

BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 143/2011 (Suo Motu)

Coram
Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V.S. Verma, Member
Shri M Deena Dayalan, Member

Date of Hearing: 21.07.2011

Date of Order: 22.10.2012

In the Matter of
Implementation of the order of the Commission dated 3.6.2010 in Petition No
26/2010 by Indian Energy Exchange

And in the Matter of
Indian Energy Exchange Ltd

Respondent

Present
Shri MG Ramachandran, Advocate for IEX
Ms Swapna Seshadri, Advocate for IEX
Shri RK Mediratta, IEX

ORDER

This Commission by its order dated 24.12.2009 in Petition No. 117/2009 (Tata Power Trading Co Ltd Vs Indian Energy Exchange and Another) observed that the Members of the Power Exchanges, other than the trading licensees and the grid connected entities, could perform no role, other than the role of a “facilitator” in trading transactions at the Power Exchanges. Therefore, this Commission directed that the Facilitator Member, by whatever name called, could provide to their clients the services of (i) IT infrastructure for bidding on electronic exchange platform, (ii)



advisory services related to power prices and the follow on bidding strategy, and (iii) facilitation of procedures on behalf of the clients for delivery of power. It was further directed that the Facilitator Members of the Power Exchanges shall not provide any credit or financing or working capital facility to their clients. Paras 16 and 17 of the order dated 24.12.2009 in this regard are noteworthy and are reproduced as under:

“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.”

2. In January 2010, the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 (the Power Market Regulations) were notified by this Commission. The Power Market Regulations contained provisions similar to those contained in Paras 16 and 17 of the order dated 24.12.2009 *ibid.* The relevant part of the Power Market Regulations are reproduced below”

“26. Membership in Power Exchange

(i) Membership in Power Exchange shall be of the following three categories:-

(a) Member who is an Electricity Trader or

(b) Member who is a distribution licensee including deemed distribution licensee or a grid connected entity or

(c) Member who is neither an Electricity Trader nor distribution licensee including deemed distribution licensee nor a grid connected entity

(ii) Member who is neither an Electricity Trader nor distribution licensee including deemed distribution licensee nor a grid connected entity can only provide the following services to its clients:-

(a) IT infrastructure for bidding on electronic Exchange platform or skilled personnel

(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. State Load Despatch Centre standing clearances, coordination with National Load Despatch Centre etc)

In no case, such a member shall provide any credit or financing or working capital facility to their clients.

(iii) Member who is an Electricity Trader shall trade and clear on its own account or trade and clear on behalf of their clients. This category of members may provide any credit or financing or working capital facility to their clients.

(iv) Member who is distribution licensee including deemed distribution licensee or grid connected entities shall transact and clear their own account only.”

3. The Power Market Regulations commanded the Power Exchanges to revise their Rules, Bye-laws, etc so as to bring them at par with the provisions of these regulations. Accordingly, the respondent, Indian Energy Exchange under its affidavit dated 6.5.2010 submitted the revised Bye-laws, Rules and Business Rules purportedly in accord with the provisions of the Power Market Regulations. While the revised Bye-laws, Rules and Business Rules were under examination, it came to notice of this Commission that the clients of the Professional (Facilitator) Members of the respondent were being made to deposit money in the Settlement Fund Account of such members who would further settle the accounts of the respondent. By order dated 3.6.2010 in Petition No 26/2010 (Suo Motu), this Commission directed the respondent to stop the practice with immediate effect since such practice was contrary to the Power Market Regulations. The application made by the respondent for extension of time for implementation of the direction was dismissed by order dated 15.7.2010.

4. The respondent filed an appeal, Appeal No 154/2010, against the orders dated 3.6.2010 and 15.7.2010. The respondent gave an undertaking before the Appellate Tribunal to implement the directions of this Commission expeditiously. The undertaking was recorded by the Appellate Tribunal in the following terms;

“The learned counsel for the appellant gives an undertaking on behalf of the appellant that the appellant will make all efforts to implement the order dated 3.6.2010 expeditiously. The undertaking is recorded.”

5. While the appeal filed before the Appellate Tribunal was pending, the revisions proposed by the respondent under its affidavit dated 6.5.2010 were examined in this Commission. These revisions were found to be lacking in certain respects. Therefore, while communicating the deficiencies observed, this Commission by order dated 26.8.2010 directed the respondent to further revise the Bye-laws, Rules and Business Rules in the light the observations conveyed. It was specifically pointed out to the respondent that the Power Market Regulations visualised separate membership structure for the persons who were not electricity traders or distribution licensees (including deemed distribution licensee) or grid connected entities. It was impressed upon the respondent to formulate the new processes and procedures for client transactions by its Professional (Facilitator) Members and to suitably incorporate the procedures in the Bye-laws etc; Ser No 53 in the tabulated statement attached to the said order dated 26.8.2010 refers.

6. The respondent revised its Bye-laws, Rules and Business Rules based on the directions and observations communicated vide order dated 26.8.2010 in all other respects, except the observation at Ser No. 53 *ibid* and submitted the revised Bye-laws etc under affidavit dated 4.10.2010 for this Commission’s approval. As regards the observation at Ser No 53 *ibid*, the respondent explained that it was likely to face certain practical difficulties in the implementation of the direction. Therefore, the

respondent prayed that incorporation of the observation/direction be not insisted upon, more so in view of pendency of its appeal before the Appellate Tribunal. Thus, the direction was not complied with during pendency of its appeal.

7. The appeal filed by the respondent before the Appellate Tribunal was dismissed by judgment dated 28.3.2011. After dismissal of the appeal, the respondent informed this Commission under letter dated 30.3.2011 that it had implemented the directions of this Commission as conveyed vide order dated 3.6.2010 in Suo Motu Petition No 26/2010 with effect from 5.4.2011.

8. By order dated 6.6.2011, a show cause notice was issued to the respondent to explain as to why action under Section 142 of the Electricity Act be not taken for non-compliance of this Commission's orders dated 3.6.2010 and 15.7.2010 and Regulation 26 (ii) of the Power Market Regulations. The respondent was further directed to file certain information and the Bye-laws, Rules and Business Rules revised in the light of this Commission's directions.

9. In compliance with the directions, the respondent has filed the required information under its affidavit dated 20.6.2011 as also the revised Bye-laws, Rules and Business Rules under its affidavit dated 1.8.2011. On perusal of the information we are satisfied that the respondent has fully complied with the directions dated 3.6.2010 and 15.7.2010. On scrutiny, the revised Bye-laws, Rules and Business

Rules submitted by the respondent under its affidavit dated 1.8.2011 have been found to be in order. Accordingly, we accord our approval to the revised Bye-laws, Rules and Business Rules of the respondent.

10. The respondent's conduct as regards the past non-compliance remains the only issue to be considered in the present order.

11. As regards the delay in compliance with the directions, the respondent has shown cause under its affidavit dated 20.6.2011. The respondent has explained that immediately on receipt of the order dated 3.6.2010, it advised the Professional (Facilitator) Members with lesser number of clients to initiate the process of directly depositing the money in the Settlement Account of the respondent and thus the direction was duly complied with in respect of clients of such Professional Members. As regards the Professional (Facilitator) Members with large base of clients, the respondent has explained that it found difficult to implement the directions immediately without detailed studies and development of the appropriate methodology. Therefore, the respondent approached this Commission by filing the Interlocutory Application seeking time for implementation, setting out the reasons for delay in giving effect to the directions. The respondent has explained that the Professional (Facilitator) Members with large client base were also advised to start on ad hoc basis a new account for regulating the operation and the flow of the funds. However, the Interlocutory Application was disposed of by order dated 15.7.2010 directing the respondent to comply with the directions contained in the order dated 3.6.2010 within 3 days. The respondent has stated that the appeal was filed before the Appellate Tribunal as more time was needed to fully implement the directions of



this Commission. The respondent further submitted that it bonfide availed of the remedy of appeal provided under section 111 of the Electricity Act.

12. The respondent has further explained that during the pendency of the appeal before the Appellate Tribunal it actively pursued the matter of implementation of the order of this Commission and was able to implement the order immediately when the appeal was decided. The respondent has stated that at all times it sincerely considered the means and ways to implement this Commission's order dated 3.6.2010, but encountered certain practical difficulties in the immediate implementation of the directions and has enumerated those difficulties.

13. The respondent has taken legal defence that when an appeal is provided against an order passed by a tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the decision of the superior forum only which subsists, remains operative and is capable of enforcement. The respondent has explained that the logic underlying the principle is that there cannot be more than one operative orders governing the same subject-matter at a given point of time. When an order passed by a lower tribunal or authority is subjected to remedy of appeal available under the law before a superior forum then, though the order under challenge continues to be effective and binding, nevertheless its veracity is being examined by the superior forum. Once the superior forum disposes of the appeal, the said order becomes final, binding and operative.

14. We have considered the cause shown by the respondent. By the respondent's own showing, this Commission's order dated 3.6.2010 was not complied with for nearly ten months, and this too in spite of the undertaking given before the Appellate Tribunal to expeditiously implement the order. Having undertaken to implement the order expeditiously, the respondent was under an obligation to take steps in that direction. The respondent in its response to the show cause notice has conceded that the order under challenge before the Appellate Tribunal continued to be effective and binding because it was not stayed. This was the additional reason for the respondent to ensure implementation of the order even during pendency of the appeal. However, the respondent continued to hold implementation of the order in abeyance till disposal of its appeal and thereby delayed implementation of the directions. This is a matter of serious concern.

15. There are, however, certain positive aspects of the respondent's conduct. As has been explained by the respondent in the reply to the show cause notice, the respondent did not delay implementation of the directions of this Commission by three out of four Professional (Facilitator) Members of the respondent as noted in Para 8 of this Commission's order dated 15.7.2010 in IA No 25/2010 filed by the respondent. The respondent thus made immediate efforts to implement the directions as regards the Professional (Facilitator) Member with larger client base. On consideration of these facts emphasized by the respondent, we are inclined to take a view that there was substantial compliance or at least an effort to ensure substantial compliance of this Commission's directions. This Commission ordered special audit of the accounts of the respondent who has come clean. Further, the

respondent implemented the directions of this Commission post haste after disposal of its appeal by the Appellate Tribunal that is to say within days of the judgment. The respondent's conduct has been watched for over one year after issue of the show cause notice and no deficiency has been noticed so far since then. Considering all these aspects, we are inclined to take a lenient view of the delay in implementation of this Commission's directions. We feel that no useful purpose is likely to be served by imposing a penalty under Section 142 of the Electricity Act. We, accordingly, discharge the notice against both the respondent issued under Section 142 of the Act with a warning that the respondent shall in future sincerely and faithfully comply with this Commission's regulations, orders and directions. Any contravention or disobedience on this count shall be sternly dealt with.

16. With the above directions, the petition stands disposed of.

sd/-
(M Deena Dayalan)
Member

sd/-
(V.S.Verma)
Member

sd/-
(S. Jayaraman)
Member

sd/-
(Dr.Pramod Deo)
Chairperson