CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:
1. **Dr. Pramod Deo, Chairperson**
2. **Shri Bhanu Bhushan, Member**
3. **Shri R.Krishnamoorthy, Member**
4. **Shri S.Jayaraman, Member**

Petition No. 88/2008
(Suo-motu)

In the matter of

Non-compliance of the provisions of Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.

And in the matter of

PTC India Ltd., New Delhi … … Respondent

Following were present:

1. Shri Mansoor Ali, Advocate, PTC
2. Shri Rakesh Kumar, PTC

ORDER
(Date of Hearing: 11.11.2008)

This order deals with show cause notice issued to the respondent for non-compliance of the provisions of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2005, hereinafter referred to as "the trading margin regulations".

2. During examination of the quarterly reports submitted by the trading licensees, it came to light that the respondent, who holds a category "F" licence for inter-State trading in electricity, has been importing electricity from Bhutan, re-selling the imported electricity within the territory of India and charging trading margin exceeding 4 paise/kWh. Thereupon, the respondent was directed to

submit further details relating to the transactions. On examination of the information furnished by the respondent, it transpired that service charge @ 5 paise/kWh was recovered by the respondent for the power purchased from Chukha HEP and Kurichchu HEP in Bhutan. Thus, prima facie provisions of the trading margin regulations, which prescribe that “the licensee shall not charge the trading margin exceeding four (4.0) paise/kWh of the electricity traded including all charges, except the charges for scheduled energy, open access and transmission losses”, were violated. Accordingly, the Commission on its own motion, vide order dated 1.9.2008 directed the respondent to show cause as to why appropriate proceedings under the law should not be initiated for non-compliance of the trading margin regulations.

3. The respondent has filed its reply to the above show cause notice under its affidavit dated 15.10.2008. The gist of the reply made by the respondent is as under:

(a) One of the main objectives of the respondent is to carry out the business of purchase and sale of electricity in India and abroad which entitles it to undertake trading in electricity throughout the country and abroad and act as agent of the Central and State Governments for trading all forms of power in the country and outside.

(b) The respondent has been selling electricity purchased from Chukha HEP and Kurichchu HEP in Bhutan and charging tariff and transaction margin, also referred to as ‘service charge’ in

accordance with the authorization by Ministry of Power and Ministry of External Affairs.

(c) The transaction margin was being charged even before the enactment of the Act and the trading margin regulations, through long-term agreements exceeding period of one year.

(d) In para 19 of the statement of reasons dated 23.1.2006 leading to enactment of trading margin regulations, the Commission recognizes that international trade is not within the domain of the Commission and that these regulations apply to the short-term transactions not exceeding one year.

(e) Definition of “Inter-State Trading” as contained in the proposed revised regulations relating to grant of trading licence indicates that the Commission is aware that the inter-State trading at present does not include electricity imported from or exported to any other country. Consequently, sale of power from Chukha HEP and Kurichchu HEP does not fall within the ambit of the Act and resultantly the trading margin regulations do not apply to these transactions.

4. In addition to above submissions, the respondent has in the correspondence brought out that although it is collecting service charge at the rate of 5 paise/kWh as authorized by Ministry of Power, provides rebate of 2.5

paise to the buyers of electricity in Eastern Region when payment is made within three working days and 1.25 paise/kWh when payment is made within 30 days of billing. According to the respondent, after allowing rebates as aforesaid, its effective service charge is less than 4 paise/kWh.

5. Heard Shri Rakesh Kumar, Advocate for the respondent.

6. The following issues emerge for the Commission's consideration, namely:

(a) Whether, for the fact that the respondent's Memorandum of Association covers sale and purchase of electricity in India and abroad, it act *de hors* the law of the land?

(b) Whether service charge being collected by the respondent is the same as trading margin?

(c) Whether the sale of power purchased by the respondent from Chukha HEP and Kurichchu HEP in Bhutan to the utilities in India is outside the regulatory jurisdiction of the Commission, being part of international trade?

(d) Whether import of power by the respondent and its re-sale within the country amounts to inter-State trading in electricity?

(e) Whether the respondent as an electricity trader is governed by the trading margin regulations in respect of the transactions involving purchase of power from outside the country but sold within it?

(f) Whether the respondent is guilty of violation of the trading margin regulations?

(g) What is the further course of action required to be taken in the case?

Re: Issue (a)

7. The answer to the first issue is obviously in the negative. Under Section 13 of the Companies Act, every company is mandated to state in its Memorandum of Association, among other things, the main objects to be pursued by it on incorporation. Its purpose is to enable the shareholders, creditors and those dealing with the company to know what is the permitted range of business of the enterprise. Any act of the company beyond the scope of its Memorandum of Association, has very serious implications since such an act will be ultra vires. The objects clause in the Memorandum of Association is an enabling provision for furtherance of the company's business. Nevertheless, every act of the company within the scope of Memorandum of Association has to conform to provisions of all other laws in force. For example, a company authorized by its Memorandum of Association to undertake trading in liquor cannot, on the strength of such authorization do so without a valid licence granted by the State Government according to law. It, therefore, follows that the respondent as a company incorporated under the Companies Act has to function within the bounds of law in force while seeking to achieve the objectives authorized under its Memorandum of Association.

Re: Issue (b)

8. The next issue meriting examination is whether service charge being collected by the respondent is the same thing as the trading margin. Neither the term “service charge”, nor the phrase “trading margin” is defined anywhere in the Act or the regulations. In the absence of any such definition, the phrase has to be understood in its ordinary sense and common usage with due reference to the context. As used in clause (f) of sub-section (1) of Section 79 of the Act, the term unambiguously refers to the fee or remuneration or charges levied by an electricity trader for the services rendered by it to the buyers of the electricity. Apparently, the phrases “transaction margin” or “service charge” in the context of payment received by the respondent over and above its purchase price can only be related to the trading margin collected by the trader for the services rendered. Accordingly, the transaction margin or service charge collected by the respondent are in fact the trading margin. The respondent is fully aware of the legal position, and that is why in the reports to the Commission, which are the origin of the show cause notice, it has indicated recovery of trading margin of 5 paise/kWh for the electricity sold.

Re: Issue (c)

9. The respondent has argued that the transactions being part of international trade, is within the exclusive jurisdiction of the Central Government

and outside the regulatory jurisdiction of the Commission. The argument deserves serious consideration. The Act defines trading as "purchase of power for resale thereof". It does not specify that both, purchase and resale must be within the geographic limits of the country. In the absence of any definite statement about the situs of the purchase and/or sale, it does not necessarily follow that the acts of purchase and re-sale, both, must be performed within the geographic limits of the country. The Act repeatedly emphasizes on safeguarding the consumers' interest. For this purpose, it has put in place an elaborate regulatory framework and fixation of trading margin is a part of the regulatory framework provided under the law. For this reason, the electricity imported from outside but sold within the country cannot be left out, since in that situation, the construction will fail to achieve one of the major objectives of the Act. At the hearing, learned counsel for the respondent placed reliance on Ministry of Power letter dated 20.10.2008 addressed to the Commission. The Ministry while furnishing its comments on sub-clause (k) of clause (1) of Regulation 2 of the revised draft (proposed) regulations governing grant of trading licence, has stated that the proposed inclusion of international trading in the definition of inter-State trade impinges on the function of policy making which is within the domain of the Central Government. In our opinion, the reliance by the respondent on the Ministry's letter *ibid* is misplaced. There cannot be any dispute on the issue that import and export of goods (including electricity) falls within the exclusive policy framework of the Central Government. However, the interpretation placed by us that the electricity imported cannot be exempted from the regulatory framework,

does not, in any manner, interfere with the policy of the Central Government so far as it relates to import or export of electricity. After the stage of import, the electricity is to be subjected to regulatory jurisdiction to achieve the objects and purposes of the Act. We, therefore, conclude that argument that as part of international trade, the transactions cannot be regulated by the Commission is untenable.

Re: Issue (d)

10. The next question is whether the sale of power purchased from Chukha HEP and Kurichchu HEP in Bhutan can be termed as inter-State trading in electricity. The phrase “inter-State trading” has not been defined in the Act. Clause 2(1)(g) of the trading licence regulations defines “inter-State Trading” as “transfer of electricity from the territory of one State to the territory of another State by an electricity trader”. It has now been proposed to redefine the term as “transfer of electricity by an electricity trader from the territory of one State for re-sale to the territory of another State and includes electricity imported from or exported to any other country” in the draft trading licence regulations, which are yet to be finalized. The purchase and re-sale of electricity, having its effects or implications in more than one State from single source is undoubtedly covered under inter-State trading of electricity. The respondent itself has been reporting these transactions to the Commission in the periodical reports. The mere fact that the Commission proposes to specifically cover imported electricity within the definition of inter-State trading does not alter the position since the purpose is to bring more clarity.

Re: Issue (e)

11. Examined from yet another angle, it still follows that the respondent shall be governed by the trading margin regulations. The trading margin regulations apply to the "licensee", which includes an electricity trader. Therefore, the respondent as an electricity trader, as defined in sub-section (26) of Section 2 of the Act, has to follow the trading margin regulations. Under the conditions of the licence granted to the respondent, a responsibility has been cast on it to comply with the trading margin regulations, without any distinction with regard to place of generation, indigenous or foreign. In that view of the matter, the respondent cannot charge trading margin exceeding 4 paise/kWh, irrespective of its source of purchase of power so long as its re-sale is within the territory of India. Authorization to the respondent by the Central Government to charge transaction margin or service charges exceeding 4 paise/kWh, as claimed by the respondent, does not make any difference, since after the Act came into force, regulation of trading margin is the statutory function of the Commission. The respondent cannot be absolved of its obligation under the law to comply with the trading margin regulations specified by the Commission in exercise of its statutory powers. It has to be pointed out that the trading margin regulations specifying trading margin of 4 paise/kWh came into effect on 27.1.2006, whereas a fresh agreement was signed by the respondent with the utilities in Eastern Region on 11.12.2007 for re-sale of electricity from Chukha HEP by charging trading margin of 5 paise/kWh. The agreement being contrary to law already in

force is to the extent it authorizes the respondent to charge trading margin exceeding 4 paise/kWh is null and void.

12. One more point raised by the respondent also needs to be considered. The respondent in its reply has relied upon para 19 of the Statement of Reasons dated 23.1.2006 accompanying the trading margin regulations and has contended that the trading margin regulations are applicable to short-term transactions not exceeding one year.

13. We have very carefully considered the matter from this angle as well. Para 19 of the Statement of Reasons, on which reliance appears to have been placed by the respondent is to be seen in the context in which trading is presently undertaken. It is to be noted that the trading margin regulations, which are of the nature of subordinate legislation, do not make any distinction between short-term and long-term transactions. It is a cardinal principle of statutory interpretation that statutory provisions are to be interpreted in the light of the intention of those who make them. Such an intention is to be gathered from the words actually used. While interpreting a statutory provision, it is absolutely necessary to follow the wording of the enactment and to disregard all collateral evidence as to intention, when such evidence is inconsistent with the language actually used, if it is clear and unambiguous. As a corollary, the principle further is that what is not expressed in the statutory provision cannot be said to have been intended. These principles of law emerge out of the judgments of the Hon'ble Supreme

Court. For example, in Ombalika Das Vs Hulisa Shaw, [(2002) 4 SCC 539], the Hon'ble Supreme Court held that:

> "Resort can be had to the legislative intent for the purpose of interpreting a provision of law, when the language employed by the legislature is doubtful or susceptible of meanings more than one. However, when the language is plain and explicit and does not admit of any doubtful interpretation, in that case, we cannot, by reference to an assumed legislative intent, expand the meaning of an expression employed by the legislature an…….."

14. In Keshavji Raviji Vs Commissioner of Income Tax (AIR 1991 SC 1806), the Hon'ble Supreme Court noted similarly that:

> "As long as there is no ambiguity in the statutory language resort to any interpretative process to unfold the legislative intent becomes impermissible. The supposed intention of the legislation cannot then be applied to whittle down the statutory language which is otherwise unambiguous. If the intendment is not in the words used it is nowhere else. The need for interpretation arises when the words used in the statute are, on their terms, ambivalent and do not manifest the intent of the legislature......"

15. The decision of the Hon'ble Supreme Court in ITC Ltd. Vs CCE, (2004) 7 SCC 591 is also to the same effect, as noted from the extracts placed below:

> "...........words have to be construed strictly according to their ordinary and natural meaning, particularly when the statute is a fiscal one irrespective of the object with which the provision was introduced. Of course if there is ambiguity in the statutory language, reference may be made to the legislative intent to resolve the ambiguity. But if the statutory language is unambiguous then that must be given effect to. The legislature is deemed to intend and mean what it says. The need for interpretation arises only when the words used in the statute are, on their own terms ambivalent and do not manifest the intention of the legislature."

16. By applying the principles decided by the Hon'ble Supreme Court, and extracted above, it is to be seen that the trading margin regulations are applicable to all the transactions, irrespective of the length of time for which the

agreement has been signed since no distinction based on the duration of the agreement is sought to be made or is discernible therefrom. The language of the trading margin regulations undoubtedly and unambiguously governs all transactions and does not embrace any doubt in this regard.

Re: Issue (f)

17. The answer to the question has to be in the affirmative. It is on record that the Power Purchase Agreements (PPAs) signed between the respondent and the utilities in Eastern Region provide for trading margin (service charge) of 5 paise/kWh. For payment within three days of presentation of bills PTC allows a rebate of 2.5 paise/kWh and rebate of 1.25 paise/kWh for payments made within 30 days. Based on these stipulations made in the PPAs, the respondent's contention is that it is charging effective trading margin is less than 4 paise/kWh. This argument of the respondent overlooks one important aspect and that is, it charges trading margin of 5 paise/kWh when payment is made beyond 30 days of billing, since in that case the respondent does not allow any rebate. This is in clear violation of the trading margin regulations.

18. We hold that the respondent has violated the provisions of the trading margin regulations inasmuch as the PPAs signed by it with the utilities in Eastern Region authorize it to collect trading margin exceeding 4 paise/kWh.

Re: Issue (g)

19. We feel that on the facts and in the circumstance of the case, ends of justice will be met if the respondent rectifies the position for the future by entering

into revised PPAs with the utilities concerned in Eastern Region. We direct accordingly. A compliance of the direction shall be reported by 31.12.2008.

Sd/-	Sd/-	Sd/-	Sd/-
[S. JAYARAMAN]	[R. KRISHNAMOORTHY]	[BHANU BHUSHAN]	[DR. PRAMOD DEO]
MEMBER	MEMBER	MEMBER	CHAIRPERSON

New Delhi, dated the 19th December 2008