

CENTRAL ELECTRICITY REGULATORY COMMISSION

Record of Proceedings

PETITION NO. 117/2009 along with I.A.Nos. 24/2009 and 47/2009

Sub: Petition under Section 66 read with regulation 24 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

.Date of hearing : 14.10.2009

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

Petitioner : Tata Power Trading Company Limited, Mumbai

Respondents : 1. Indian Energy Exchange Ltd., New Delhi
2. Power Exchange India Limited, Mumbai

Parties present : Shri Sitesh Mukherjee, Advocate for the petitioner
Shri Vishal Anand, Advocate for the petitioner
Shri M.G.Ramchandran, Advocate, IEX
Shri R.K.Mediratta, IEXL
Shri Ashish Bernard, Advocate, PXIL
Shri P.K.Sarkar, PXIL
Shri Rajiv Yadav, Advocate, GEL

At the outset, learned counsel for the first respondent pointed out that the copy of I.A. No. 47/2009 filed by M/s. Global Energy Private Limited (GEL) was not served on them. In response, learned counsel for the GEL submitted that they were under the impression that copies were to be sent only after issue of notice; besides, they were not aware that the main petition was listed for final hearing. The Commission directed GEL to serve copy of the IA on the parties in the main petition. Learned counsel for GEL was further informed that unless the issues raised in the IA were similar to those in the main petition, a separate petition would require to be filed by it.

2. The learned counsel for the petitioner referred to the various definitions and clauses from bye-laws, rules and business rules of the power exchanges

approved by the Commission with respect to trade, contract, buyer, seller, member, delivery, clearing and settlement, defaults and penalties in support of his submission that the brokers (members of the exchange which are not the trading licensee or grid connected entities) were carrying on activities akin to those of trading licensees. Therefore, they were required to be licensed for carrying out such activities. Learned counsel pointed out that as per the provisions of the bye-laws, application forms for admission to trading of the power exchange the broker was liable for delivery and payment and therefore, was not merely a facilitator as contended by the respondents. Learned counsel further pointed out the provisions in the bye-laws of the respondents which mentioned that in case of default the power exchange shall proceed against the member and not his clients and the undertaking by the members agreeing for attaching his personal assets. According to him these clauses established that the member was finally responsible for the trade and was the owner of electricity. In this regard learned counsel also placed strong reliance on the Hon'ble Patna High Court judgment in **Merchant and Co. V Pura Golkdih Coal Co. and others [AIR 1960 Patna 364]**.

3. Learned counsel for the petitioner further submitted that a broker was performing the same functions as a trading licensee but was not subjected to the conditions in the regulations of the Commission such as credit worthiness, net-worth criteria, trading margin, etc. As regards the contention that there was no risk of non-delivery, learned counsel for the petitioner contended that there is no risk because the non-delivery was settled through UI mechanism. If there were provisions for liquidated damages, the broker would be liable for it. He added that it might be worthwhile to examine what percentage of the contract were settled through actual delivery and how much through UI mechanism.

4. For the above mentioned reasons, he urged that participation, in the power exchange, by those members of the power exchange who are not licenced to trade is illegal and prayed for intervention by the Commission to prevent them from carrying on the trade through power exchange.

5. In response to the above, learned counsel for the first respondent submitted that the petitioner had proceeded on a fundamentally wrong premise that such persons who facilitate transaction in electricity were necessarily engaged in the business of trading within the meaning of sub-section (71) of Section 2 of the Electricity Act, 2003 (the Act). He contended that the professional members did not undertake the purchase or sale of electricity in their name, but were operating on behalf of their clients. According to him, such members did not acquire ownership of electricity at any stage. He submitted that the sale and purchase of electricity were always by the grid connected entities or trading licensees who were authorized to undertake such purchase and resale of electricity. According to him, merely by assuming certain financial liabilities, an agent does not acquire the position of the principal. Relying on sections 230 and 233 of the Contracts Act, the counsel for the first respondent claimed that the Patna High Court judgment cited by the petitioner, in fact, supported the case of the respondents because nowhere in the judgment, it was stated that the agent had acquired the place of the principal. He said that there could also be a contract to the effect that the agent alone is responsible for payment. According to him, the contract of undertaking, contract of guarantee, contract of bailment, etc. are possible and the same have not been precluded by the Electricity Act, 2003 (the Act), nor by any of the regulations of the Commission.

6. Learned counsel for the first respondent further pointed out that apprehending that some of the provisions of its bye-laws could be interpreted to enable the professional member other than a trading licensee to undertake trading, the respondent, in August 2009, had issued a clarification by inserting the following clause in the rules and bye-laws of the exchange.

“ Notwithstanding anything to the contrary contained in the guidelines, bye-laws, rules, business rules or any other documents of the Exchange dealing with the rights, privileges, duties and functions of a professional member as dealt in the above, it is hereby clarified that a professional member, other than a trader, shall not carry out the activities of a trader as defined in the Electricity Act, 2003.”

7. Learned counsel for the first respondent submitted that the bye-laws of the respondent were not in derogation of the regulations of the Commission but they specified certain additional conditions for the orderly conduct of the power exchange, which was a common practice in any professional body. According to him the power exchange was at liberty to define “trading” in wider terms, but the activities therein are to be tested with reference to the definition of “trading” in the Act.

8. Learned counsel for the first respondent placed on record an affidavit from the first respondent annexing papers relating to the two kinds of the clients of the petitioner who has been operating in the respondent exchange as a professional member. He invited attention to the fact that client registration form clearly proved for the distinction namely that the trader client was required to submit a copy of the Agreement with the entity.

9. In response to the argument of the first respondent, learned counsel for the petitioner stated that the amendment to the bye-law was not a solution to the problem raised by the petitioner. According to him, prior to the amendment the rules enabled brokers to perform an activity by-passing the trading licensees. He further submitted that the broker was essentially performing the functions of a trading licensee without subjecting itself to stringent regulations governing the trading licensee with respect to credit worthiness, net-worth requirement, reporting requirement and cap on margins.

10. Learned counsel for the second respondent submitted that the designated counsel could not appear due to a personal difficulty and requested for a short hearing. He also requested permission for filing a written submission within a week. The second respondent was permitted to file its written submission within one week.

11. Learned counsel for the first respondent requested for one week’s time to file its written submissions. Request was allowed. 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.

12. The case shall be re-notified for submissions by the second respondent with notice to all the parties.

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