

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 117/2009 with  
I.A.No. 24/2009 and 47/2009**

**Coram:**

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri S.Jayaraman, Member**
- 3. Shri V.S.Verma, Member**

**DATE OF HEARING: 24.11.2009**

**DATE OF ORDER: 24 .12.2009**

**In the matter of**

Petition under Section 66 read with regulation 24 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

**And in the matter of**

Tata Power Trading Company Ltd., Mumbai

**....Applicant**

**Vs.**

1. Indian Energy Exchange Ltd. New Delhi
2. Power Exchange of India Limited, Mumbai

**.....Respondents**

**The following were present:**

1. Shri Sitiesh Mukherjee, Advocate for the petitioner
2. Shri Vishal Anand, Advocate for the petitioner
3. Ms Megha, Advocate for the petitioner
4. Ms Swapna Sesadri, Advocate, IEX
5. Shri R.K.Mediratta, IEX
6. Shri Bikram Singh, IEX
7. Shri Ashish Berned, Advocate, PXIL
8. Shri P.K.Sarkar, PXIL
9. Shri Rajiv Yadav, Advocate, GEL

## ORDER

The petitioner, Tata Power Trading Company Ltd. has filed this petition under Section 66 of the Electricity Act, 2003 ("the Act") read with Regulation 24 of the CERC (Conduct of Business) Regulation, 1999 seeking the following prayers:

- (i) Amend or alter the business rules, bye-laws, rules and contracts of the Respondents to the extent necessary, to circumscribe the nature and extent of activities carried out by Brokers, including existing Brokers, and to exclude therefrom the right to trade in contracts resulting in delivery of underlying units of electricity;
- (ii) disallow Brokers from entering into any transactions for trading of contracts on Respondents' power exchange that involve undertaking any obligation or risks of delivery/offtake of underlying units of electricity related to the transactions;
- (iii) appoint Commissioner to call for and examine all contracts entered into by Brokers with their respective clients for trading of contracts in respondents' power exchanges including the terms relating to payment of brokerage, commission or other charges charged by them under various transactions;
- (iv) direct the Respondent NO. 1 and Respondent NO. 2 to amend the rule, by law and business rules to disallow broker who are entitled not recognized under the Act from being a member of the Respondent No.1 and Respondent No. 2, respectively;

(v) pass such further and/or other order (s) as the Hon'ble Commission may deem fit in the facts and circumstances of the case.

2. The petitioner has submitted that the Indian Energy Exchange Ltd. and Power Exchange of India Ltd., the Respondent Nos. 1 and 2 herein, have been set up with the approval of the Commission vide order dated 31.8.2007 in Petition No. 38/2007 and order dated 27.5.2008 in Petition No. 21/2008. The Commission in its order dated 31.8.2007 has made a clear cut distinction between the proprietary members who are the grid connected entities entitled to trade of their own account and professional members who are not connected to the grid and allowed to carry out trading of their own account and on behalf of their constituents/clients. Similarly, in the order dated 27.5.2009 in Petition No.21/2008, the Commission has directed that the Members will be required to submit no objection certificate from the SLDC, RLDC, STU and CTU as the case may be for their connectivity to the grid", though no distinction has been made between the proprietary members and professional members in case of Respondent No.2. It has been submitted that professional members include trading licensees and those who do not possess trading license issued by the Appropriate Commission. The petitioner is concerned with the functioning of the professional members not having trading license who are carrying on trading in contracts in

the power exchanges of the respondents. The petitioner has referred this category of professional members as “brokers” in its petition.

3. The petitioner has submitted that the trading licensees who have been issued licenses by the Appropriate Commission have been clubbed together with brokers as professional members having similar rights and obligations with regard to trading in contracts on power exchanges. Therefore, an important legal issue has arisen regarding nature of functions being performed by a broker. The main contention of the petitioner is that the professional members other than trading licensees are neither grid connected entities nor trading licensees. They are carrying out trading in the power exchanges of the respondents in contravention of the provisions of the Act. Such members are assuming the obligations and risks of physical delivery of electricity without being connected to the grid or without obtaining a trading license. According to the petitioner the brokers are enjoying rights and discharging obligations similar to those undertaken by trading licensees and therefore it would not be permissible under law to allow the brokers to carry on trading in contracts in power exchange without obtaining trading license from the Appropriate Commission.

4. The Petitioner has submitted that the trading in contracts in the power exchanges can be carried out under the approved rules and

bye-laws only through the members registered with the respondents. For the purpose of trading, every member is provided with a unique password, software and inter-connection with specified terminals by the respondents to allow the members to participate in the trading activity. The members are entitled to charge from their client, professional charges or a brokerage for the services rendered by them. In addition to the brokerage, the members also collect from their clients transactional charges such as transmission charges, transaction charges levied by the respondents.

5. The petitioner has quoted from the bye-laws of the respondents in support of its contention and has submitted that the rules and bye-laws of the power exchanges of the respondents provide for the following namely,:

(i) the power exchange recognizes bids submitted through approved working stations of the member and using approved codes issued to members or their recognized approved users;

(ii) all clearance and settlement of contract at the exchange can be made only by a member of exchange;

(iii) the volume of transaction admitted by the exchange from member or through any of its authorized representatives is limited to the extent of margin furnished by the member;

(iv) any cancellation or modification of the bid can be carried out only by a member;

(v) a member is primarily and solely liable to the exchange to clear all dues arising out of trading liabilities;

(vi) the members liability is not mitigated or reduced in the event of non-agreement or non-payment by its constituents

(vii) the members are solely liable for any default in the clearing and settlement of contracts.

6. The petitioner has submitted that a very important feature in the trading of contract is the fact that the termination of contractual liabilities by members can be only through delivery and/or by financial settlements. The delivery of underlying units of electricity is a necessary consequence of the contracts in the power exchange. This has been amplified by the Commission in Para 25 of its order dated 18.1.2007 in Petition No. 155/2006. Since the trading in contracts on power exchange necessarily involve physical delivery of underlying units of electricity, the bidding capacity by or on behalf of an entity in a buy or sale transaction is limited to the extent of their actual generation or consumption capacity. This is evident from the rules and bye-laws of respondents. Therefore, a contract entered in a power exchange can only be successfully completed by a grid connected entity who is in a position to

give delivery and accept delivery of electricity. This obligation of actual delivery has been imposed under the rules of the exchange on their professional members also who are not connected to the grid. The rules and bye-laws impose penal liabilities on the professional members for any default in delivery. Therefore, on a trading of contracts on power exchange, it is the member who is the person responsible for carrying out actual delivery to complete the transaction.

7. It has been submitted that the Act recognizes the entity who undertakes sale or purchase of electricity and operates within parameters of law. Such activity of purchase and sale of electricity cannot be carried out by any other entity unknown to the Act. Since the brokers are not connected to the grid and are, therefore, not capable of delivery and consumption, they are not recognized by the Act to undertake sale or purchase of electricity. While the grid connected proprietary members and trading licensees are authorized to undertake such obligations under the Act, the broker is not an entity recognized under the Act to undertake such obligation.

8. It has been further submitted that in terms of the delivery obligation under the rules or bye-laws of the respondents, there is no distinction between the brokers and other members of the respondents and all members are liable for the delivery or off-take of the underlying units of electricity towards the performance of the contract. The

member, while submitting a bid for any particular transaction, has to ensure sufficient margin to the exchange for payment of all liabilities arising out of the transaction. Payment of margin can be carried out only by a member either out of his settlement account or through bank guarantee or such other prescribed arrangement, even when the bid may have been placed by any of its grid connected clients. All adjustments by the exchange in terms of pay-in and pay-outs and all dues in relation to a transaction is made to the members account and it is the member who is liable for any such dues irrespective of nonpayment or absence of the prescribed member-client agreement by any of the clients of such member. The member may have the liberty to determine the quantity or price of the bid on behalf of the client unless specifically instructed otherwise by the client. Any default is similarly contributable exclusively to the member under the rules and bye-laws of the power exchange. In these circumstances, to the extent a broker is allowed to participate in trading of contracts in power exchange with the corresponding rights and obligations of settlement and delivery under the contracts, they are carrying out functions that have been specifically authorized by the Act to be undertake by a trading licensee. Therefore, a broker being an entity unknown to the Act cannot be allowed to carry out such activities since the same is contrary to the express provisions of law and also amounts to discriminatory treatment against a trading licensee.



9. The Commission, in its Record of Proceedings of the hearing held on 30.7.2009, directed the respondents to bring the issues raised in the petition to the notice of their members for their information, and such action as may be considered appropriate. Respondents have confirmed that the contents of the petition have been brought to the notice of their members.

### **Reply of Indian Energy Exchange (IEX)**

10. Respondent No. 1 in its reply has submitted that the petitioner has proceeded on a fundamentally wrong premise that such person who facilitates a transaction in electricity is necessarily engaged in the business of trading within the meaning of section 2 (71) of the Act. Trading under the Act has a defined meaning which involves purchase of electricity for resale thereof. A person can be said to be engaged in the business of trading only if he is an electricity trader within the meaning of the definition of the trading and not otherwise. It has been submitted that under the Act, some of the activities connected with electricity are licensed activities and others are only regulated activities. In terms of Section 12 read with Section 14 of the Act the activities which cannot be carried on without a license are transmission of electricity, distribution of electricity and trading in electricity. Therefore, if the activities carried on by the person does not amount to transmission, distribution or trading in electricity and dealt within the Act, it cannot be said that the person is acting contrary to the provisions of the Act. The

sale and purchase of electricity are always by the grid connected entities or a trading licensees which are authorized to undertake such purchase and resale of electricity in the power exchange. The functions of professional members, brokers etc. other than the person holding trading license have always been associated with the similar market right from the inception whether it is stock-exchanges for shares, securities and commodity exchanges for other commodities. Such professional members do not undertake the purchase and sale of electricity in their name. The sale and purchase of electricity are always by the grid connected entities or a trading licensee who is authorized to undertake such purchase and resale of electricity. The other professional members only facilitate such purchase and resale of electricity by the grid connected entities or a trading licensee. Such facilitation activities is being undertaken in other exchanges like stock exchange, commodity exchanges etc, without the broker undertaking such activities of purchasing or selling the stock of commodity in their own name but acting for clients. Therefore, there can be no objection whatsoever to the participation of such professional members in the power exchanges so long as they do not undertake any activities which are not licensed activities. In order to effectively organize the transaction to the power exchanges, the bye-laws requires the professional members to assume various obligations including furnishing security, margin etc. This does not by itself mean that such professional members are engaged in the

purchase and sale of electricity on the power exchange in their own name. The first respondent has further submitted that in order to address the apprehension of the petitioner, it has amended its business rules stating the following:

*“Notwithstanding anything to the contrary contained in the guidelines, bye-laws, rules, business rules or any other documents of the Exchange dealing with the rights, privileges, duties and functions of a professional member as dealt in the above, it is hereby clarified that in so far as the purchase of electricity in their own name for resale (of electricity in their own name) as per the definition of the term ‘trading’ in Section 2 (71) of the Electricity Act, 2003, the same shall not be undertaken except when he is authorized under the Electricity Act, 2003 to undertake trading.”*

11. The respondent has submitted that transaction in the power exchanges involves physical delivery of electricity, commercial sale and purchase of electricity and facilitation of transactions. While physical delivery of electricity can be only between grid connected entities, commercial sale and purchase of electricity can also involve traders and the facilitation order can be obtained by the professional members. The first respondent relying on Sections 230 and 233 of the Indian Contract Act, 1872 has also submitted that the assumptions of certain financial obligation by the agent do not convert the agent into the principal. The mere fact that there are certain obligations assumed by the professional members in their dealing with the power exchanges including in regard to performance of financial obligation of the transaction cannot by itself make them a purchaser or seller of electricity. As regards the risks, it has been submitted that the financial

default by buyer is managed through an agreement between client and member wherein the client is required to keep adequate margins with the members for expected trade volumes. The member is expected to collect all margins from his clients and there is no liability on members for default in delivery after the scheduling has been done and the member is not assuming any risk of delivery of electricity. As regards the delivery obligations, it has been stated that besides grid connected entities, no other entities including trading licensees can be part of scheduling who can cover delivery risk. The respondent has submitted that the professional members other than trading licensees operating on the exchange are merely facilitating the transactions and obligations of settlements and further delivery is passed on to the clients which is either a grid connected entity or a trading licensee. Therefore, such member is not required to hold a trading license for operating on power exchange on behalf of its clients.

12. The petitioner has subsequently filed IA No 24 of 2009 seeking a direction to the respondents to disallow brokers, their servants, agents or constituents from entering into or executing any agreement or transaction of trading in contracts on their power exchange in any manner whatsoever which results in an obligation on such Brokers to deliver the underlying units of electricity for termination of contractual liabilities as per the rules and bye laws of the Respondents, forthwith and

till the disposal of the main petition. The IA has been opposed by the Respondents.

**Reply of Power Exchange of India Limited (PXIL)**

13. Respondent No. 2 in its reply has submitted that the basic grievance of the petitioner is that the brokers while carrying on trading in the power exchange are assuming the obligation and risks of physical delivery of electricity without being connected to the grid or without obtaining a trading license. The respondent has submitted that the Members are participants that act as agents of other clients that are registered with respondent exchange and such clients are either grid connected entities or trading licensees or otherwise entitled to deal in electricity. Such members do not enter into any contract for delivery or purchase of electricity in their own name and they merely act as agents or clients and the eventual contracts that are concluded are for and on behalf of and in the name of the clients that are either grid connected entities, or are trading licensees or are otherwise legally entitled to deal in electricity and enter into the contracts for sale and purchase of electricity. There are two types of members in the exchange of Respondent No.2 viz. Client or Constituents and Members. Both these categories are registered with the exchange. As per the business rules of the exchange, a client is either a grid connected client or a Trader client. Members are those who are either entitled to trade on their own

account in their own name or on behalf of a client. When a Member trades on behalf of a client, he does not in any manner carry on any activity of a trading licensee under the Act. The transaction being undertaken by such Members on behalf of a client is a "trading transaction" as defined under the rules of the exchange and not trading as defined under the Act. Members who trade on behalf of their client do not undertake any responsibility for physical delivery of the contracted electricity. The Member is only acting as an agent of the client and the contract eventually concluded between two entities, other than the member and in such case, each of the counter parties to such concluded contract are either grid connected entities or the trading licensees or are otherwise entitled to deal in electricity and enter into, buy or sell transactions in respect of electricity.

#### **Submission of Global Energy Ltd (GEL)**

14. Global Energy Ltd, (GEL) as an intervener, has filed an Interlocutory Application No. 47/2009 for impleadment in the matter for seeking certain clarification on the status of the Power Exchanges under the Act, and the nature of transactions executed by different categories of members by the two exchanges. It has been submitted that being an inter-State trading licensee, it is directly impacted by the activities of the respondents. The Commission during the hearing on 14.10.2009 directed GEL that unless the issues raised in the interlocutory application are

similar to those in the main petition, it would be required to file a separate application in accordance with law. During the hearing on 24.11.2009, the Counsel for GEL submitted that it will confine its arguments on those issues which are similar to the issues raised in the main petition. The Commission permitted GEL to file its written submissions which has since been filed on 16.12.2009. In view of this, GEL has been permitted to be impleaded as an intervener in the present application.

15. The intervener respondent has submitted that the transaction executed on the Power Exchanges is for all practical purposes electrical trading transactions. The Act expressly prohibits any unlicensed entity from trading in electricity and therefore, trading cannot be undertaken by Power Exchange members who do not have a valid trading license. Relying on the judgment of the Hon'ble Supreme Court in *Chandrakant Hargovindas Shah-v- Deputy Commissioner of Police (2009) 7 SCC 186*, it has been submitted that trading which is not permitted to non-licensees under the Act, cannot be permitted to be undertaken by such entities indirectly through the instrumentality of Power Exchange. There is no real difference between bilateral transaction and transactions executed through Power Exchange and therefore, the trading carried out by members without license illegal. It has been further submitted that there is complete lack of transparency *vis-à-vis* sharing of market clearing price reached at the Power Exchange. There is no mechanism to

monitor the margin or brokerage, being earned by the members on trading transactions executed through the Power Exchanges. Section 66 of the Act specifically mandates the Commission to take steps for development of market and therefore such steps for development of market would need to necessarily conform to the scheme of the Act. As the Act stipulates trading to be a licensed activity and there is elaborate criteria and conditions to be fulfilled before a trading license is granted, these conditions cannot be waived in case of the members of the exchange who are permitted to do trading on payment of the membership fees to the exchanges.

### **Findings of the Commission**

16. Having heard the parties, and after considering the materials placed on record, we are of the view that, though professional members transacting on the power exchange do not own the title of the electricity being transacted in the platform of the power exchange making them different from the traders who by virtue of purchase of electricity own the title of the electricity purchased before selling it, there may be scope for ambiguity. By undertaking obligations of risk of delivery/off-take of underlying units of electricity related to transactions, there could be an element of mischief as members of power exchange not only function as brokers but also provide credit facility as well as indemnify the exchange by taking the financial risks/ claims arising out of



non delivery of electricity by clients of such members. Although, in the current regulatory framework, the members are not “Electricity Traders” within the meaning of Section 2(26) of the Act, in view of the apprehensions raised in the present application and in order to arrest the possibility of any mischief it is necessary to clarify the role of the members. Accordingly, the role of members other than the trading licensees and the grid connected entities, being that of a “facilitator” would be only to provide the following services:

- (a) IT infrastructure for bidding on electronic exchange platform
- (b) Advisory services related to power prices and the follow on bidding strategy (e.g. weather related information, demand supply position etc)
- (c) Facilitation of procedures on behalf of his client for delivery of power (e.g. SLDC standing clearances, coordination with NLDC etc)

17. We direct that the members of power exchange who are not trading licensee shall not provide any credit or financing or working capital facility to their clients.

18. We further direct that the Power Exchanges shall incorporate the role of the members as stated in para 16 and 17 above by amending their bye-laws, business rules and other related documents immediately and submit compliance within a period of one month. Till the time the above directions are complied with, the Respondent power exchanges

shall not permit members other than the trading licensees and those connected to the grid to transact on their exchanges in any manner other than as directed above.

19. Petition No. 117/2009 and IA Nos. 24/2009 and 47/2009 are disposed of in terms of the above.

**-sd/-**  
**(V.S.VERMA)**  
**MEMBER**

**-sd/-**  
**(S.JAYARAMAN)**  
**MEMBER**

**-sd/-**  
**(DR.PRAMOD DEO)**  
**CHAIRPERSON**