

# CENTRAL ELECTRICITY REGULATORY COMMISSION

## Record of Proceedings

### PETITION NO.115/2009

Sub: Petition seeking re-consideration and/or review and/or modification of certain observation and findings in the order dated 28.4.2009 in Petition No. 159/2008.

.Date of hearing : 15.9.2009

Coram : Dr. Pramod Deo, Chairperson  
Shri R.Krishnamoorthy, Member  
Shri S.Jayaraman, Member  
Shri V.S.Verma, Member

Petitioner : Multi Commodity Exchange of India Ltd., Mumbai

Respondents : 1. Power Exchange of India Limited, Mumbai  
2. Indian Energy Exchange Ltd., New Delhi  
3. Forward Markets Commission, Mumbai

Parties present : Shri Rajeev Dutta, Senior Advocate, MCX  
Shri Vishwanathan Iyer, MCX  
Dr. Raghavendra Prasad, MCX  
Shri Aashish Beranrd, Advocate, PXIL  
Shri Dev Dutt Kamat, Advocate, PXIL

At the outset, learned senior counsel for the petitioner submitted that the review petition had been filed on the ground of errors apparent in the face of the record of the Commission's order dated 28.4.2009. Learned senior counsel submitted that the petitioner had filed an I.A. No. 7/2009 wherein the issue of jurisdiction of the Commission was raised. After the proceedings held on 26.2.2009, learned senior counsel pointed out, the Commission had re-notified the matter on 12.3.2009, for hearing on the jurisdictional issue as noticed from the record of proceedings. It was submitted that having notified the matter specifically for hearing the arguments on the jurisdictional issue, the Commission decided the petition on merits, which was in violation of the principles of natural justice. In this regard learned senior counsel also placed strong reliance on the Hon'ble Supreme Court's judgment in **SEBI v Mangalore Stock Exchange**, reported at **(2005) 10 SCC 274**, wherein the Hon'ble Supreme Court held that "once the Tribunal has noted that the appeal had been challenged as not being maintainable, it should dispose of the issue of maintainability first before passing any further order. In that view of the matter, the impugned order dated 20.1.2005 is stayed until the Tribunal disposes of the issue of maintainability." Hence, it was submitted, in light of the law declared by the Hon'ble Supreme Court, the Commission ought to have restricted to deciding the preliminary issue of

jurisdiction and ought not to have decided the petition on merits.

2. Learned senior counsel further submitted that there was another error apparent on the face of the record of the order dated 28.4.2009, inasmuch as on the one hand Commission concluded that both FMC as well as the Commission operated in two separate fields governed by two separate statutes, namely the Electricity Act, 2003 (the Act) and Forward Contracts (Regulation) Act, 1952 (at paras 46 and 47 of the order), on the other hand, the Commission erroneously concluded that it had jurisdiction over the daily and weekly contracts approved by FMC and being traded at the petitioner's platform.

3. Learned senior counsel also submitted that Commission (*in paras 49 to 53 of the order*) had erroneously come to the conclusion that the contracts for sale and purchase of electricity would necessarily result in delivery. Further, the conclusions that the day-ahead and week-ahead contracts, on the ground that the payment of price of electricity purchased was simultaneous with delivery, were necessarily out of the scope of 'forward contracts' were also erroneous. Similarly, there were contradictions in the findings of the Commission when it held that the fortnight-ahead contracts and month-ahead contracts, as they became ready delivery contracts or non-transferable specific delivery contracts; could not be traded on MCX, without seeking approval from Commission.

4. Learned senior counsel for the petitioner submitted that in terms of Section 66 of the Act, Commission had to endeavor to promote development in power market, including trading. However, the 'forward trading' with which the petitioner was concerned, did not involve physical trading but they were the financial derivatives. It was further submitted that the Commission had not appreciated that the petitioner was not a power exchange. The petitioner was a 'commodity exchange' having been notified and authorized by FMC. The petitioner permitted its forum for trading in futures contracts in a number of goods, including electricity, learned senior counsel stated.

5. It was further submitted that the futures contracts which were being traded at the petitioner's platform did not envisage physical delivery of electricity. Therefore, to say that the weekly and monthly contracts would necessarily involve physical delivery was incorrect. In this regard, learned senior counsel brought to the notice of the Commission, the table incorporated below para 19 in the review petition to explain the difference in the working of the contracts being traded at the petitioner's platform; and the spot contracts being traded on power exchanges. It was reiterated that in the petitioner's contracts, there was negligible physical delivery of contracts, since the said contracts did not reach

the stage of physical delivery. However, it was submitted that in case the contracts reached the stage of physical delivery, the Commission would have the jurisdiction to regulate such contracts, it was submitted.

6. Learned counsel for the first respondent sought to argue that there was no 'error apparent on the face of the record' and hence, no ground in law had arisen for review of the order dated 28.4.2009. Learned counsel cited certain judgments of the Hon`ble Supreme Court to support his claim that it was not a fit case for review.

7. Learned counsel for the first respondent further submitted that the order dated 28.4.2009 was only in pursuance of and a follow up to the previous orders dated 18.1.2007 and 6.2.2007 whereby the Commission had laid down guidelines for regulation of 'power exchanges'. The said order dated 28.4.2009 was merely a reiteration of the earlier orders. Learned Counsel pointed out that the earlier orders, made after detailed consultative process had acquired finality as they were neither challenged by the petitioner or any other stakeholder.

8. Learned counsel for the first respondent submitted that the Act was a self contained code with regard to electricity and in terms of the provisions of the Act, the Commission had the jurisdiction over all aspects of electricity be it trading of ready delivery contracts or non-transferable specific delivery contracts.

9. It was submitted that in terms of the order dated 28.4.2009, approval granted by FMC was not interfered with though the first respondent had prayed for its quashing. Thus, learned counsel submitted, it was the first respondent who was really aggrieved by the order. He submitted that it was merely observed that Commission would have jurisdiction, in addition to the FMC on certain kinds of contracts which were either the ready delivery contract or no-transferable specific delivery contracts. However, as per the Commission's findings transferable specific delivery contracts in electricity would be regulated by FMC, learned counsel had argued.

10. Learned counsel for the first respondent submitted that the petitioner had availed of full opportunity to argue the matter on jurisdictional issue as well as on merits and for this learned counsel brought to the Commission's notice the written submissions filed by the petitioner.

11. In oral rejoinder, learned senior counsel for the petitioner once again

submitted that the Petition No. 159/2008 was scheduled to be heard on the issue of jurisdiction only. However, while dealing with the issue, the Commission had decided the petition on merits. It was reiterated that the error apparent on the face of the record was that while holding that both being specialized statutes operational in two separate fields/domains, the Commission's conclusions in the order dated 28.4.2009, resulted in extension of its domain beyond the physical electricity contracts and the Commission had delved into the financial derivatives market; thereby making FMC subservient to the Commission. FMC has complete jurisdiction over all trading involving financial derivatives, including futures contracts in electricity. He reiterated that the Commission had jurisdiction over the physical aspects of electricity, including generation, transmission, distribution and trading (which means actual delivery) of electricity. It is a basic characteristic of the derivatives being traded at the petitioner's platforms that, they did not necessarily culminate into physical delivery. Admittedly, if and when, they culminated into actual physical delivery of electricity at that stage, they would come within Commission's scope of the regulatory oversight.

12. In light of the above, learned senior counsel pleaded for review of the order dated 28.4.2009, especially in terms of the observations made at para 49 to para 53 of the said order.

13. Learned counsel for the first respondent requested for one week's time to file its written submissions. Request was allowed. Similarly, the petitioner was also permitted to file its written submissions within one week. The copies of the written submissions filed shall be exchanged between the parties.

14. Subject to para 13 above, the Commission reserved its order.

Sd/-  
(K.S.Dhingra)  
Chief (Law)