

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri K.N. Sinha, Member**
2. **Shri Bhanu Bhushan, Member**

Petition No. 20/2004

In the matter of

Grant of Licence for Inter-State Trading in Electricity to Power Trading Corporation of India Ltd.

And in the matter of

Power Trading Corporation of India Ltd. ... **Applicant**

The following were present:

1. Shri M.G. Ramachandran, Advocate, PTC & PGCIL
2. Shri K.V. Balakrishnan, Advocate, PTC & PGCIL
3. Shri S.K. Dube, Dir. (O), PTC
4. Shri Rajiv Malhotra, Sr. Mgr, PTC
5. Shri Ameet Ahluwalia, PTC
6. Ms. Ambika Chauhan, PTC
7. Shri S. Basu, Advisor, PTC
1. Shri Ameet Nayak, Advisor, PTC
2. Shri Rajiv Bharadwaj, PTC
3. Shri Deepak Amitabh, PTC
4. Shri M. Kumar, PTC
5. Shri B.M. Das, PTC
6. Shri G.S. Gupta, PTC
7. Shri U.C. Misra, Director, PGCIL
8. Shri T.S.P. Rao, PGCIL
9. Ms. Ranjna Cudoo, PGCIL
10. Ms. Jyoti Prasad, PGCIL
11. Shri Gajendra Haldea, Chief Advisor, NCAER

**ORDER
(DATE OF HEARING: 24.5.2004)**

The applicant, Power Trading Corporation of India Ltd., has made this application under sub-section (1) of Section 15 of the Electricity Act, 2003 (the Act) for grant of licence for inter-state trading in electricity. The applicant proposes to

trade more than 1000 MU of electricity during the first year after grant of licence and similar volume, during each of the next five years. Accordingly, the applicant has made application for "F" category of licence. The public notices as required under sub-section (2) of Section 15 of the Act, read with the regulations framed by the Commission on the subject were published by the applicant. However, no objection has been received.

2. Earlier, Shri Gajendra Haldea, Chief Advisor, National Council for Applied Economic Research (NCAER) had sent a letter dated 4.2.2004 wherein he had raised certain issues in the context of trading activities carried out by the applicant. Considering the nature of issues raised, the Commission considered it desirable to satisfy itself on those issues before taking a view on the application for grant of licence made by the applicant. Therefore, the comments of the applicant on the contents of the letter received from Shri Haldea were obtained and these are available on record. We will deal with these issues in later part of this order since it is first necessary to have a look at the background against which these issues are raised.

3. The applicant was promoted by NTPC, PGCIL, PFC and NHPC (all Government companies) and was incorporated under the Companies Act, 1956 in April 1999. In accordance with Article 10 of the Articles of Association of the applicant, not less than 32% of the issued equity share capital is subscribed and paid up by the promoters namely, NTPC, PGCIL, PFC and NHPC, each subscribing and paying up not less than 8% of the subscribed paid up capital. Remaining 68% of the issued equity share capital is open for subscription by other entities, financial

institutions and public at large. In the affidavit filed by the applicant, the shareholding structure is indicated as under:

Category	Pre Issue		Post Issue	
	Number of Equity shares	Percentage (%)	Number of Equity shares	Percentage (%)
Promoters	48,000,000	52.45	48,000,000	32.00
Power Grid Corporation of India Ltd	12,000,000	13.11	12,000,000	8.00
National Thermal Power Corporation Ltd	12,000,000	13.11	12,000,000	8.00
Power Finance Corporation Ltd	12,000,000	13.11	12,000,000	8.00
National Hydroelectric Power Corporation Ltd	12,000,000	13.11	12,000,000	8.00
Other Shareholders	43,500,010	47.55	102,000,000	68.00
The Tata Power Company Ltd	15,000,000	16.39	15,000,000	10.00
Damodar Valley Corporation	10,000,000	10.92	10,000,000	6.67
Industrial Development Bank of India	5,000,000	5.46	5,000,000	3.33
Infrastructure development Finance Company Ltd	5,000,000	5.46	5,000,000	3.33
Life Insurance Corporation of India	4,000,000	4.37	4,000,000	2.67
IFCI Ltd	2,500,000	2.73	2,500,000	1.67
GIC	2,000,000	2.18	2,000,000	1.33
Public (including reservation)	10	0.00	58,500,000	39.00
Total	91,500,010	100.00	150,000,000	100.00

4. PGCIL is the Central Transmission Utility (the CTU) under Section 38 of the Act. PGCIL in its capacity as the CTU is also a deemed transmission licensee under the second proviso to Section 14 of the Act. By virtue of first proviso to sub-section (2) of Section 27 of the Act, the CTU operates the Regional Load Despatch Centres (RLDCs) whose functions are defined under Section 28 of the Act. Under the regulations framed by the Commission on open access, the CTU and RLDCs are declared as the nodal agencies for performing functions in connection with grant of long-term and short-term open access respectively to the inter-state transmission

system. As a CTU, PGCIL has to impartially perform certain roles and functions assigned to it under the Act and the regulations framed by the Commission on open access. Further, by virtue of first proviso to Section 38(1) of the Act, the CTU cannot engage in the business of trading in electricity. Similarly, the second proviso to Section 27(2) also prohibits RLDCs from engaging in the business of trading in electricity. Also, under the third proviso to Section 41 of the Act, a transmission licensee cannot enter into any contract or otherwise engage in the business of trading in electricity.

5. In view of the above-noted factual background and the statutory provisions, it was urged by Shri Gajendra Haldea on 27.4.2004 when the application was taken up that grant of licence to the applicant would amount to PGCIL, a deemed transmission licensee, entering into trading activity through the applicant which will amount to infringement of the above-noted provisions of the Act. It was also urged that PGCIL as a shareholder in the applicant, cannot perform its functions impartially assigned to it as the CTU under the Act and the regulations framed by the Commission, since there was a possibility of PGCIL favouring the applicant in the matter of open access on its transmission network for undertaking its trading activities.

6. After hearing on 27.4.2004, the Commission had considered it appropriate to give an opportunity to PGCIL of making its representation on the issues raised since the matter was of direct concern to it. PGCIL has filed an affidavit clarifying its position. When this matter was heard again on 24.5.2004, a copy of the affidavit filed by PGCIL was handed over to Shri Haldea. He requested for time for a week to file his comments on the affidavit. However, no further comments have been received

from Shri Haldea in response to the affidavit filed by PGCIL. PGCIL has placed on record two opinions, one dated 29.4.2004 and the other dated 6.5.2004 of the learned Attorney General of India on the above-noted issues a reference to which was made by the learned counsel, Shri MG Ramachandran. The copies of these two opinions have also been sent to Shri Haldea. No response has been filed by Shri Haldea on these opinions either.

7. We heard Shri M.G. Ramachandran, Advocate who appeared on behalf of the applicant as also PGCIL. We also heard Shri Gajendra Haldea at length and in great detail *ab initio* on all the points raised by him in his letter dated 4.2.2004.

8. The first question that arises for our examination is whether grant of licence for trading in electricity to the applicant, would amount to grant of licence to PGCIL on account of latter holding 8% of the share capital of the applicant. An outstanding feature of a company incorporated under the Companies Act is its independent corporate existence. A company is at law a distinct legal *persona*, existing independent of its shareholders who compose it. No shareholder can say that he is the owner of the company, as the business conducted by the company belongs to the company and not to its shareholders. Neither is the company in law the agent or trustee of its shareholders. Under the ordinary rules of law, a holding company and a subsidiary company, even a 100 per cent subsidiary company, are distinct legal entities and in the absence of an agency contract between the two companies, one cannot be said to be the agent of the other.

9. The above-noted legal position emerges out of the rulings of the Hon'ble Supreme Court. In Charanjit Lal Choudhry Vs Union of India [AIR 1951 SC 41], it was held that the company and shareholders are separate entities in law and if the allegation is made that if any property belonging to the company has been taken possession of without compensation or the rights enjoyed by the company under Article 19(1) (f) have been infringed, it would be for the company to come forward to assert or vindicate its own right. The individual shareholders, being distinct from the company have no right to complain for violation of the rights of the company. In Electronic Corporation of India Ltd. Vs Secretary, Revenue Department, Government of Andhra Pradesh [(1999) 4 SCC 458], the Hon'ble Supreme Court noted the distinction between the company and its shareholders and held as under:

“A clear distinction must be drawn between a company and its shareholders, even though that shareholder may be only one and that the Central or a State Government. In the eyes of law, a company registered under the Companies Act, 1956, is a distinct legal entity other than the legal entity or entities that hold its shares”.

10. A similar view was taken by the Hon'ble Supreme Court in LIC of India Vs Escorts Ltd. (AIR 1986 SC 1371). It follows that PGCIL and the applicant are distinct legal entities independent of each other. Therefore, the statutory bar imposed on PGCIL, in its capacity as the CTU and the deemed transmission licensee, to undertake trading in electricity cannot be extended to the applicant. In our conclusion, we are supported by the view of the learned Attorney-General who has opined that the investment by PGCIL of 8% in the equity of the applicant does not amount to trading in power by PGCIL or otherwise entering into any contract or engaging in the business of trading in electricity by PGCIL.

11. However, the theory of corporate entity which is the basic principle on which the whole of company law is based cannot be pushed to unnatural limits. Circumstances may occur to identify the company with its shareholders. There may be situations where it becomes necessary to lift the veil of incorporation in order to examine the realities, which lay behind. There are certain well established grounds, evolved by the courts to seek piercing of veil of corporate personality, namely, for determination of character of the company to see whether it is the 'enemy' company by examining the character of the persons in real control of the corporate affairs; for the benefit of revenue (see Bacha F Guzdar Vs CIT-AIR 1955 SC 74). Also, in the past the Courts have refused to uphold the separate existence of the company where it is formed to defeat or circumvent law, to defraud or to avoid legal obligations.

12. To us, it appears that none of the above grounds are attracted in the case of the applicant. The applicant company was formed in April 1999, much before the enactment of the Act, to carry out the business of purchase and sale of electrical power, along with other objects, with four Government companies, including PGCIL, as the promoters. There is no evidence to suggest, even obliquely, that the applicant was promoted to over-reach or circumvent the provisions of any law in force at that time. By virtue of constitution of the applicant company, PGCIL is not in a position to unduly influence the activities of the applicant or draw undue advantage out of the profits earned. Thus, even if it is possible to draw aside the veil of incorporation, applicant's claim for grant of trading licence cannot be overlooked on the mere ground of presence of PGCIL on its shareholders' list.

13. Shri Gajendra Haldea relying upon the Supreme Court judgement in AIR 1971 SC 2428 submitted that by virtue of pecuniary interest of PGCIL in the applicant, there is possibility of PGCIL favouring the applicant in the matter of open access. It was urged that a person having pecuniary interest is disqualified from acting as a judge. He also argued that the dividing line between administrative and judicial actions is thin and is gradually obliterating. Therefore, Shri Haldea argued that so long as PGCIL holds share of the applicant, the applicant should not be granted licence for inter state trading in electricity.

14. Learned Attorney-General after going through factual matrix, in his opinion has recorded that the mere fact of PGCIL's investment of 8% in the equity of the applicant does not itself invalidate PGCIL's decisions as the CTU on the ground of bias or favouritism or conflict of interest, since any decision by PGCIL would not be a subjective decision but would be based on the objective criteria laid down by the Commission. Therefore, according to the learned Attorney-General, the action or decisions of PGCIL or the RLDCs in providing open access to the applicant and not to other generating companies/licensees/traders etc. at any point of time could not be validly questioned on ground of bias.

15. In A.K. Kraipak Vs. Union of India (AIR 1970 SC 150), the Hon'ble Supreme Court observed that:

"The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore, what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias". (Emphasis added)

16. In R.L. Sharma Vs Managing Committee (AIR 1993 SC 2155), the Supreme Court further held that the test of bias is where a reasonable intelligent man fully apprised of all the circumstances would feel a serious apprehension of bias. On consideration of the facts on record that PGCIL is holding 8% of the shares of the applicant it cannot be visualised that there is real likelihood of bias that PGCIL would be favouring the applicant to allow open access to its transmission system. In our opinion, PGCIL cannot unduly influence the trading activities of applicant when licence is granted to the latter. The allegations of bias or prejudice are based on surmises since no concrete evidence whatsoever has been produced before us to substantiate these allegations. Further, the disputes regarding denial of open access by PGCIL are to be resolved by the Commission. The Commission will not hesitate to use its whip hand as and when any instances of discrimination are brought to its notice.

17. Shri Haldea further argued that the procurement price of power purchased by the applicant is not determined by any authority since according to the applicant, pricing of trading transactions are all market determined. It was argued that this kind of *carte blanche* to the applicant may lead to exploitation of the end consumer. We have considered the submission. We do not find any cause for apprehension that because of the trading activities of the applicant, the ultimate consumer can be put to any disadvantageous position. The sale and purchase price of electricity is regulated. The applicant may sell electricity to a distribution licensee direct or through an intermediary. By virtue of Section 86 (1) (b) of the Act, the State Commission is assigned the function to regulate electricity purchased and procurement process of distribution licensees including the price on which electricity shall be procured from

generating companies or licensees or from other sources through agreement for purchase of power for distribution and supply within the State. In this manner the interest of the end consumer is duly secured as it is the State Commission which has the ultimate say in the matter of fixation of tariff of a distribution licensee to the consumer. Therefore, the apprehension expressed by Shri Haldea cannot be considered sufficient to deny licence to the applicant.

18. Shri Haldea had also pointed out that under Clause (j) of sub-section (1) of Section 79 of the Act, this Commission is to fix trading margin for inter-state trading of electricity, but the trading margin has not been fixed by this Commission so far. According to him, non-fixation of trading margin by this Commission may also lead to consumer exploitation. We have noted the concern of Shri Haldea. The Commission may fix trading margin for inter-state of electricity, if considered necessary, as provided in Clause (j) of sub-section (1) of Section 79 ibid. It is true that the trading margin has not been fixed by the Commission so far. It should be noted that the Commission has not so far granted any licence for inter-state trading in electricity. The Commission would in the first place like the margins to be driven by the market forces. However, if the Commission comes to the conclusion that undue profiteering is taking place in the market, it shall fix trading margins. For doing so, it is necessary to study the trends of sale and purchase of power by the electricity trader. To that end in view, the Commission will be calling for quarterly reports from the licensees, including information regarding sale/purchase price of the electricity. A provision to that effect is already made in the regulations on inter-state trading notified by the Commission. After studying these reports for some time, the Commission will consider to fix the trading margins, if considered necessary. The mere fact that the

Commission has not fixed trading margins so far should not be a ground for denial of licence to the applicant as otherwise enough regulatory safeguards are available.

19. It was next argued by Shri Haldea that the applicant is abusing its dominant position, which is likely to cause an adverse effect on competition, thereby attracting provisions of Section 60 of the Act. We have considered the submission. Section 60 of the Act provides that the Commission may issue such direction as it considers appropriate to a licensee or a generating company, if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry. No instances of abuse of its position by the applicant have been brought to our notice, though applicant has been in the business of trading without a licence under the old laws since its incorporation in April 1999. At the stage of considering the applicant's request for grant of licence, the question raised does not merit much attention. The Commission may address the situations under Section 60 of the Act as and when they arise, in order to prevent misuse of the dominant position by any player in the electricity market.

20. The shareholding pattern of the applicant has been reproduced above. The applicant is not a Government company by the reason of definition given in Section 617 of the Companies Act. Neither the applicant is a subsidiary of a Government company. The applicant in its affidavit filed before the Commission has stated that it has been working under the guidance of Ministry of Power. A perusal of Articles of Association of the applicant reveals that the control exercised by the Central Government is limited to nominate one Director (Nominee Director). Further, as per

the Articles of Association, the applicant may, subject to resolution in a general meeting and with the approval of Central Government increase the number of Directors and may alter the qualifications. These provisions of the Articles of Association cannot be construed to clothe the Central Government with administrative control over the applicant or giving guidance. It has emerged that the annual report of the applicant are not presented before the Parliament, the applicant does not fall under the purview of the Parliamentary Committee on Public Undertakings, the selection of Director, including the CMD of the applicant is not made through the Public Enterprises Selection Board, the accounts of the applicant are not placed before the Public Accounts Committee of the Parliament. These features are pointer to the fact that the applicant is a non-government public limited company. Shri Haldea has brought to our notice an advertisement published in large number of newspapers by Ministry of Power on 6.2.2004 which catalogues the major achievements of the Central Government in the power sector. In the said advertisement, the applicant has been bracketed with other Central Power Sector Utilities functioning under Ministry of Power. According to Shri Haldea, such advertisements place other private utilities involved in trading of electricity in a disadvantageous position in the matter of trading since they tend to give an impression that the applicant is a Government company and enjoys patronage of the Central Government. We find some merit in the submission of Shri Haldea. The advertisement can be misleading because of which the applicant can get advantage over other players involved in trading of electricity. In our opinion, this kind of advertisement should be avoided at all costs. We urge upon the Central Government in Ministry of Power to have a look into this aspect.

21. As per clause 6 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Trading Licence and other related matters) Regulations, 2004, the net worth of the Electricity trader at the time of application shall not be less than 20 crore in case the applicant proposes to undertake trading of more than 1000 MUs in a year. The applicant in the present case proposes to undertake trading of more than 1000 MUs in a year. The applicant has submitted its annual reports from the year 1999-2000 to 2003-2004 (up to 31.12.2003). The net worth of the company for the last 5 years, beginning from 1999-2000 has been analysed from these annual reports as detailed below:

Year	1999-00	2000-01	2001-02	2002-03	2003-04 (up to 31.12.2003)
Paid up capital*					
Paid up equity capital	600.00	600.00	2400.00	7250.00	9150.00
Paid up redeemable preference share capital					
Total	600.00	600.00	2400.00	7250.00	9150.00
Reserves and Surplus (Excluding Revaluation Reserves)					
General reserve					
Preference share redemption reserve					
Debenture redemption reserve					
Share premium A/C					150.00
Reserve under income tax Act.					
Surplus in P/L A/C		0.00	570.20	1330.57	3770.41
Total	0.00	0.00	570.20	1330.57	3920.41
Less: Accumulated Losses and Intangible assets					
Pre operative Expenses Pending allocation	0.00	0.00	0.00	0.00	0.00
Accumulated loses	6.00	16.21			
Misc. Expenses to the extent not written off or adjusted	95.54	396.66	572.89	938.96	793.50
Net Worth	498.46	187.13	2397.31	7641.61	12276.91

22. We are satisfied that the applicant qualifies for grant of licence for trading as a category 'F' electricity trader i.e. for trading of more than 1000 MUs in a year. The Commission, therefore, proposes to grant licence to the applicant as category 'F' electricity trader. We direct that the notice as required under sub-section (5) of Section 15 of the Act be issued by the office of the Commission inviting further suggestions or objections to this proposal, latest by 25.6.2004. List this petition on 29.6.2004.

23. Meanwhile, the applicant is directed to file copies of the power purchase and sale agreements entered into by it with the utilities since 1.1.2003. In future, the applicant shall also file the copies of the agreements on quarterly basis for a period of one year in the first instance.

(BHANU BHUSHAN)
MEMBER

(K.N. SINHA)
MEMBER

New Delhi dated the 4th June, 2004