

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Interlocutory Application No. 10/2015
in
Petition No. 341/SM/2013**

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A.K.Singhal, Member
Shri A.S.Bakshi, Member**

Date of Hearing: 16.4.2015

Date of Order: 17.4.2015

In the matter of

Regulatory oversight of the management and governance of Indian Energy Exchange Limited

And

In the matter of

Indian Energy Exchange Limited
4th Floor, TDI Centre,
Plot No. 7, Jasola,
New Delhi-110 025

.....Petitioner

Vs.

Financial Technologies India Limited
FT Tower,
CTS No. 256 and 257, Suren Road,
Chakal, Andheri (East)

...Respondent

Parties present:

Shri M. G. Ramachandaran, Advocate, IEX
Ms. Shruti Bhatia, IEX
Shri Vishrov Mukherjee, Advocate, FTIL

ORDER

Interlocutory Application No.10/2015 has been filed by Indian Energy Exchange Ltd. (IEX) seeking certain directions/orders for ensuring full compliance of the order dated 13.5.2014 in Petition No.SM/341/2013.

2. The Commission in order dated 13.5.2014 in Petition No.SM/341/2013 had directed IEX as under:-

“Keeping in view the public interest and the interest of the power market participants, the Commission is of the view that FTIL should divest its entire shares in the IEX. Accordingly, the Commission in exercise of its powers under Regulation 22 (A) and Regulation 63 (i) of the Power Market Regulations direct the following for compliance by IEX:-

(a) IEX shall ensure that FTIL divests its entire shareholding from the IEX by 30.9.2014.

(b) Pending divestment of shares, the voting rights of FTIL shall stand extinguished and any corporate benefit in lieu of such shareholding shall be kept in abeyance or withheld by the exchange.

(c) IEX shall ensure that no nominee of FTIL is represented in the Board of IEX.

(d) IEX is directed to ensure compliance of the above directions with immediate effect and submit monthly report to the Commission.”

3. IEX has submitted in the IA that it has complied with the directions at (b) and (c) by taking the following steps:-

(a) Resignation of FTIL nominees from the Board of Directors of IEX.

(b) Amendment to the Article of Association of IEX in order to deny FTIL any right of representation in the Board of IEX.

(c) Extinguishment of voting rights of FTIL in the IEX.

(d) Holding back the disbursement of dividend to FTIL for the Financial Year 2013-14 and interim dividend for the Financial Year 2014-15 in the IEX- Unpaid Equity Dividend Account.

4. As regards the directions of the Commission regarding divestment of shares, IEX has submitted that actual divestment of shares held by FTIL in IEX is dependent on the conclusion of Share Purchase Agreement and transferring and registering the shares in the name of the purchaser in accordance with the provisions of the Companies Act, 2013. IEX has further submitted that though FTIL has initiated the process of divestment of shares on 5.11.2014 by entering into Share Purchase Agreement with investors for sale of 25.6% equity shares in IEX on fully diluted basis, the said process is still to be completed. IEX has proposed the following alternatives for consideration of the Commission in order to fully comply with the directions in order dated 13.5.2014. The proposed alternatives are extracted as under:-

“(i) IEX to have a lien on the shareholding of FTIL in IEX. IEX shall release the lien only when FTIL has finalized up the buyer for divesting its stake in IEX.

(ii) As an alternative to option (i) mentioned above, in accordance with Section 89 of the Companies Act, 2013, FTIL to deposit the Share Certificates along with the duly executed blank transfer form with a person nominated by IEX or such person as this Honourable Commission may direct.

Persons so nominated will hold the shares as an Administrator or a Receiver to fulfill the conditions of the Order dated 13.5.2014 and effect the transfer of shares to such person or entity with whom FTIL enters into an agreement for the transfer of shares;

Upon FTIL intimating the name of the person or entity to whom FTIL will sell the shares, IEX will approach this Honourable Commission giving all the necessary particulars of such sale and seek directions of this Honourable Commission for the person so nominated to execute the transfer form and register the transfer of shares;

In the meanwhile, FTIL will replace the blank transfer form by another duly executed form to maintain the validity of the transfer form to effect the transfer of shares by the person so nominated;

The person so nominated shall also not exercise any voting rights or claim any benefit of the shares till such time the shares are transferred and vested in a Transferee with the approval of this Honourable Commission.

In the above scheme, FTIL will be left with no interest in the shares except a right to sell the shares to a Transferee and receive the sale proceeds thereof. For all intent and purpose, FTIL would have divested the interest in the shareholding and give

authority to the person so nominated as mentioned herein above. The interest of FTIL will remain only to receive the sale proceeds.”

5. IEX has submitted that the scheme has been proposed as a substantial compliance with the directions of the Commission in order dated 13.5.2014 with regard to divestment of shares in the context of the fact that IEX is not the owner of shares held by FTIL in IEX and under the provisions of the Companies Act, 2013, IEX as a company cannot purchase and hold its own shares. IEX has submitted that the proposed scheme would effectively comply with the directions contained in the order dated 13.5.2014. In para 13 of the IA, IEX has further submitted the following:

“13. IEX is also willing to implement any other directions of the Honourable Commission in regard to the shareholding held in the name of FTIL, including, if so directed by the Honourable Commission to enter the name of the person nominated as mentioned hereinabove in the Register of Members and to hold legal ownership of the shares with beneficial ownership contained in the shares with FTIL, only to the extent of receiving the sale proceeds on the transfer and registration of shares in the name of the Transferee. The person so nominated can file a declaration of the beneficial interest of FTIL in the shares in regard to the receipt of the sale consideration. In such an event, legal ownership of the shares shall stand divested from FTIL to the person so nominated, thereby complying with the conditions contained in the order dated 13.5.2014 passed by this Honourable Commission”.

6. IEX has made the following prayers in the IA:

“(a) Issue orders for the Company to exercise lien over the shares for fulfillment of the statutory directions contained in the order dated 13.5.2014 passed by the Hon’ble Commission in Petition No. SM/341/2013;

(b) Direct that the legal ownership of the shares be held in the name of a person to act as an Administrator or Receiver to fulfill the terms and conditions of the order dated 13.5.2014 and the beneficial ownership in the shares restricted for receiving the sale proceeds on the sale and transfer of the shares, shall only remain with FTIL and for all other intent and purpose the person so nominated shall exercise all legal ownership in the shares;

or

Direct that the legal ownership of the shares be registered in the name of the nominated person in compliance with the directions contained in the order dated 13.5.2014 passed in Petition No. SM/341/2013 pending the transfer and registration

of the shares and the name of such nominee be recorded in the Register of Members in place of the name of FTIL;

- (c) Consider making FTIL a party in this Suo-Motu petition SM/341/2013 to implement the above;
- (d) May be pleased to treat the above as compliance of condition (a) quoted above;
- (e) Pass any such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."

7. The IA was heard on 12.3.2015. The prayer of IEX to implead FTIL as a party to the IA was allowed and notice was issued to FTIL. Reply has been filed by FTIL vide affidavit dated 30.3.2015. FTIL in its reply has submitted that FTIL has substantially complied with the Commission's order dated 13.5.2014 and has taken all steps to give effect to the directions given in the said order, without prejudice to its rights. FTIL has submitted that as per the directions of the Commission, two representative Directors of FTIL in IEX have tendered their resignation from the Board of IEX and consequently, FTIL does not have any nominee Directors on the Board of IEX and hence, FTIL does not exercise any control over the management and functioning of IEX. FTIL has submitted that on 5.11.2014, FTIL signed a Sale Purchase Agreement (SPA) with various investors for sale of its 25.64% equity stake on a fully diluted basis. However, the said process is not complete as certain conditions precedent including buy out of the application software and other technology of use by IEX have not been fulfilled. FTIL has submitted that delay in divestment of FTIL's stake has been on account of non-fulfillment of one of the conditions precedent by IEX and not on account of FTIL. In terms of Article 4 of the SPA, all the conditions precedent are ready except the purchase of the application software and other technology by IEX for its own use. FTIL has further submitted that at a belated stage, IEX vide letter dated 24.2.2015 refused to

fulfill its obligation as a result of which prospective buyers would like to renegotiate the purchase consideration with FTIL which is currently in progress. FTIL has further submitted that notwithstanding the ownership of shares, FTIL does not have any role to play in the management of IEX which fact has been admitted by IEX. Therefore, no prejudice would be caused if the ownership of shares remains with FTIL pending sale thereof and the relief sought by IEX in the form of creation of lien or deposit of share certificates will not serve any purpose. FTIL has sought 90 days' time to complete the SPA.

8. During the course of hearing, learned counsel for FTIL submitted that there is no provision in the regulations which permits such an arrangement for forcible transfer of shares owned by FTIL in IEX. Learned counsel further submitted that notwithstanding its ownership of shares to the extent of 25.64%, FTIL does not have any role to play in the management of IEX which has been endorsed by IEX. Therefore, no prejudice would be caused if the ownership of shares remains with FTIL pending divestment thereof. Learned counsel further submitted that FTIL and purchasers are in discussion and re-negotiation since the end of February, 2015 to waive the condition precedent along with other commercial points due to withdrawal of technology buyout. Learned counsel for FTIL submitted that Axis Capital which is the merchant banker to the transaction to FTIL vide its letter dated 15.4.2015 has informed that the SPA transaction is likely to be closed within 45 days. Learned counsel further submitted a letter dated 15.4.2015 jointly written by FTIL and Purchasers requesting the Commission for 45 days' time to conclude the negotiation and further requesting the Commission not to

take any precipitate action in the interest of all the stakeholders. Learned counsel prayed for a period of 45 days to fully comply with the directions of the Commission.

9. Learned counsel for IEX submitted that for ensuring substantive compliance with the directions of the Commission, IEX has suggested certain alternatives in the IA which may be considered by the Commission and directions to that effect may be issued till the actual divestment of its shares by FTIL. Learned counsel further submitted that even FTIL can nominate a person who will be the custodian of shares and such person will act as per the directions of the Commission till the shares are divested by FTIL.

10. FTIL vide its affidavit dated 16.4.2015 has placed on record the letter dated 15.4.2015 written by Axis Capital to FTIL and the letter dated 15.4.2015 written by FTIL and the purchasers of shares to the Commission.

11. We have considered the submissions of the learned counsels for the parties. It is noted that out of the three substantive directions in our order dated 13.5.2014, IEX has complied with two directions, namely, (a) voting rights of FTIL have been extinguished by amending the Articles of Association of IEX and the corporate benefits in the form of disbursement of dividend for the financial year 2013-14 and 2014-15 have been held back in the IEX Unpaid Equity Dividend Account; and (b) the nominees of FTIL in the Board of IEX have resigned and at present there is no representation of FTIL in the Board of IEX. However, the direction regarding divestment of shares of FTIL in IEX has not yet been complied with. FTIL started the process of divestment on 7.7.2014 and on 5.11.2014 signed the Sale Purchase Agreement with the prospective investors for divestment of shares. The Commission allowed time till 4.1.2015 to complete the

process. According to FTIL, after IEX in its letter dated 24.2.2015 expressed its inability to fulfill the condition regarding buy-out of application software and technology, FTIL and purchasers have again set down for discussion and re-negotiation to waive the said condition precedent with other commercial points due to withdrawal of technology buy-out and have requested the Commission to allow 45 days' time to conclude the negotiation.

12. We are dismayed and take strong exception to the casual manner in which the matter has been handled by both FTIL and IEX to comply with our directions. Buy-out of application software and other technology by IEX from FTIL is a commercial issue between both parties and by making it a condition precedent for transfer of shares under the Share Purchase Agreement, the divestment process has been unduly delayed and the directions of the Commission have not been complied with.

13. IEX has proposed two alternatives for compliance with the directions of the Commission till divestment of shares by FTIL. The first alternative is for a direction to create lien in favour of IEX on the shareholding of FTIL in IEX with the condition that the lien shall be released only when FTIL has finalized the buyer for divestment of shares. The second alternative is to issue directions to FTIL to deposit the Share Certificates in accordance with provisions of section 89 of the Companies Act, 2013 with a person nominated by IEX or the Commission, who will hold the shares of FTIL as an Administrator or a Receiver and effect transfer of the shares to an entity with whom FTIL enters into an agreement for transfer of shares. FTIL has opposed the alternative suggestions on the ground that FTIL cannot be divested of its rights in its shares in IEX

except with the authority of law and undertaking such a process would delay the divestment, seriously affect investor confidence and cause impact on valuation.

14. We have considered the courses of action suggested by IEX and the objections of FTIL. The Commission had directed for divestment of shares of FTIL in IEX after following the due process of law vide order dated 13.5.2014 which has been upheld by the Appellate Tribunal for Electricity vide judgment dated 4.2.2015 in Appeal No.186 of 2014. Since FTIL has failed to divest its share of 25.64% in IEX despite being granted sufficient time for the purpose, urgent action is required for compliance of the directions of the Commission in order dated 13.5.2014. Accordingly following directions are issued for strict compliance by IEX and FTIL:

(a) FTIL is granted 3 (three) weeks' time from the date of issue of this order to unconditionally divest its shares in IEX (not later than 9.5.2015). Application for further extension of time shall not be entertained.

(b) If FTIL fails to divest its shares in IEX within three weeks, IEX is directed to ensure divestment of FTIL's shares within a period of 3 (three) weeks thereafter (not later than 1.6.2015) to effectively implement the order of the Commission.

(c) If the directions above are not complied with by IEX within the period as stated in (b) above, this shall be construed as failure on the part of IEX to comply with the directions of the Commission and the Commission shall proceed to initiate action for withdrawal of permission to IEX to maintain and

operate the power exchange, in accordance with Regulation 37 the Central Electricity Regulatory Commission (Power Market) Regulations, 2010, as amended from time to time. This order may be treated as notice for withdrawal of permission to IEX for management and operation of the power exchange.

(d) Till the shares of FTIL in IEX are divested, FTIL shall be debarred from creating any third party rights or encumbrance on the said shares except for the purpose of divestment of shares to comply with the directions of the Commission.

(e) IEX is directed to ensure that IEX is independent from FTIL in all respects.

15. IEX shall submit reports on 11.5.2015 and 2.6.2015 regarding compliance of our directions as above.

16. IA No.10/2015 in Petition No.341/SM/2013 is accordingly disposed of.

sd/-
(A.S.Bakshi)
Member

sd/-
(A.K.Singhal)
Member

sd/-
(Gireesh B.Pradhan)
Chairperson