



C/PTC/CS&P/CERC/5890

14th August, 2020

Shri Sanoj Kumar Jha,
Secretary, Central Electricity Regulatory Commission
2nd & 3rd Floor, Chanderlok Building
Janpath, New Delhi – 110 001

Sub: PTC India Limited's revised comments/suggestions on "Draft Central Electricity Regulatory Commission (Power Market) Regulations, 2020."

Respected Sir,

This has reference to Hon'ble Commission's Public Notice Dated 18th July, 2020 and 6th August, 2020 seeking comments/suggestions on "Draft Central Electricity Regulatory Commission (Power Market) Regulations, 2020" ("Draft Regulations").

PTC India Limited's comments/suggestions sent wide letter dated 13th Aug, 2020 had some inadvertent errors which we have rectified. Please find enclosed PTC India Limited's revised comments /suggestions on the Draft Regulations for your kind consideration.

Thanking you,

Yours faithfully,


(Sneh Daheriya)
Vice President

PTC India Limited

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**BEFORE THE CENTRAL ELECTRICITY REGULATORY
COMMISSION, AT NEW DELHI
IN THE MATTER OF:**

**DRAFT CENTRAL ELECTRICITY REGULATORY COMMISSION
(POWER MARKET) REGULATIONS, 2020.**

COMMENTS/SUGGESTIONS OF PTC INDIA LTD, NEW DELHI

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1. **Background of Power Market regulations:**

1.1 The Electricity Act, 2003 mandates that endeavours shall be made to promote the development of a market, including trading and this Hon'ble Commission has been authorised to make Regulations for the purpose. It is presumed that the Regulation must be framed to further the purposes and objectives set out under the Act and not restrict the application of the parent law. Section 66 of the Electricity Act reads as under:

*"Section 66: Development of market --: The Appropriate Commission shall endeavour to promote the development of a market (**including trading**) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard."*

1.2 Section 66 further requires the Hon'ble Commission to be guided by the National Electricity Policy. The **National Electricity Policy (NEP)** mandates the Hon'ble Commission to provide for regulations that enable establishing of an exchange.

1.3 It is pertinent to examine the intent of the Commission to introduce Central Electricity Regulatory Commission (Power Market) Regulations, 2010 ("PMR 2010") and as per the **Statement of objects & reasons of PMR, 2010** dated 28.01.2010, the main objectives for formulating PMR, 2010 were:

- i. Developing the market in power (including trading), in accordance with the functions vested in the Central Commission under the Electricity Act, 2003 and National Electricity Policy notified there under.
- ii. Creation of a comprehensive market structure and enabling the transaction, execution and contracting all types of possible products in the electricity markets.
- iii. To develop a market where power sector participants can efficiently buy and sell power that is not tied up in long term PPAs.
- iv. **To promote competition, efficiency, and economy in Power Markets.**
- v. **To create a level playing field between different types of entities.**

- 1.4 Accordingly, this Hon'ble Commission notified the PMR 2010 on 20th January 2010 laying down, in detail, the guidelines for establishment, operation & management of the Power exchange.
- 1.5 This Hon'ble Commission has now issued a Draft Central Electricity Regulatory Commission (Power Market) Regulations, 2020 ("Draft PMR, 2020") with the Explanatory Memorandum, proposing to amend, modify or repeal certain provisions of the PMR 2010.
- 1.6 This move to have an updated Power Market Regulations is a welcome step in the right direction; however, it is felt that some of the proposed amendment(s) needs reconsideration by the Hon'ble Commission.

2. Introduction:

- 2.1 The Power Market Regulations are aimed at creating a market structure and develop a market where power sector participants can efficiently buy and sell power that is not tied up in long term PPAs. This is to be achieved by promoting competition, efficiency, and economy in Power Markets and creating a level playing field between different types of entities.
- 2.2 As this Commission is aware, that today, after more than a decade of PMR 2010 coming into operation, there is in reality only one exchange which is operating and having more than 98% of the market share. The other exchange has been surviving just on account of some provisions in the PMR 2010. The intention of the Regulations has been to promote healthy competition in the Power Market and the present draft should be aimed to attain that goal and in no way should be restrictive so to put restrictions on new and serious players in promoting an exchange which will lead to a healthy competition and attain the objectives as enshrined in the Electricity Act, 2003 and the National Electricity Policy.

2.3 Standing Committee report of Parliament

The Standing Committee on Energy (2015-16) Sixteenth Lok Sabha in its Report on 'Evaluation of Role, Performance and Functioning of the Power Exchanges' has exhaustively dealt on the issue and some of the extracts of the said Report are as under:

- *"One of the many ways of bringing transparency in market institutions is through competition. Healthy competition between power exchanges will be very useful to the participants and the power sector. Therefore, one of the goals of the CERC has been and will continue to be to promote healthy competition in the power markets space."*
- *"The Committee were informed that one of the objectives behind the setting up of the Power Exchanges was to promote competition in the power market. The Electricity Act, 2003 envisages development of a competitive power market for promoting efficiency, economy and for mobilization of new investments in the Power Sector. However, the Committee note that there are only two Power Exchanges in the country of which one has monopoly in the Power Trading, which according to the Committee, is not in the interest of the sector. 96 per cent of the Power Market is owned by one Exchange.*
- *With a view to addressing the need for elimination of this anomaly in the Power Market which is not conducive to the concept of competitive economy, the Committee recommend that:*
 - (i) *The Ministry and the CERC must come up with clear and effective Guidelines so as to ensure healthy competition in the Power Market and also to eliminate the monopoly of one Power Exchange so that the diminishing trust of the stakeholders in the system can be restored.*
 - (ii) *The Ministry should work out an Action Plan on setting up of the Power Exchanges in every zone (North Zone, South Zone, East Zone, West Zone, Central Zone and North East Zone) of India, to facilitate competition in the Market which will benefit the consumer.*
- *The Committee observe that the Power Exchanges are an online platform that help generators and consumers to come together and discover prices of electricity, based on the demand-supply mechanism. It also fulfills the diverse needs of electricity consumers in the country. Large consumers with a requirement of 1 MW and above are primarily served by the Power Exchanges for buying electricity. The Power Market is now moving from a regulated one to a market driven regime and hence more and more buyers and sellers are opting to trade electricity through these Exchanges. However, the existence of only two Power Exchanges has been restricting the effective functioning of the sector. The monopoly of one Exchange has further eroded the spirit of the Electricity Act, 2003 and is impinging upon hassle-free trading activities in the electricity market. This has hampered alternative mechanisms to evolve and hindered further improvement in the performance of the Exchanges. It has also led to problems of power liquidity, non-transparent peak management, under-utilization of transmission capacity and optimal functioning of the market.*

2.4 The finding in the above report stands good even today when the situation and the environment haven't changed. It is most humbly suggested that this Hon'ble Commission may please keep the above views in perspective and formulate regulations which are in furtherance of the stated objectives.

3. **Pointwise Comments/Suggestions:**

3.1. **Draft Regulations 7(1): "Contracts transacted in the OTC Market**

(1) Price discovery: The price and other terms of contract in the OTC Market shall be determined either through mutual agreement between the buyer and the seller or through competitive bidding process or as determined by the Appropriate Commission."

3.1.1 Comments/Suggestions: It is observed that there has been an inadvertent error, as role of the Electricity Trader has been omitted. Accordingly, it is suggested that the Regulations may be amended as under;

"The price and other terms of contract in the OTC Market shall be determined between the buyer and the seller directly or through a Trading Licensee either through mutual agreement or through competitive bidding process or as determined by the Appropriate Commission."

3.1.2 Rationale:

- This appears to be an inadvertent omission in the clause, which is otherwise good and clarifies the position regarding OTC contracts. OTC Market transactions are between buyers and sellers directly or through Trading Licensees as described in the Definition 2(ao) of Draft PMR 2020, which reads as under:

(ao) "Over the Counter (OTC) Market" is a market where OTC Contracts are transacted between the sellers and the buyers directly or through a Trading Licensee;"

- Explanatory Memorandum to the Draft PMR 2020 also recognizes the role of a trader, as an intermediary, in the OTC Platform. Clause 3.6.1 of the Explanatory Memorandum reads as under

3.6.1. *The OTC Market consists of transactions that take place outside the Power Exchange between generators and consumers directly or through market intermediaries.*

- Further Clause 3.7.1 of the Explanatory memorandum reads as under:

3.7.1. *Power Market Regulations, 2010 provide for market oversight by the Commission, circumstances requiring intervention by the Commission in the market and Page 35 of 39 investigation of matters (if required). However, there have been several developments in the power market in the past decade. The volume of electricity transacted on the Power Exchanges has grown manifold, and there is expectation of continued strong growth in the future as well, led by a renewed focus on short-term markets. Further, with the introduction of Real-time market on Power Exchanges, there exist two markets for collective transactions at the Power Exchanges viz. Day Ahead market and Real-time market. Along with this, the Commission has proposed the introduction of longer duration Term Ahead Contracts in the Draft Regulations, which will allow buyers and sellers to transact electricity for a duration of more than 11 days ahead, subject to specific conditions. **As far as the OTC Market is concerned, in addition to trading licensees as market intermediaries, the Draft Regulations propose the introduction of OTC Platform as an electronic platform for facilitating information exchange amongst buyers and sellers of electricity in the OTC Market.** On an overall basis, it is expected that there would be an increase in the number of participants in the market in the future (such as distribution licensees and generating companies, especially led by growth in RE generators).*
- Accordingly, it is suggested that the words “or through a Trading Licensee” in the description of OTC Market Transactions may be incorporated. This is consistent with the schema of Power Market Regulations, 2010 Clause 3(i) as well.

3.2 Draft Regulation 17(11): Governance structure of Power Exchange

17(11): "No member of Power Exchange or their client shall be on the Board of Directors of any Power Exchange."

3.2.1 Comments/Suggestions:

As the Management and Operations of a Power Exchange is demutualized and ring fenced, it is suggested that this provision in the Draft Regulations may be amended so as to give representation to the members on the Board of the Power Exchange as is existing in the PMR 2010. The significant market and industry experience that members and clients bring to the table, would only add value in decision making by the Boards of the Power Exchanges.

3.2.2 Some Conceptual Issues:

- i. As per Regulation 19(1)(ii) of the PMR 2010, *"A Member of the Power Exchange can have a maximum (whether directly or indirectly) of 5% shareholding in the Power Exchange."* While, as per Regulation 22(4), *"Not more than one fourth of the Board of directors shall represent Members of Power Exchange."* Regulation 22(1)(c) stated that *"There shall be a clear demarcation between ownership, management / operations and participation in trading."*
- ii. Therefore, it can be clearly seen that under PMR 2010, members of the power exchange were granted board representation of up to one fourth in the Board of Directors of the Exchange, while ensuring a clear demarcation between ownership, management and participation in trading.
- iii. This issue was discussed prior to notification of PMR 2010 which was captured in the Statement of Objects and Reasons (SOR) of PMR 2010 and relevant portions of the SOR are as under:
 - *Regulation 18 and 19 - Shareholding pattern of Power Exchange keeping in view the requirements of ring-fencing, demutualisation and need of having dispersed ownership of important market platforms, modifications were proposed in the draft regulations in respect of the capital structure and governance structure of Power Exchanges from the earlier issued guidelines.*

8.5.2. Decision and rationale

(i) The Commission has considered the views of all stakeholders. The Commission maintains the view that Power Exchange is market based institution and hence should be a widely held organisation. The commission is also of the view that Power Exchange should be fully demutualised and ringfenced organisation and hence a power sector participant may have equity stake in the Power Exchange (as is an international practice) but limited to 5 % of the total shareholding.

- *Regulation 21 – Ownership and Governance structure of Power Exchange and Staffing of Power Exchange*

8.7.2. Decision and rationale

We appreciate that it may be practically difficult to find professional experts who would deal with Power Exchange but do not deal with any other matters in the power sector. This will have a negative effect on the quality of talent available to Power Exchange and hamper capacity building of Power Exchanges. At the same time, conflict of interest has to be avoided. Therefore restrictions as proposed in the draft regulations are being retained in respect of employees of the Power Exchanges. To address the need of having access to professional advice we have now provided that any consultant or advisor can be engaged as long as they do not handle price sensitive information which can be used to benefit the members or clients of Power Exchange and there is no conflict of interest between the assignments undertaken by the consultant in the Power Exchange and in other companies served by the consultant or advisor; However, in order to ensure ring fencing between day to day operation and participation in transacting, the provision with respect to MD/ CEO/ director in charge of day to day operation/ employee is retained as earlier.

- iv.** Thus the PMR 2010 recognised that the Power Exchange operations will be demutualized and ringfenced. The Explanatory Note to the Draft PMR 2020 has continued with the same concept and no reason has been assigned as to

why “No member of Power Exchange or their client shall be on the Board of Directors of any Power Exchange.”

- v. The only explanation that has been provided in the Explanatory memorandum to the draft PMR 2020 is *“The Commission opines that presence of member or clients on the board of the Power Exchange may lead to potential conflict of interest situations. Hence the Draft Regulations propose that no member of Power Exchange or their client shall be on the Board of Directors of any Power Exchange.”*
- vi. It has not been explained as to on what basis this opinion has been arrived at, and that too in case where the Management and operations are totally demutualized and ring-fenced. It is pertinent to mention that PTC (through its subsidiary PTC India Financial Services Ltd) had representation on the Board of one of the one of the Existing Exchanges from 2007 (inception of the Exchange) upto 31st March 2016, and there was no occasion where any issue was ever raised as to the working of the Exchange and conflict of interest. It is pertinent to mention that the Power Exchanges are highly regulated entities under the supervision of this Hon’ble Commission.
- vii. If such a provision is incorporated, it will go against the spirit of the Electricity Act and the Power Market, as the member of the Power Exchange brings with it a vast experience as to the needs of the buyer and seller so as to enable the Power Exchange to operate in a manner which will meet the aspirations of the buyer and seller and shall add commercial and financial value of the commercial interest of the Power Exchange.

3.2.3 Draft Regulation 17 (11): Whether such a Provision will serve the purpose for which it is sought to be introduced?

- i. The proposed provision will not serve any purpose as the exchange is completely demutualised and ringfenced and enough safeguard has been

laid down in the Draft PMR 2020, Draft Regulation 17, some of which are as under:

Draft Regulation 17. Governance structure of Power Exchange

.....

.....

(5) The Managing Director shall be a professional qualified in the fields of power sector or finance or management or information technology and hold sufficient experience.

(6) The Managing Director shall function as the Chief Executive of the Power Exchange and all powers in respect of day-to-day affairs of the Power Exchange shall be vested with him.

(7) The Managing Director or any employee of the Power Exchange shall not be directly or indirectly associated with any member of the Power Exchange or client or participant of the Power Exchange or with a holding or subsidiary company thereof.

(8) The Managing Director shall ensure that the details of individual bids of members of the Power Exchange are not shared with the Board of Directors.

- ii. The purpose of giving Board representation to shareholders is to protect the interests/investments of shareholders. By creating a distinction between members of the power exchange and other shareholders and to deny a certain category of shareholders any Board representation is absolutely arbitrary and contrary to Article 14 of the Constitution of India and Article 19(1) (g) of the Constitution of India which guarantees freedom to practice any profession, or carry on any occupation, trade or business.
- iii. Moreover, by putting such a restriction may discourage serious and well reputed players to come as a promoter of Power Exchange. As this Commission is aware, today after more than a decade of PMR 2010 coming into operation, there is really only one exchange which is operating having more than 98% of the market share. The other exchange has been surviving just on account of some provisions in the PMR 2010. The intention of the Regulations has been to promote healthy

competition in the Power Market and it is humbly submitted that putting such a restrictive regulation may come in the way of promoting healthy competition and may continue the monopoly by one exchange.

- iv. The issue of Governance becomes more stringent as in Draft PMR 2020, it has been suggested that at least 50% of the Board Members need to be Independent Directors. It is pertinent to point out that how a member shareholder having not more than 5% shareholding and a board position will be able to influence any decision of the Board/Power Exchange. Further, the issue of conflict of interest will never arise in any decision making.
- v. By once again permitting a member of a power exchange to hold shares to an extent of 5 %, while precluding them from any Board representation, these Regulations appear to be manifestly arbitrary.

3.2.4 Draft Regulation 17(11): Examination from view point of Subordinate Legislation

- i. The Regulations made by the Ld. CERC fall in the category of "subordinate legislation," as enacted under the enabling statute i.e. the Electricity Act. As per the law laid down by the Hon'ble Supreme Court in a number of cases such as *State of Tamil Nadu v. P. Krishnamurthy* (2006) 4 SCC 517 and *Cellular Operators Assn of India v. TRAI* (2016) 7 SCC 703, any subordinate/delegated legislation has to satisfy certain conditions in order to be legally sustainable.
- ii. In this regard, in *Global Energy v. CERC* 2009 15 SCC 570, the Hon'ble Supreme Court held that "*it is now a well settled principle of law that "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation making power cannot be exercised so*

as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act."

- iii. On the issue of subordinate legislation, Hon'ble Supreme Court in case of ***Indian Express Newspaper vrs Union of India (1985)1 SCC 641*** has held ***as under***

*"75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock, L.J. in *Mixnam's Properties Ltd. v. Chertsey Urban District Council*-thus:*

"The various special grounds on which subordinate legislation has sometimes been said to be void ... can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus, the kind of unreasonableness which invalidates a bye-law is not the antonym of 'reasonableness' in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'...if the courts can declare subordinate legislation to be invalid for 'uncertainty' as distinct from

unenforceable...this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain."

- iv. It is therefore submitted that it can never be said that the Electricity Act seeks to/permits a class of shareholders in a power exchange to be deprived of any Board Representation and therefore this disability that is sought to be brought into existence is not in line with the Electricity Act i.e. the enabling statute and can thus not be sustained in law.
- v. Another ground on which the legality of a subordinate legislation can be scrutinised is whether it is repugnant to any law of the land i.e. an enactment. In this regard, it is relevant to examine certain guiding principles as well as provisions of the Companies Act.

3.2.5 Draft Regulation 17(11): Provisions of the Companies Act

- i. A perusal of the Companies Act, 2013 will reveal that there is no provision, which precludes a category of shareholders from having any Board Representation. To the contrary, section 151 even provides a mechanism for very small shareholders to have Board representation.
- ii. It can therefore be safely said that the Companies Act seeks to protect the rights of shareholders and one of the means is naturally Board representation.
- iii. It is therefore submitted that to create a category of shareholders, who do not have the right to any Board representation, is repugnant to the law of the land i.e. the Companies Act and therefore a subordinate legislation, which seeks to do this would be unsustainable in law.
- iv. Therefore, a situation has arisen, whereby a member of a power exchange is permitted to be a shareholder, but denied board representation in a power exchange. This appears to be without rationale and needs reconsideration.

3.2.6 Conclusion

Accordingly it is most humbly suggested that a member of the Power Exchange can be permitted to be on the Board of the Power Exchange, with a restriction that the number of such Directors will not exceed 25% of the total strength of the Board Members as in the existing PMR 2010. Further, if the member is a promoter of the Exchange, such member may be allowed to hold a permanent Board Position if agreed by the other Shareholders as per provisions of the Companies Act and the Articles of Association of the Company (Power Exchange).

3.3 Draft Regulation 27

Clearing and Settlement: 1st Para:

"The Power Exchange shall enter into an agreement in writing for Clearing and Settlement of any transaction of electricity undertaken on the Power Exchange with an entity established in accordance with the provisions of the Payment and Settlement Systems Act, 2007:

3.3.1 Suggestion: This is a welcome step, however, more clarity with regard to power, roles, functions, structure and shareholding of clearing and settlement entity may be elaborated.

3.4 Draft Regulation 37 & 38

Market Coupling:

Draft Regulation 37: "Objectives of Market Coupling:

- (1) Discovery of uniform market clearing price for the Day Ahead Market or Real-time Market or any other market as notified by the Commission;*
- (2) Optimal use of transmission infrastructure;*
- (3) Maximisation of economic surplus, after taking into account all bid types and thereby creating simultaneous buyer-seller surplus."*

Draft Regulation 38: “Designation of Market Coupling Operator

Subject to provisions of these regulations, the Commission shall designate a Market Coupling Operator who shall be responsible for operation and management of Market Coupling.”

3.4.1 Comments/Suggestions: The provision regarding Marketing Coupling Operator is a welcome step, as it will ensure uniformity in the power market. However, clarity on achievement of objectives and definitive timeline may please be specified for establishment of Market Coupling Operator. We also propose that if the provision is retained, the products in Power Exchanges, where the uniform price discovery takes place, such as Renewable Energy Certificates (REC) and Energy Saving Certificates (ECerts), may be included under Market Coupling Operator.

3.4.2 Rationale:

The objectives of ensuring optimal utilization of transmission resources and maximization of economic surplus, apart from development of a derivatives market, are stated to be objectives of Market Coupling. The Hon’ble Commission may like to examine this in further detail and clarify to stakeholders as to how these objectives will be able to be achieved through market coupling.

3.5 Draft Regulation 44(2): Eligibility Criteria for registration of OTC Platform:

“A Power Exchange or Trading Licensee or any of their Associates or grid connected entities shall not be permitted to set up, operate, or have any shareholding in an OTC Platform.”

3.5.1 Comments/Suggestions: It is suggested that with safeguards of demutualization (similar to that specified for Power Exchange), a Power Exchange or Trading Licensee or any of their Associates or grid connected entities may be permitted to set up, operate, or have any shareholding in an OTC Platform. Further this Hon’ble Commission may consider raising the minimum

net worth of the OTC Platform to a higher limit so as to ensure the participation of only serious players.

3.5.2 Rationale

- In the past, most of the products in the power market were initially introduced by Trading Licensees and later, similar products were introduced in Power Exchanges.
- Market participants shall benefit from innovative products/services introduced in OTC Platform by Trading Licensees.
- To deny a Power Exchange or Trading Licensee or any of their Associates or grid connected entities to set up an OTC platform may not be in consonance with the provisions of Electricity Act, National Electricity Policy and the spirit of the Power Market Regulations as the OTC platform, if set up, may provide valuable service to the stakeholders in the Power Market and the Power Exchange or Trading Licensee or any of their Associates or grid connected entities being significant player in the power market will provide immense value and inputs to the OTC Platform.
- A Power Exchange or Trading Licensee or any of their Associates or grid connected entities may be permitted to set up, operate, or have any shareholding in an OTC Platform, as it will add value to the OTC Platform and help it to develop innovative products.
- Safeguards similar to those applicable in case of a Power Exchange may be put in place in case of OTC Platform as well so as to ensure demutualization and ring-fencing.