a period of time, various notified goods came exclusively under the domain of forward contracts governed and regulated by FMC and were traded at the platforms authorized by FMC. In this context, in the opinion of learned counsel, the 2003 Act which was brought into effect on 10.6.2003 under List III could not be interpreted to mean by any manner to interfere with or override the existing field already occupied by the 1952 Act and FMC.

24. It was further submitted that the present application called for this Commission to interpret the constitutional and legislative content of two statutes – one of them being its own parent statute. Learned counsel argued that the questions involved were purely legal and could only be determined by the Writ

court. The constitutional scheme (List I and List III read with Article 246) did not permit this Commission to decide upon its own jurisdiction *qua* the jurisdiction of a statutory body – FMC – under another statute, it was argued. It was submitted that grant of reliefs prayed for would amount to this Commission exercising judicial powers over and above those provided for under section 79 of the 2003 Act, not permitted constitutionally and statutorily and would amount to this Commission reading down a Parliamentary legislation not provided for under any law.

25. Learned counsel further submitted that in the UK, with OFGEM and FSA had separate domains of jurisdiction – the two regulators had adopted a prudent approach whereby the electricity regulator (OFGEM) recognized that in certain circumstances FSA would be the necessary regulatory authority to maintain discipline in the markets by the players. Such discipline helped to boost liquidity in the forwards, and increase liquidity in the wholesale electricity markets (i.e. spot markets) too. Further, with reference to the Abhijit Sen Committee Report it was submitted that the Committee did not find any conclusive evidence that forward trading always caused inflation. Thus, the report had followed the approach of giving forward trading the benefit of doubt on the matter of less benign transactions and to chart out some requirement that would strengthen positive aspects. Further, it was submitted that looking towards the international jurisdictions, the International Organization of Securities Commissions (IOSCO), in its Final Report of March 2009 by the Technical Committee had also observed that forward trading did not cause inflation. Therefore, there were no economic constraints in introduction of forward contracts. Learned counsel strenuously argued that this Commission had the

jurisdiction over the trading of electricity. However, electricity forward market and trading in forward contracts were within the jurisdiction of FMC. The two authorities had distinct statutory powers, functions and duties and one's jurisdiction could not be exercised in a manner so as to curtail/encroach upon the jurisdiction of the other.

26. Lastly, learned counsel argued that the 1952 Act and the 2003 Act were to be read together, in particular by virtue of section 175 of the 2003 Act, according to which, operation of the latter Act was in addition to and not in derogation of any law for the time being in force. It was pointed out that the Hon'ble Supreme Court had already held in a number of cases that in the case of inconsistency between the provisions of two enactments, both regarded as special statutes, the conflict had to be resolved by reference to the purpose and policy underlying the two enactments and the clear intent conveyed by the language of the relevant provisions thereof. Applying this principle to the present case, learned counsel submitted, even though the 2003 Act was later in time, it was a special law exclusively dealing with electricity. Likewise, the 1952 Act was also a special law dealing with the regulation of forward markets. By applying the principles laid down by the Hon'ble Supreme Court, learned counsel sought to impress, trading in forward contracts in respect of all notified goods including electricity, was expressly included within the domain of the 1952 Act and the 2003 Act did not envisage to carve out and arrogate this particular activity to come within its purview. Learned counsel argued that the purpose and intent of the 1952 Act would get defeated, *qua* several other enactments if the 2003 Act is given overriding effect since similar demands could follow from other quarters which would render the 1952 Act to nullity. According to

learned counsel, this interpretation would also not be in consonance with the object and spirit behind the Allocation of Business Rules.

Rejoinder by Applicant

27. In his rejoinder to the oral submissions made by learned counsel for MCX, learned counsel for the applicant clarified that the applicant was not opposed to introduction of forward trading in electricity, but reiterated that it was in fact concerned about the process followed by MCX, in total disregard of this Commission's role and consideration of timing. Learned counsel clarified that the applicant had not claimed any relief against FMC which was impleaded because of it accorded approval for forward contracts in electricity. He reiterated that as per section 15 of the 1952 Act, FMC assumed jurisdiction with regard to financial aspects of forward contracts, but since in forward contracts physical delivery of the goods was involved, the electricity forward contracts ought to be approved by this Commission. Hence, it was submitted that before the electricity forward contracts were to be introduced, it would be mandatory to seek approval of this Commission.

Submissions on behalf of IEX

28. The representative of IEX submitted that it was another power exchange authorized by this Commission, for spot trading in electricity. Therefore, it was neither a necessary nor even a desirable party in the present proceedings and that it was wrongly arrayed.

29. Having heard the parties and after considering the material placed on record, we are of the view that the perceived confusion and cobweb on the regulatory overlap of FMC and this Commission needs to be cleared by explaining the true nature of electricity contracts.

Questions of Law

30. Learned counsel for MCX has raised a number of issues regarding interpretation of the constitutional provisions. We do not consider it necessary to go into all those issues. In our opinion the principles of interpretation of scope of legislative entries in List I and List III pressed into service by learned counsel for MCX have no application while interpreting the statutes enacted by the same legislature, the Union Parliament in the case before us. The principles put forth by learned counsel may be invoked while interpreting scope of enactments passed by two different legislatures, namely the Union Parliament on one hand and the Legislature of the State on the other. Nevertheless, we consider it appropriate to refer to the landmark judgment of the Hon'ble Supreme Court in the case of **I.T.C. Ltd. vs. Agricultural Produce Market Committee (AIR 2002 SC 852)** that reads as follows:-

“97. The principles of interpretation are well settled. There is no doubt that the entries in the lists in the Seventh Schedule do not provide competence or power to legislate on the legislature for which the source of power is contained in Art. 246 of the Constitution. In deciding question of legislative competence, it has to be kept in view that the Constitution is not required to be considered with a narrow or pedantic approach. It is not to be construed as a mere law but as a machinery by which laws are made. The interpretation should be broad and liberal. The entries only demarcate the legislative field of respective legislature and do not confer legislative power as such and if it is found that some of the entries overlap or in conflict with

the other, an attempt to reconcile such entries and bring about a harmonious construction is the duty of the Court. When, however, reconciliation is not possible, as here, then the Court will have to examine the entries in relation to legislative power in the Constitution.”

31. For the purpose of examination of the case before us, it is sufficient for us to say that we clear the area of uncertainty by proceeding on legality, validity and efficacy of the two statutes made by the Union Parliament. In our opinion the following issues arise for our consideration and decision, namely –

- (a) Enforceability of the 1952 Act vis-à-vis the 2003 Act,
- (b) Role of the Commission in development of market in power,
- (c) Regulatory jurisdiction over operation of term-ahead contracts by power exchanges approved by this Commission, and
- (d) Regulatory jurisdiction of this Commission over the contracts operated by MCX and other commodity exchanges approved by FMC.

Enforceability of the 1952 Act vis-à-vis the 2003 Act

32. For deciding the issue, we first of all need to take note of the provisions of the two enactments.

33. FMC is established under section 3 of the 1952 Act to perform functions assigned under section 4 thereof. According to sub-section (1) of section 15 of the 1952 Act, after a notification by the Central Government such goods or class of goods as may be specified in the notification, but subject to the provisions of section 18, the forward contracts for sale or purchase of goods, entered into otherwise than

between members of recognized association or through or with any such member shall be illegal. The requirement of section 15 thus is that in respect of the notified goods, unless falling within the exceptions carved out in section 18, forward contracts for sale and purchase must be entered into by the members of the recognized association or through or with the member of the recognized association, otherwise the forward contract will be illegal. Section 6 of the 1952 Act, provides for recognition of the association by the Central Government on an application to that effect made under section 5 by an association concerned with regulation and control of forward contracts. Section 6 further provides that recognition granted to the association shall specify the goods or classes of goods with respect to which forward contracts may be entered into between members of such association or through or with any such member. Clause (c) of section 2 of the 1952 Act defines 'forward contract' as the contract for delivery of goods and which is not a ready delivery contract. 'Ready delivery contract' as defined in clause (i) of section 2 means a contract where delivery of goods and payment of price therefor is made either immediately or within a period not exceeding eleven days after the date of the contract. However, as provided in the proviso to clause (i), if the contract is performed by payment of money difference, it would not be a ready delivery contract. Section 18 of the 1952 Act contains special provisions respecting certain kinds of forward contracts. Sub-section (1) of section 18 lays down that provisions of Chapters III and IV (section 15 included) do not apply to non-transferable specific delivery contracts for the sale or purchase of any goods. Sub-section (2) of section 18 empowers the Central Government to exclude the goods from the application of provisions of the notification issued under section 15 transferable

specific delivery contracts for the sale or purchase of the said goods or class of goods either generally, or in particular in any area or part thereof. Sub-section (3) of section 18 further authorises the Central Government to extend application of section 15 and other sections to non-transferable specific delivery contracts if in its opinion, in the interest of the trade or in the public interest it is expedient to regulate and control non-transferable specific delivery contracts in any area.

34. The expressions “transferable specific delivery contract” and “non-transferable specific delivery contract” are defined in relation to the expression “specific delivery contract” which means a forward contract providing for actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned, clause (m) of Section 2. Non-transferable specific delivery contract is a specific delivery contract, under which the rights or liabilities are not transferable, clause (f) of Section 2. It, therefore, follows that transferable specific delivery contract is a forward contract in which rights and liabilities are transferable, clause (n) of section 2. Thus, the 1952 Act primarily governs the forward contracts in which rights liabilities are transferable, unless exempted by the Central Government under a notification under sub-section (2) of section 18 of the 1952 Act.

35. Next we take note of relevant provisions of the 2003 Act. This Commission is established under section 76 of the 2003 Act to perform functions assigned thereunder. This Commission, under section 66 of the 2003 Act is mandated to endeavour to promote development of market (including trading) in power, in such a

manner as may be `specified' and in doing so, this Commission is guided by the National Electricity Policy. The term `specified' has been defined as 'specified by regulations made by the appropriate Commission'. According to section 174, the 2003 Act has overriding effect over all other statutes, except the Consumer Protection Act, the Atomic Energy Act and the Railways Act. Section 175 lays down that the provisions of the 2003 Act are in addition to and not in derogation of any other law for the time being in force.

36. In the context of the issue framed, the first question, therefore, involves consideration of interplay of sections 174 and 175 of the 2003 Act. This matter has been considered by the Hon'ble Supreme Court in a recent judgment reported as **Gujarat Urja Vikas Nigam Ltd., Vs. Essar Power Ltd. [(2008) 4 SCC 755]**. The Hon'ble Supreme Court held that-

“57. in our opinion the principle laid down in Section 174 of the Electricity Act, 2003 is the principal or primary whereas the principle laid down in Section 175 is the accessory or subordinate to the principal. Hence Section 174 will prevail over Section 175 in matters where there is any conflict (but no further).

58. in our opinion Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by utilizing the samanjasya, badha and gunapradhana principles of Mimansa. This can be done by holding that when there is any express or implied conflict between the provisions of the Electricity Act, 2003 and any other Act then the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts are to be read together.”

37. From the above observations of the Hon'ble Supreme Court, it follows that by virtue of section 174, the 2003 Act will have overriding effect in case of conflict with other statutes and not otherwise. In other words, in the absence of conflict with

other statutes, the provisions of other statutes also apply by virtue of section 175. Thus, it needs to be seen whether the provisions of the 1952 Act are inconsistent with those of the 2003 Act so as to give the overriding effect to the latter.

38. The test of inconsistency between two statutory enactments was prescribed as early as in 1891 when Queen's Bench in **Kunter v. Phillips [(1891) 2 QB 267]** held that: "It is only when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one then only the two cannot stand together and the earlier stands abrogated by the later." A similar view has been expressed by the Hon'ble Supreme Court in **Maruti Udyog Ltd. v. Ram Lal, [(2005) 2 SCC 638]** when it observed that

"41. The said Act contains a non obstante clause. It is well settled that when both statutes containing non obstante clauses are special statutes, an endeavour should be made to give effect to both of them. In case of conflict, the later shall prevail."

39. In the above context it is to be noted that as observed by the Hon'ble Supreme Court in **Engg. Kamgar Union v. Electro Steels Castings Ltd. [(2004) 6 SCC 36]**, "*.....if two Acts produce two different legal results, a conflict will arise.*"

40. The above principle was elaborated by the Hon'ble Supreme Court in **M. Karunanidhi v. Union of India [(1979) 3 SCC 431]** wherein the tests of inconsistency or repugnancy were laid down in the following words, namely -

"35.1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.”

41. A view similar to that expressed by the Hon’ble Supreme Court in *M. Karunanidhi* (supra) was earlier expressed by Andhra Pradesh High Court in **M. Agaiah Vs. Mohd. Abdul Kereem (AIR 1961 AP 201)** when the High Court laid down that

“28. It is a well settled canon of construction of statutes that the provisions of a statute should be so read as to harmonise one with the other and not to read a repugnancy into them. Even if two enactments appear to be inconsistent, it must be seen that one is a qualification of the other.”

42. In **The J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Ors. (AIR 1961 SC 1170)** the Hon’ble Supreme Court held the general provision of one statute is subservient to the special provision of another statute as noticed from the following extracts of the judgment, namely-

“11. There will be complete harmony however if we hold instead that clause 5(a) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of clause 23. We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislature instrument. This suggestion does not find support in either principle or authority. The rule that general

provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect.

12. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that clause 5(a) has no application in a case where the special provisions of clause 23 are applicable.”

43. In **Union of India Vs Satyabati and Ors. (AIR 1961 Pat 130)** the Court observed that a special statute does not derogate from another special statute without express words of abrogation and held that the special provisions made under the Workmen's Compensation Act did not abrogate the rights arising under the Fatal Accidents Act, further deciding that a workman who makes a claim under the Workmen's Compensation Act has an alternative remedy in the Civil Court under the Fatal Accidents Act.

44. An example of resolving inconsistency is found in the interpretation of section 6 of the Madhya Pradesh Motor Vehicles Taxation Act, 1947 by the Hon'ble Supreme Court in **Cantonment Board, Mhow Vs Madhya Pradesh State Road Transport Corporation (AIR 1997 SC 2013)**. Section 6 of the Madhya Pradesh Motor Vehicles Taxation Act prohibits a local authority to impose "a tax toll or licence fee in respect of a motor vehicle". Sub-section (1) of section 3 of the Taxation Act authorises imposition of a tax on "motor vehicles used or kept for use" at the specified rates. Clause (iii) of sub-section (1) of section 127 of the Madhya Pradesh Municipalities Act, 1961 authorises imposition of tax on "vehicles entering

the limits of the municipality". On a comparison of the two Acts, the Hon'ble Supreme Court held that on harmonious construction of the two Acts the prohibition in section 6 of the Taxation Act related to tax on vehicles used or kept for use which could be levied under sub-section (1) of section 3 and not the entry tax which could be imposed by a municipality under clause (iii) of sub-section (1) of section 127 of the Municipalities Act. In this manner, the Hon'ble Supreme Court resolved the inconsistency appearing on the face of the two statutes.

45. From the above judgments, the principles that emerge for deciding the issue framed are –

(a) Section 174 of the 2003 Act may be invoked in case of inconsistency *qua* the 1952 Act and in case there is no inconsistency between the two statutes, section 175 of the 2003 Act will apply.

(b) In the first instance every effort needs to be made to give effect to both the statutes by harmonizing them and they can be said to be inconsistent if they contain repugnant and irreconcilable provisions.

(c) There will not be any question of repugnancy or inconsistency in case the two enactments even though occupying the same field can be operated without any collision.

(d) In cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision.

(e) In case of conflict between the two special statutes, the later in time will prevail.

46. The 1952 Act has been enacted by the Union Parliament to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and other connected matters. The object of the 2003 Act is to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interests of consumers and supply of electricity to all areas, etc. Considering the aims and objects of the two statutes, both are special enactments as they cover the special fields. Therefore, unless it is impossible to reconcile the two statutes in a manner that both can coexist harmoniously so as to give effect to both of them and neither of the two can be considered to be redundant or otiose, the 2003 Act shall prevail.

47. As noted above, sub-section (1) of section 15 of the 1952 Act declares that every forward contract for sale or purchase of any goods specified in the notification (electricity in the present case) are illegal unless such contract is entered into between members of a recognized association or through or with such member. Section 6 of the 1952 Act provides for recognition of the associations by the Central Government. Section 14A of the 1952 Act further lays down that no association concerned with the regulation and control of business relating to forward contracts can carry on such business except under, and in accordance with, the conditions of a certificate of registration granted under the 1952 Act by FMC. These provisions and also the other provisions of the 1952 Act cover the specific areas which are not

covered under any of the provisions of the 2003 Act. When seen in the light of the various provisions of the two enactments, there does not appear to be any overlapping or inconsistency between them. The two statutes can operate independently in the fields assigned to them without any possibility of collision and without any invasion into the specific areas covered by the other. For this reason, both the statutes have to be given effect by harmoniously reading together the provisions of the 1952 Act and the 2003 Act. Such a conclusion will be in consonance with the law laid down by the Hon'ble Supreme Court at para 58 of its judgment in Gujarat Urja Vikas Nigam Ltd (supra). In view of this conclusion, approval accorded by FMC to MCX for trading of daily electricity contracts, weekly electricity contracts and monthly electricity contracts cannot be faulted and we do not propose to interfere in the matter.

Role of the Commission in Development of Market

48. The Commission, under section 66 of the 2003 Act is mandated to promote development of market (including trading) in power, in such a manner as may be 'specified'. The term 'specified' has been defined in the 2003 Act as 'specified by regulations made by the appropriate Commission under the Act'. Clause (y) of sub-section (2) of section 178 of the 2003 Act specifically provides for making of regulations for the development of market in power, including trading under section 66. Thus, this Commission is assigned a statutory responsibility to promote development of market in power through the regulations. The responsibility assigned to the Commission under section 66 of the 2003 Act does not in any manner conflict with the provisions of the 1952 Act. Therefore, the regulations when framed by this Commission under section 66 of the 2003 Act shall govern all

concerned, including the associations permitted by and registered with FMC for undertaking forward contracts for sale or purchase of electricity. To conclude the finding on the issue, this Commission has jurisdiction to regulate development of market in electricity in all its forms, by notifying the statutory regulations under section 66 of the 2003 Act, and in their absence through the guidelines, and these regulations or guidelines, as the case may be, shall bind everyone. To reiterate, this Commission has exclusive role in promotion of development of market in power through the regulatory oversight mandated under section 66 of the 2003 Act. In this manner, this Commission will govern the market development (including trading) in accordance with the regulations specified by this Commission, and till such time the regulations are specified, through the guidelines.

Regulatory jurisdiction over operation of term-ahead contracts by power exchanges approved by this Commission

49. In order to categorise a contract as a ready delivery contract as evident from the definition given in clause (i) of section 2 of the 1952 Act, delivery as well as price of goods should be within a period of 11 days after the date of entering into the contract. It means that if either delivery and/or price are/is delayed beyond 11 days, the contract is no longer a ready delivery contract, but will be a forward contract. Further, in view of proviso to clause (i) of section 2, a contract which is discharged either by tendering documents of title to the goods covered by the contract, or by payment of money difference, or by any other means whereby actual tendering of the goods covered by the contract or the payment of the full price therefor is dispensed with, shall be a forward contract, notwithstanding the duration of the contract. This means that even in term-ahead contracts where period of

contract is up to 11 days, the contract will be a forward contract when any of the conditions prescribed under proviso to clause (i) of section 2 of the 1952 Act applies. Thus, a contract of duration of less than 11 days, including a daily contract, may also be a forward contract in cases where either physical delivery of goods does not take place within the said period of 11 days (for example when a daily contract is settled by payment of money difference or tendering of title documents) or price is not paid in the said period of 11 days.

50. IEX (Respondent No. 2) and PXIL (the applicant) are the two power exchanges presently functioning with the approval of this Commission. The various types of contracts under which electricity can be traded through these power exchanges are day-ahead contracts, week-ahead contracts, fortnight-ahead contracts and month-ahead contracts, etc, though presently the power exchanges are permitted only day-ahead contracts.

51. As per the guidelines of this Commission, the contracts traded on power exchanges approved by this Commission cannot provide for transfer of rights and liabilities to any person other than the one who has entered into the contract. This Commission, while granting approval to the existing power exchanges, specifically directed that there shall be no fictional trading at the power exchanges and all trades cleared by the power exchanges shall be compulsorily scheduled. Thus, all contracts for sale and purchase of electricity through power exchanges are necessarily to be scheduled and thus delivery has been ensured. On matching of

sale and purchase bids, delivery of electricity to the grid-connected entity through the process of scheduling takes place.

52. In case of the day-ahead contracts, electricity is sold and purchased for the day next to the day on which contract is entered into. The payment of price of electricity purchased is simultaneous with the delivery. Thus, in day-ahead contracts the delivery and the payment of price take place on same day basis and within a period not exceeding eleven days after the date of the contract. Therefore, day-ahead contract is outside the meaning and ambit of 'forward contract' as defined under clause (c) of section 2 of the 1952 Act as they are the 'ready delivery contracts'. For parity of reasoning, 'week-ahead contract' shall also be outside the scope of 'forward contract'.

53. This remains to be examined whether the fortnight-ahead and month-ahead contracts to be traded at power exchanges are 'forward contracts' because the delivery and price are settled beyond 11 days. In these cases also, as explained at para 51 above, physical delivery and payment of price already settled between the parties through power exchanges are to take place simultaneously. In their case, parties are already identified, power is compulsorily scheduled to these identified parties at prices settled before hand. Therefore, the fortnight-ahead and month-ahead contracts are non-transferable specific delivery contracts as defined in clause (f) of section 2 of the 1952 Act. By virtue of sub-section (1) of section 18 of the 1952 Act, they are exempt from the notification issued by Department of Consumer Affairs on 9.1.2006. Therefore, the fortnight-ahead and month-ahead contracts that may be permitted by this Commission in future too shall not be governed by the

1952 Act. Accordingly, the power exchanges operating with the approval of this Commission under its guidelines and permitted to use their platform for trading various kinds of contracts are not mandated to approach FMC for approval under the 1952 Act for their operations, as FMC does not have any regulatory jurisdiction over such contracts of the power exchanges. As a corollary of the above, all contracts in electricity which are either ready delivery contracts or non-transferable specific delivery contracts cannot be undertaken by any person, including MCX and other commodity exchanges approved by FMC for forward contracts in electricity, without approval and complying with the prescriptions and regulations of this Commission.

Regulatory jurisdiction of this Commission over MCX and other Commodity Exchanges permitted by FMC

54. MCX has been permitted by FMC to trade daily electricity contracts, weekly electricity contracts and monthly electricity contracts. MCX has argued that generally for the goods traded on the exchange, physical delivery does not take place and such contracts are invariably the forward contracts. MCX has further stated that, as also noted at para 21 above, in all contracts where physical delivery of goods takes place, these deliveries will be subject to regulations and requirements of the physical market in electricity. Thus, MCX envisages possibility of physical delivery of electricity and payment of price therefor within 11 days in cases of daily electricity contracts and weekly electricity contracts. In that event, these contracts will not be forward contracts, but will be ready delivery contracts. Such contracts will be within the exclusive jurisdiction of this Commission. This fact has been acknowledged by FMC in its letter dated 7.1.2009, wherein it has been

stated that this Commission will continue to have jurisdiction over what has been termed as 'spot market'. This argument of FMC has also been adopted by MCX. Therefore, we make it clear that MCX cannot launch such products without the prior approval of this Commission in accordance with this Commission's guidelines or the statutory regulations.

55. The next question in this regard is the regulatory oversight of this Commission in case of monthly electricity contracts permitted by FMC to be traded at MCX platform. MCX has contended that these are transferable specific delivery contracts as defined under the 1952 Act. We have no doubt that these contracts will be regulated by FMC to the extent the provisions contained in the 1952 Act, govern such contracts. In our view, however, regulation of transferable specific delivery contracts in electricity within the category of forward contracts are not be left to the exclusive jurisdiction of FMC. Undoubtedly, the policies affecting the use of forward contracts, futures, and derivatives should be developed by this Commission while discharging the function of promoting the development of market on aspects not covered under the 1952 Act. However, FMC is really concerned with the smooth functioning of the forward market and elimination of deceptive practices. Yet, this Commission, while promoting development of market in power, has authority and jurisdiction to scrutinize the activities of firms to ensure that they are not acting in a manner to jeopardize the consumers' interest. FMC, by virtue of the functions assigned to it under the 1952 Act may not be able to focus its regulatory oversight on protecting the interest of electricity consumers and the integrity of the electricity sector. These functions are per force to be undertaken by this Commission, the necessary infrastructure and technical expertise required for the twin purposes are

available with the Commission. This Commission has to protect consumers' interest from the indirect consequences of potentially speculative derivative activities undertaken by electricity traders, generators, and other retail service providers in the market. It is a duty enjoined upon this Commission by the 2003 Act to ensure that these transactions are in the best interest of consumers. This Commission is also required under the 2003 Act to promote competition, and regulation and development of markets would certainly be step-in-aid towards promotion of competition. As the electricity market becomes more competitive, cost and demand fluctuations will increasingly be translated into price fluctuations. This should make both generation and consumption more efficient. Customers will gain access to cheaper off-peak power, and will receive more accurate price signals during expensive, on-peak power periods. This should result in a flattening of the load-duration curve and an increase in load factors, which will, in turn, reduce reserve margins and the average cost of power. In considering the development of policies in this area, it will be necessary for this Commission to understand and regulate the risks associated with forward trading in electricity, common hedging strategies, speculative and hedging activities, etc. This Commission will have an interest in ensuring that transactions on the exchanges are conducted in a free and fair manner so that consumers are not subjected to potentially anti-competitive behaviour. Therefore, the commodity exchanges dealing with transferable or non-transferable contracts in electricity shall be subject to the prescriptions and regulations of this Commission. The regulation of the commodity exchanges under the statutory regime of section 66 of the 2003 Act would be in addition to exercise of regulatory jurisdiction and oversight under the 1952 Act. And this is what section

175 of the 2003 Act provides for. Any commodity exchange dealing with such contracts is, therefore, required to comply with the orders and guidelines of the Commission, in particular the orders dated 18.1.2007, and 6.2.2007 in Petition No. 155/2006, till such time the appropriate regulations are framed under section 66 of the 2003 Act, since these orders/guidelines do not impinge on the legal provisions of the 1952 Act.

56. Accordingly, we hold that MCX and any other commodity exchange using their platform for trading of forward contracts in electricity, whether transferable or non-transferable, shall be subject to the orders, guidelines and regulations of this Commission. It, therefore follows that such contracts cannot be undertaken without complying with the prescriptions and regulations of this Commission.

Conclusion

57. To sum up, we direct that

(a) FMC exercises jurisdiction over the forward contracts in accordance with the provisions of the 1952 Act as they cannot be said to be inconsistent with those of the 2003 Act and the two statutes operate in independent fields.

(b) Regulatory oversight to promote development of market in power is vested in this Commission as mandated under Section 66 of the 2003 Act and, therefore, the orders, guidelines issued by this Commission and the regulations framed shall be binding on all concerned.

(c) Power exchanges approved by this Commission need not approach FMC for any approval for the reasons that the contracts traded or to be traded outside the scope of section 15 of the 1952 Act.

(d) MCX and other commodity exchanges permitted trading of forward contracts by FMC at their platform shall be governed by the orders, guidelines, regulations and other prescriptions of this Commission since they are not inconsistent with the provisions of the 1952 Act.

58. The present application stands disposed of in above terms.

IA No. 7/2009

59. This interlocutory application was filed by MCX with a prayer to first decide on the question of jurisdiction of this Commission to adjudicate upon the issues raised in the main application filed by PXIL. For the view we have taken in the main application, this interlocutory application has become infructuous and stands disposed of accordingly.

Sd/-
[V.S. VERMA]
MEMBER

Sd/-
[R. KRISHNAMOORTHY]
MEMBER

Sd/-
[DR. PRAMOD DEO]
CHAIRPERSON

New Delhi, dated 28th April, 2009