

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI  
Record of Proceedings**

**Petition No.159/2008**

Subject: Violation of the provisions of Section 66 of the Electricity Act, 2003 read with para 5.7.1. (f) of the National Electricity Policy and order dated 6.2.2007 in Petition No. 155/2006.

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

Date of Hearing : 13.1.2009

Petitioner : Power Exchange India Limited, Mumbai

Respondents : 1. Multi Commodity Exchange of India Ltd., Mumbai  
2. Indian Energy Exchange Limited, New Delhi  
3. Forward Market Commission, Mumbai

Parties present : Shri Hemant Sahai, Advocate PXIL  
Ms. Rupa Devi Singh, PXIL  
Shri Prabhajit Kumar Sarkar, PXIL  
Shri Amit Kapoor, Advocate , MCX  
Ms. Shobhna, Advocate, MCX  
Ms. Raj Rani Bhalla, Advocate, MCX  
Shri Vishwanathan Iyer, MCX  
Shri M.G.Ramchandran, Advocate, IEX  
Shri Anand Ganesan, Advocate, IEX  
Shri Jayant Dev, IEX

Learned counsel for the petitioner sought time to file rejoinder to reply of first respondent on 12.1.2008. Learned counsel for the respondents did not raise any objection to the request made by the learned counsel for the petitioner. The third respondent has filed its reply under letter dated 7.1.2009, a copy of which is being sent by the office to the parties. In view of the submission made by the learned counsel, the Commission allowed the petitioner to file its rejoinders by 30.1.2009 with an advance copy to the respondents.

2. Meanwhile, Ministry of Power under its OM No.25/9/2006- R&R, dated January 2009 has taken up the matter with the Department of Consumer Affairs for appropriate advice to the third respondent and also for deleting `electricity` from its notification dated 9.1.2006, issued under Sections 15 and 16 of the Forward Contracts (Regulation) Act, 1952. This OM may be taken on record as a part of the present proceedings. The Commission has directed that a copy of this OM be also forwarded to the parties.

3. The petition shall be re-notified for hearing on 10.2.2009.

sd/-  
**(K.S.Dhingra)**  
**Chief (Legal)**



टेलिफोन : २२७९५३००/२२७९५३०४  
तार : वायदायोग कालबादेवी  
फैक्स : २२८१ २०८६

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FORWARD MARKETS COMMISSION

उपभोक्ता मामले, खाद्य और सार्वजनिक वितरण मंत्रालय  
MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC DISTRIBUTION  
(उपभोक्ता मामले विभाग)  
(DEPARTMENT OF CONSUMER AFFAIRS)

एवरेस्ट, तीसरी मंजिल  
'EVEREST', 3<sup>RD</sup> FLOOR  
१००, मरीन ड्राइव, मुंबई - ४०० ००२.  
100, MARINE DRIVE, MUMBAI - 400 002.

File No. 1/01/2009- CERC / No. 159 of 2008/LAD/70

दिनांक: Date: 7<sup>th</sup> January, 2009

To

The Chairman,  
Central Electricity Regulatory Commission,  
4<sup>th</sup> Floor, Chanderlok Building, 36, Janapath,  
New Delhi - 110 001

Dear Sir,


This refers to Petition No.159 of 2008 filed by Power Exchange India Ltd, and the Order passed by the C.E.R.C. on 24<sup>th</sup> December, 2008. In this connection I am directed to briefly indicate the legal position in respect of electricity as a "good" and the jurisdiction for regulating forward contracts in electricity in the following paragraphs:

- i) Under Section 2(d) of the Forward Contracts (Regulation) Act, 1952 (hereinafter refer to as FC(R) Act). "goods" have been defined as any movable property other than actionable claims, money, and securities.
- ii) Under Section 15 of the FC(R) Act, the Central Government is empowered to notify "goods" in which forward trading can be permitted through recognized associations. Forward trading in such notified commodities can be conducted between, with or through members of recognized associations.
- iii) Under section 2(c) of the FC(R) Act, "forward contract" has been defined as the contract for delivery of goods and which is not a ready delivery contract. Section 2(i) of the FC(R) Act. Defines "ready delivery contract." In view of these two definitions, any contract in which the delivery of goods is made after a period exceeding eleven days or where the contract is performed without giving/taking delivery becomes forward contract.
- iv) A three tier regulatory system has been provided under the F.C.(R) Act, the Central Government being the apex Regulator. Most powers of the Central Government have been delegated to the second tier of the regulation viz., Forward Markets Commission (FMC). The recognized associations are the third tier, of the regulation.

- v) FMC, which functions under the administrative control of Department of Consumer Affairs, Ministry of Consumer Affairs, Food & Public Distribution, Government of India, has been set up in 1953 under section 3 of the FC(R) Act. Section 4 of the Act lists out the regulatory functions of the Commission in respect of forward trading in goods.
- vi) Under Section 6 of the FC(R) Act, the Central Government is empowered to grant recognition to associations for organizing forward trading in notified commodities on the basis of recommendations by the FMC.
- vii) The Central Government has issued a Notification S.O.29(E) dated 9<sup>th</sup> January, 2006 (copy enclosed) applying the provisions of Section 15 to Electricity. This implies that forward trading in electricity can be organized by an association recognized by the Central Government for that good.
- viii) Multi Commodity Exchange (MCX) is an association recognized by the Central Government under Section 6 of the FC(R) Act vide Notification No. S.O.1116(E) dated 26.9.2003 (copy enclosed). The recognition has been granted to the MCX in all "goods" subject to the condition that the Association will comply with directions given by the FMC from time to time.

2. I am also to add that spot markets and forward markets in goods can be regulated by two different regulators. For example, agricultural markets and consequently trading in agricultural commodities have been put in the State List vide Seventh Schedule of the Constitution of India. However, forward trading in commodities has been put in the Union List. Thus, though the States have powers to enact legislation pertaining to spot trading in agricultural commodities, the Central Government has powers to enact legislation, and regulate forward trading in agricultural commodities. Spot trading in agricultural commodities is, therefore, regulated by various States under the State Agricultural Produce Market Committee (APMC) Acts. Forward trading in agricultural commodities is, however, governed by F.C(R) Act in the whole country.

3. In view of the above, forward trading in electricity comes under the purview of FC(R) Act. This does not take away the jurisdiction of the CERC in respect of spot trading in electricity. Hence, the petition No. 159/2008 is clearly misconceived and has no legal basis, and as such, desires to be dismissed for want of jurisdiction of CERC.

Yours faithfully  
  
(Prabhakar Patil)  
Director (Law)

Shram Shakti Bhawan, Rafi Marg,  
New Delhi, January, 2009

OFFICE MEMORANDUM

Subject: Power Market Regulation.

The undersigned is directed to refer to this Ministry's O.M. of even number dated 30.6.2006 regarding amendment to the notification dated 9.1.2006 issued by the Department of Consumer Affairs under the provisions of section 15(1) of the Forward Contract (Regulations) Act, 1952. The Department of Consumer Affairs may also refer to their OM No. 16/1/2006-IT dated 21<sup>st</sup> August, 2006 stating that amendment is not required.

2. According to the provisions of Electricity Act, 2003 trading is a distinct activity and the powers to grant licence for trading of electricity vest with the Electricity Regulatory Commissions (ERCs) under the provisions of sections 12 and 14 of the Electricity Act, 2003. The development of electricity market (including trading) is the specific responsibility entrusted to the Regulatory Commissions under section 66 of the Electricity Act, 2003. Section 178(2)(y) of the Act empowers the CERC to make regulations on the manner by which development of market in power including trading specified under section 66 of the Act. Thus the trading of power, in all forms comes under the purview of the ERCs only.

3. Further, it is stated that the Electricity Act, 2003 has been enacted after the Forward Contract (Regulations) Act, 1952 and it also has overriding effect over all previous Acts unless specifically saved under section 173 of the Electricity Act, 2003 (Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989). Provisions of Section 173 and Section 174 of the Electricity Act, 2003 are as under:

173. *Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.*

174. *Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act*

4. Also under the Government of India (Allocation of Business) Rules, 1961 the Electricity Act, 2003 has been allocated to the Ministry of Power and therefore, for the purposes of the said Act, the Central Government means the Minister-in-charge in the Ministry of Power.

5. The Power Exchange India Limited (PXIL) vide its letter of 16<sup>th</sup> December, 2008 has expressed concern about news report in a business newspaper regarding application by Multi Commodity Exchange (MCX), the major promoter of Indian Energy Exchange (IEX) to the Forward Markets Commission (FMC) for permission to launch deliverable commodity basket and electricity futures contract. A copy of the letter of PXIL is enclosed.

6. In view of the above the responsibility of developing power markets being with the Central Electricity Regulatory Commission under the provisions of the Electricity Act, 2003, the Department of Consumer Affairs is requested to advise the Forward Market Commission not to give any permission for future trading on electricity, as this may cause confusion among power sector stakeholders and may even affect the nascent power market due to overlapping regulatory scenario. The Department of Consumer Affairs is also requested to reconsider the request of this Ministry to issue amendment to the notification of 9<sup>th</sup> January, 2006 by deleting the word 'electricity' from the said notification to remove the inconsistency. In case of any difference of opinion between the Ministries on the issue, the views of Ministry of Law & Justice may kindly be taken.

12/01/09

(Malay Shrivastava)

Director

Tel: 2371 4000

Department of Consumer Affairs,  
(Shri BrijMohan, Deputy Secretary(IT),  
Krishi Bhawan,  
New Delhi.

Copy to:

1. The Chairman, Central Electricity Regulatory Commission, New Delhi.
2. The Chairman, Forward Markets Commission, Mumbai.