CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 114/2011 (*Suo Motu*)

with I.A No. 22/2011

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

Date of hearing: 09.06.2011
Date of Order :11.10.2012

In the matter of:

Non-compliance of the provisions of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010

And in the matter of:

National Energy Trading and Services Ltd., New Delhi **Respondent**

Present:
1. Shri Sitesh Mukherjee, Advocate, NETS
2. Shri Sakya Singha Chaudhuri, Advocate, NETS
3. Shri M.N. Ravishankar, NETS
4. Shri Rajendran, NETS
5. Shri Narendran, NETS
6. Shri Hemant Gupta, LANCO
7. Shri Prabhat, LANCO

ORDER

It came to the notice of this Commission that the respondent, an inter-State trading licensee, during 2010 purchased electricity from Madhya Pradesh Power Trading Company Ltd (MPPTCL) and certain Captive Power Plants in Chhattisgarh State for sale to BSES Rajdhani Power Ltd (BRPL). Further scrutiny of the details of trading transactions by the respondent revealed that in July 2010 it purchased electricity @ ₹5.50/kWh from MPPTCL and sold it @ ₹6.14/kWh, and in August 2010 electricity was purchased from MPPTCL @ ₹5.00/kWh and sold @ ₹6.14/kWh. *Prima*

facie it appeared that in these trading transactions, the respondent charged trading margin of ₹0.64/kWh and ₹1.14 kWh during July and August 2010 respectively, in excess of the ceiling rates fixed under Regulation 4 of the Central Electricity Regulatory Commission (Trading Margin) Regulations, 2010 (the trading margin regulations). Therefore, by order dated 20.4.2011 the respondent was issued a show cause notice under Section 142 of the Electricity Act, 2003 (the Act) and was directed to explain as to why action for non-compliance with Regulation 4 ibid be not taken against it. The respondent was further directed to resubmit the complete details of trading transactions for the months of July and August, 2010.

2. On receipt of the show cause notice, the respondent filed an Interlocutory Application (I.A No. 13/2011) for recall and review of the order dated 20.4.2011 with a further prayer that this Commission should hold that there was no contravention of the trading margin regulations. The respondent furnished the details of the trading transactions undertaken by it during July and August 2010. At the hearing, learned counsel for the respondent submitted that the interlocutory application may be treated as the respondent's reply to the show cause and considered accordingly. Accordingly, the Interlocutory application was taken on record as the respondent's reply to the show cause notice.

3. The respondent in its reply has stated that BSES Rajdhani Power Ltd (BRPL) had agreed to purchase up to 100 MW of off-peak power at the rate of ₹6.17/kWh from April to September 2010 and another 150 MW power round-the-clock from July to September 2010 at the rate of ₹6.14/kWh. The respondent has explained that it could not locate single seller to supply total quantity of 250 MW power. Therefore, to

meet the demand of BRPL, the respondent explored the option of purchasing power from multiple sellers in the Western Region. The respondent has stated that it tied up purchase of off-peak power from 16-17 captive power plants in the State of Chhattisgarh, at different rates. The respondent also purchased peak power from MPPTCL during July @ ₹5.50/kWh and August ₹5/kWh and clubbed it with off-peak power purchased from the captive power plants for resale to BRPL. The respondent has claimed to have charged the gross trading margin less than the trading margin of 7 paise/kWh, the statutorily specified upper limit during July and August 2010. The respondent has submitted the details of weighted average purchase price and sale price of the supplies and the gross trading margin charged as under:

(a) Weighted average Purchase Price for July and August 2010 - ₹ 6.08509.

(b) Weighted average sale price for July and August 2010 - ₹ 6.15181

(c) Gross Margin Charges for July and August 2010 - ₹ 0.06671

4. The respondent has submitted the details of purchase price of power from the captive power plants in Chhattisgarh State and sale to BRPL. These details show that the respondent charged trading margin of 7 paise/kWh or less for the electricity purchased from the captive power plant. In support of computation of weighted average purchase and sale prices for the months of July and August 2010 and gross margin charges arrived at:

(a) Volume Purchased (MU) 264821117

(b) Volume purchased from MPPTCL 22307000

(c) Gross Receipts (Rs.)	1629128843
(d) Gross Payment (Rs.)	1597242378
(e) Margin Amount (Before Transmission Losses & Open Access Charges) (Rs.)	31886465
(f) Transmission Losses (MU)	1837440
(g) Open Access Charges (Rs.)	4550155
(h) Margin Amount (After Transmission Losses & Open Access Charges) (Rs.)	17667490
(i) Margin earned per kWh (Rs.)	0.1204
(j) Margin earned After Tr. Loss & OA (Rs.)	0.0667

5. The respondent has submitted that under Regulation 4 of the trading margin regulations, trading margin is to be charged on the "scheduled quantity" of electricity which refers to the contractual obligation to be fulfilled by the trader towards the buyer of power. According to the respondent, in the instant case the scheduled quantity was 250 MW, the quantity contracted for sale to BRPL and when trading margin was calculated on this quantum for the duration of two months, the average trading margin charged did not exceed the margin specified by this Commission.

6. The respondent has further stated that this Commission in the Statement of Reasons issued in support of the trading margin regulations took note of the possibility of aggregation of contracts by the traders, but expressed concern regarding computation of trading margin on average basis might lead to cross-subsidization of one buyer with greater market power by another with lesser market power. Therefore, according to the respondent, calculation of trading margin on average basis on the aggregated supply of power was permissible so long as the

trading margin was within the limits specified under Regulation 4 of the trading margin regulations and there was no cross-subsidization. The respondent has argued that since resale of power by the respondent to single buyer (BRPL) did not involve cross-subsidization, the respondent cannot be held guilty of violation of Regulation 4, which itself allows aggregation and segregation of contracts because of the wide language used not excluding the situations computation of trading margin on average basis. The respondent has submitted that this Commission had in fact in the Statement of Reasons invited proposals for permissible aggregation mechanism that eliminates cross-subsidization. The respondent has argued that aggregation of contracts for sale of electricity by the electricity trader is ultimately in the interest of power sector and leads to development of power market. The respondent has further relied upon Regulation 4 of the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 (the power market regulations) to support its contention that aggregation of contracts for sale of power is permitted. It has been urged by the respondent that the trading margin regulations and the power market regulations are to be interpreted harmoniously. The respondent's contention is that when aggregation of contracts is permitted under the power market regulations, averaging of trading margin is the natural consequence and, therefore, cannot be faulted.

7. We heard the learned counsel for the respondent at great length and have bestowed our thoughtful consideration to the submissions made by the respondent in its reply and by learned counsel.

8. The respondent expressed its apology for violation, if any, of the regulations of this Commission. The respondent, however, simultaneously proceeded to justify

the trading margin charged and sought to demonstrate that there was no violation of the trading margin regulations and that its activities were within the letter and spirit of the regulations. In view of the fact that the apology rendered by the respondent was not unqualified and it approbated and reprobated at the same time, we have not accepted the apology and are proceeding to examine the matter.

9. The Statement of Reasons issued by this Commission while finalising the trading margin regulations had expressed itself against the concept of averaging propounded by some of the stakeholders in response to the draft regulations. Further, this Commission expressly favoured the charging of trading margin on contract basis. The relevant extracts from the Statement of Reasons are placed below:

> *"14. As regards the suggestion that the draft regulations provide for contracts to aggregate buyers/ suppliers which is possible only when the trading margin is computed on average basis, we are of the view that calculation of trading margin on an average basis might lead to cross subsidization of one buyer at the cost of another buyer. In such a scenario, buyers with greater market power might be charged margins that are non compensatory for the traders while buyers with less market power might have to pay higher than justified margins. We therefore hold that margins should be charged on contract basis rather than on an average basis. However, the Commission would welcome any proposal from the traders on any robust mechanism that allows aggregation of buyers/ suppliers and at the same time eliminates the possibility of cross subsidization among buyers as discussed above."* (Emphasis added)

10. For the foregoing reasons, the respondent's contention that averaging of trading margin was permitted deserves to be summarily rejected and is hereby rejected. By inviting proposals from the inter-State electricity traders on any robust mechanism that would allow aggregation of buy/ sell contracts and at the same time

eliminate the possibility of cross-subsidization among buyers, this Commission cannot be said to have opted in favour of averaging of trading margin on large number of transactions. There are reasons for such a view. Firstly, the invitation of proposals does not mean that this Commission had taken any decision in the matter. Secondly, the respondent did not submit any proposal but started acting on its own in a manner which suited its commercial interests without consideration for the ceiling of trading margin fixed under the trading margin regulations which stood as they were enacted.

11. The above decision notwithstanding, we propose to examine the matter in detail in the light of the pleas taken by the respondent. The epicentre of the allegation against the respondent involves interpretation of Regulation 4 of the trading margin regulations. Therefore, for facility of analysis, Regulation 4 of the trading margin regulations is extracted hereunder:

> *"4. Trading Margin: The licensee shall not charge trading margin exceeding seven (7.0) paise/kWh in case the sale price is exceeding Rupees three (3.0)/kWh and four (4.0) paise/kWh where the sale price is less than or equal to Rupees three (3.0)/kWh. This margin shall include all charges, except the charges for scheduled energy, open access and transmission losses. The trading margin shall be charged on the scheduled quantity of electricity.*
>
> *Provided that trading margin specified under these regulations shall be the cumulative value of the trading margin charged by all the traders involved in the chain of transactions between the generator and the ultimate buyer, that is to say, trading margin in case of multiple trader-to-trader transactions shall not exceed the ceiling trading margin specified under these regulations.*
>
> *Explanation: The charges for the open access include the transmission charge, operating charge and the application fee."*

12. The salient features of Regulation 4 are –

(a) It fixes the ceiling rates of trading margin that can be charged by an inter-State trading licensee in short term buy-short term sell contracts, that is, where the duration of contract for purchase and sale is less than one year.

(b) The inter-State trading licensee is not permitted to charge trading margin exceeding 7 paise/kWh where the sale price is more than ₹3/kWh and trading margin exceeding 4 paise/ kWh where the sale price is equal to or less than ₹3/kWh.

(c) The trading margin fixed is exclusive of charges for scheduled energy, open access and the transmission losses.

(d) The trading margin is to be charged on the "scheduled quantity of electricity".

13. A plain reading of Regulation 4 thus indicates that it does not even remotely suggest that the trading margin is to be calculated based on the weighted average purchase and sale prices of several transactions undertaken by the inter-State trading licensee. As already stated, this Commission had ruled charging of trading margin separately for each contract. Therefore, there is no warrant for the view that the trading margin regulations read with the Statement of Reasons allowed averaging of purchase and sale prices on different contracts and thereby the trading margin.

14. In accordance with Regulation 4 of the trading margin regulations, the trading margin is to be charged on the "scheduled quantity of electricity". Therefore, the question that may arise for consideration is whether the expression "scheduled quantity of electricity" permits averaging of purchase and sale prices and consequently the trading margin. The trading margin regulations do not define or explain the expression "scheduled quantity of electricity". According to the respondent, the expression means the quantum of electricity scheduled for supply to ultimate buyer. Based on this, the respondent has contended that the scheduled quantity in the instant case was 250 MW since this was the quantity supplied to the ultimate buyer, BRPL. Therefore, according to the respondent, the trading margin charged was to be computed based on weighted average purchase and sale prices for the entire supply of 250 MW of power and when so calculated it was less than the ceiling limit of 7 paise/kWh specified under Regulation 4 of the trading margin regulations. The respondent has further contended that the average trading margin should ideally be calculated for the entire duration of the supply contract to factor fluctuations of purchase and sale prices as per the market conditions.

15. The respondent availed of open access to the inter-State transmission system for conveyance of electricity from Western Region to Northern Region. The Central Electricity Regulatory Commission (Open Access in Inter-State Transmission System) Regulations, 2008 (the open access regulations) govern different facets of

open access. Therefore, the issue raised by the respondent is to be examined with the aid of the relevant provisions of the open access regulations.

16. Regulation 6 of the open access regulations, extracted hereunder, provides for submission of application for availing short-term open access:

> ***Submission of Short-term Open Access Application***
>
> *6. (1) An short-term customer or the power exchange (on behalf of buyers and sellers) intending to avail of short-term open access for use of the transmission lines or associated facilities for such lines on the inter-State transmission system, shall make an application to the nodal agency in accordance with these regulations.*
>
> *(2) The application for a bilateral transaction shall contain the details, such as names and location of supplier and buyer, contracted power (MW) to be scheduled and interface at which it is referred to, point of injection, point of drawal, starting time block and date, ending time block and date, and such other information that may be required in the detailed procedure.*
>
> *(3) The application for a collective transaction shall contain the requisite details in accordance with the detailed procedure.*

17. In terms of clause (2) of Regulation 6 of the open access regulations, an application for bilateral transaction shall *inter alia* contain the information relating to point of injection and point of drawl of power. Regulation 9 of the open access regulations provides for advance scheduling of bilateral open access. Proviso to clause (1) of Regulation 9 prescribes that separate application shall be made for each month, and for each transaction.

18. From Regulation 6 it is seen that the open access regulations visualize two types of transactions, bilateral and collective transactions. The transactions involving exchange of electricity between a specified buyer and a specified seller, either directly or through an electricity trader, fall within the scope of bilateral transactions

as seen from the definition of the term ‘bilateral transaction’ given in sub-clause (b) of clause (1) of Regulation 2 of the open access regulations extracted hereunder:

> *“bilateral transaction” means a transaction for exchange of energy (MWh) between a specified buyer and a specified seller, directly or through a trading licensee or discovered at power exchange through anonymous bidding, from a specified point of injection to a specified point of drawl for a fixed or varying quantum of power (MW) for any time period during a month.*

19. Therefore, the ‘bilateral transaction’ in which category the respondent's transactions fell, not only involves a specified buyer and a specified seller but also involves a specific point of injection to a specified point of drawl at any time period during a month.

20. From the combined reading of the above-referred provisions of the open access regulations, the following conclusions are drawn:

(a) The short-term open access for bilateral transaction entails a specified point of injection and specified point of drawl of energy.

(b) The bilateral transactions with different points of injection or drawl are scheduled separately as separate applications are to be given for scheduling of electricity with different points of injection or drawl and each such scheduling is a bilateral transaction.

(c) Separate application is made for open access for each month, and for each transaction.

(d) Advance scheduling of short-term open access cannot exceed a period of one month at a time.

21. The respondent purchased electricity from a number of captive power plants in the State of Chhattisgarh and also from MPPTCL. Each source was having a separate point of injection though point of drawl was common. Therefore each injection by the respondent was scheduled separately in accordance with the open access regulations and for that reason, each injection was a separate bilateral transaction. The quantity of electricity scheduled under each such transaction was the "scheduled quantity" for the purpose of charging trading margin. Since the power purchased by the respondent from MPPTCL was scheduled independently of other purchases in the State of Chhattisgarh, the transaction involving purchase of power from MPPTCL and sale to BRPL could not be clubbed with other transactions. This negates the respondent's contention that the entire 250 MW of power sold to BRPL should be treated as scheduled quantity for charging trading margin under Regulation 4 of the trading margin regulations. The scheduled quantity is to be considered separately for each transaction. Further, since a bilateral transaction cannot be scheduled for a period exceeding one month, it is not possible to accept the respondent's contention that the entire period of supply from 1.7.2010 to 30.9.2010 be treated as single transaction. It is axiomatic to say that even this analysis itself rules out the averaging of trading margin under the trading margin regulations.

22. The respondent has very strenuously argued that aggregation and segregation of contracts is permissible under the power market regulations and

therefore averaging of purchase and sale prices and consequently the trading margin should be the natural consequence. The respondent has pointed to the problems in aggregation and segregation of contracts with trading margins on a "one to one contract" basis. According to the respondent these problems can be easily overcome through the process of averaging by aggregation and segregation of contracts involving purchase and sale of electricity. The respondent has, therefore, contended that it is the weighted average margin in case of aggregation of contracts, and not individual contract margins that should be within the allowed margin ceilings under Regulation 4 of the trading margin regulations.

23. We have given our serious thought to these contentions of the respondent. Aggregation permits purchase of electricity by a person, say an inter-State trading licensee, from more than one source and sale to single entity or buyer, as is the case on hand. On the contrary, segregation refers to a situation where purchase is from a single source but sale is to more than one entity or buyer. It is true that Regulation 4 of the power market regulations refers to aggregation and segregation of contracts. However, from this it does not follow that aggregation and segregation of contracts permit averaging of trading margin which is governed by the trading margin regulations. We have already held that the trading margin regulations do not permit averaging. We do not accept the respondent's plea that without averaging, aggregation and segregation of contracts is not possible. There could be no difficulty in separately arriving at for the electricity purchased by the respondent from MPPTCL. By an interpretation advocated by the respondent, cross-subsidization cannot be ruled out. For this precise reason, this Commission did not accept the views of stakeholders to permit averaging of trading margin. This Commission

discounted the suggestion of averaging of margins, since it could lead to abuse of market power and cross-subsidization. This Commission expressly directed that the trading margin should be charged on contract basis rather than on average basis. The relevant portion of the Statement of Reasons has already been extracted.

24. The nub of the above discussion is that the trading margin regulations do not permit averaging of trading margin under any circumstances. Admittedly, the respondent charged trading margin exceeding 7 paise/kWh on the transactions involving purchase of electricity from MPPTCL to BRPL during July and August 2010. We are, therefore, satisfied that the respondent has contravened Regulation 4 of the trading margin regulations and by so contravening, the respondent has made itself liable for punishment under Section 142 of the Electricity act.

25. Section 142 of the Electricity Act is extracted hereunder:

> ***142. Punishment for non-compliance of directions by Appropriate Commission:*** *In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction*

26. Section 142 empowers this Commission to levy penalty not exceeding one lakh rupees for each contravention. As noticed from the details furnished by the respondent and incorporated at para 4 above, the respondent purchased 2307000

MU of electricity from MPPTCL for sale to BRPL and has charged trading margin in violation of the trading margin regulations. However, this is the first instance of contravention of the regulations by the respondent which has been brought to our notice. Considering the totality of the circumstances, we impose penalty of ₹1 (one) lakh on the respondent. The amount of penalty shall be deposited by the respondent latest by 31.10.2012. We further direct that the respondent shall get its account audited by a competent audit firm for the period from 12.2.2010 (i.e. the date of coming into force of trading margin regulations) till date and the audit report should contain the status of compliance with the specified trading margin with reference to each transaction in the light of our discussion in this order. The report shall be submitted by 30.11.2012.

27. With the above directions, suo motu proceeding initiated against the respondent stands disposed of.

IA No 22/2011

28. During pendency of the proceeding, MPPTCL filed the Interlocutory Application, IA No. 22/2011 seeking permission to intervene and impleadment as a party to the proceeding. Subsequently, MPPTCL has filed further submissions and documents in the matter. MPPTCL has pointed out that the as per the agreement between MPPTCL and the respondent, the latter was required to pay tto MPPCL the amount recovered by it on sale of MPPTCL power in excess of the trading margin fixed by this Commission. MPPTCL has alleged that the respondent has retained the excess amount which legitimately belonged to it (MPPTCL) as per the agreement.

Accordingly, MPPTCL has sought direction to the respondent for refund of the ecess amount.

29. We have considered the submission made by MPPTCL. The present proceeding under section 142 of the Electricity Act is *quasi* criminal proceeding, akin to contempt of court proceeding under the Contempt of Courts Act. The scope of this proceeding is limited to examination whether or not the respondent had contravened the provisions of the trading margin regulations. There is no scope for directions for refund/decree of money in this proceeding. The Interlocutory application is accordingly dismissed. MPPTCL is at liberty to initiate appropriate proceeding for recovery of any dues, if so advised, in accordance with law.

sd/-	sd/ -	sd/-
(V.S.Verma)	**(S. Jayaraman)**	**(Dr. Pramod Deo)**
Member	**Member**	**Chairperson**