

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No.15 of 2009

Dated: 18th February, 2009

Present : **Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson**
Hon'ble Mr. A.A. Khan, Technical Member

Power Trading Corporation of India Ltd.
Having its office at NBCC Towers, 2nd floor,
Bhikaji Cama Place, New Delhi – 110 066

Appellant (s)

Versus

Central Electricity Regulatory Commission
Core 3, 6th Floor, Scope Complex,
New Delhi – 110 003

... Respondent (s)

Counsel for the Appellant (s) : Mr. Vikas Singh, Sr. Adv., with
Mr. Amit Kapur & Mr. Shresth

Counsel for the Respondent(s) : Mr. Nikhil Nayyar & Mr. Ambuj Agarwal

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam

Power Trading Corporation (PTC) India Ltd., a company situated in New Delhi is the appellant herein.

2. Aggrieved by the impugned order dated 19/12/08 passed by the Central Commission (CERC) directing the Appellant to enter into the revised PPAs with the utilities in the Eastern Region of India by fixing

the trading margin charges not exceeding 4 paise/kilowatt hour (kwh) as provided in the trading regulations, the appellant has filed this appeal.

3. The Appellant is a trading licensee. As per the Trading Regulations, 2006, the Appellant can collect the trading margin charges which shall not exceed 4 paise/kwh. On coming to know through the examination of the Quarterly Reports submitted by various trading licensees including the Appellant, that the Appellant has been importing electricity from Bhutan and selling the imported electricity within the territory of India, that charging the trading margin charges in the name of service charges exceeding 4 paise/kwh, in violation of the trading regulations, the Central Commission directed the Appellant to give more information about the transactions. Accordingly, the required informations were furnished.

4. On examining the said information furnished by the Appellant, the Commission noticed that the Appellant had been collecting trading margin charge in the name of service charges @ 5 paise/kwh from the power utilities in the Eastern Region of India, after purchasing the said power from the power utilities in Bhutan. Therefore, the Commission issued a show-cause notice to the Appellant, PTC as to why appropriate

proceedings should not be initiated for non-compliance of the trading margin regulations by PTC.

5. The Appellant filed a reply to the above show-cause notice, mainly contending that this transaction involves international trade in pursuance of the agreements signed between India and Bhutan; that the said international trade is not within the domain of the Commission as these regulations would not apply and that therefore, the Commission has no jurisdiction over this matter.

6. The Central Commission after having considered the materials and the reply filed by the Appellant, passed the impugned order concluding that it has got a jurisdiction as it is not international trade and that it is only the interstate trade as the power purchased from the projects in Bhutan is being sold by the PTC, the Appellant to the various utilities in several States collecting trading margin charges more than the permitted limit violating the regulations in the Eastern Region of India. Consequently, the Central Commission directed the Appellant to enter into revised PPAs with the utilities in India at least for the future transactions.

7. The above is the subject matter of the challenge in this Appeal.

8. Short facts relevant for the disposal of the Appeal are as follows:

9. Since 16/4/99, the PTC India Ltd. an entity promoted by the Government of India, has been mandated to undertake trading in electricity with the neighbouring countries like Nepal and Bhutan. On 6/7/99 the Ministry of Power, Government of India directed various authorities to facilitate the taking over by PTC, the Appellant, from the Power Grid Corporation of India Ltd. (PGCIL), the activities purchasing power from the Chukha Hydel Power Project in Bhutan and to sell the said power to various utilities in the Eastern Region of India, at a surcharge of 5 paise/unit.

10. On 11/2/02 the Ministry of Power, Government of India took a decision that the sale and purchase of power generated in both the Chukha and Kurichhu Hydel Power Projects in Bhutan would be taken over by the Appellant, PTC from the PGCIL w.e.f. 1/2/02.

11. On 2/8/02, the Appellant entered into Power Purchase Agreements with the various power utilities in the Eastern Region namely the West Bengal EB, Damodar Valley Corporation, Eastern Region Electricity Board, Kolkata for the sale of power purchased from the Power Projects in Bhutan. Similarly, on 21/8/02, the PTC entered into more PPAs with the Bihar State EB, Jharkhand State EB, Gridco, Orissa etc. for the sale of power from the power companies in Bhutan.

12. On 31/8/02 the Appellant entered into two PPAs with the Kurichhu and Chukha Hydel Power Corporation in Bhutan for the purchase of the generated power.

13. On 30/1/04, the Central Commission issued the grant of trading license regulations. Under these regulations, the inter-State trading is defined as transfer of electricity from the territory of one state to the territory of another State by an electricity trader. On 30/6/04, the Appellant was granted a Category 'F' trading license by the CERC.

14. On 23/1/05, the Central Commission passed a detailed order titled 'fixation of trading margin'. Further on 27/1/06, the Central Commission framed further regulations providing for fixing the trading margin charges for inter-State trading of electricity as 4 paise kwh.

15. There upon, the Central Commission came to know that even though under the trading regulations issued by the Commission that trading margin charges should not exceed 4 paise/ kwh, the Appellant has been collecting a margin exceeding 4 paise/kwh in violation of the CERC regulations.

16. On receipt of this information through the Reports, the Central Commission asked for further information from the Appellant. The PTC the Appellant sent information admitting that they have been collecting

a surcharge of 5 paise/kwh for the power sold to the power utilities in the Eastern Region of India which was purchased from the companies in Bhutan, as per the letters issued by Government of India. On the basis of this information, on 1/9/08, the Central Commission issued a show-cause notice to the Appellant as to why appropriate proceedings should not be initiated for non-compliance of trading margin regulations by the Appellant.

17. The Appellant, on receipt of notice, filed a reply before the Central Commission that the sale of power purchased from the two projects in Bhutan does not fall within the ambit of the Act, and as such, trading margin regulations framed by the Commission fixing the trading margin charges do not apply to these transactions and therefore, the Commission does not have jurisdiction.

18. On considering the same, the Central Commission by the impugned order dated 19/12/08 concluded that it has got jurisdiction and found that PTC has violated the provisions of trading margin regulations by charging more, and consequently directed the PTC to rectify its position in the future by entering into revised PPAs with the power utilities in the Eastern Region as provided for in the trading regulations.

19. Challenging the same, the present Appeal has been filed.

20. Shri Vikas Singh, the Learned Senior Counsel for the Appellant would make the following contentions:

A) The Central Commission is a creature of the statute and its powers are limited to the area of operation only in India except Jammu & Kashmir. By passing the Order regulating the transactions which have taken place outside India i.e. in Bhutan, the Central Commission has exceeded its jurisdiction. The situs of purchase of power by PTC and the onward sale by PTC to the Indian beneficiaries is in Bhutan. As such, this is a cross-border international trading activity. Therefore, the Central Commission has no jurisdiction.

B) The PTC is trading in electricity by purchasing from the Chukha and Kurichhu Hydel Power Projects in Bhutan and is selling the same to the constituent States of the Eastern Region by charging the tariffs and service charges in terms of the directions issued by the Ministry of Power and the Ministry of External Affairs, Government of India, through the communication dated 6/7/99. Therefore, the Appellant has been following the directions given by the Ministry of Power and the Ministry of External Affairs, and as such there is no violation.

C) The purchase of power from the two projects in Bhutan is pursuant to the two bilateral power agreements entered into between

the two sovereign governments, namely Bhutan and India. As a matter of fact, by the communication dated 3/7/2001 and 26/5/03, the Appellant has been appointed as the nodal agency in Nepal and Bhutan. This collection of service charge as per the direction have been continued even before the enactment of the Electricity Act, 2003 as well as before the fixation of the Trading Margin Regulations, 2006 introduced by the Central Commission. Therefore, the Central Commission's direction is beyond the scope of both the Electricity Act as well as the Regulations.

D) The Central Commission has wrongly assumed jurisdiction over the cross-border international trading which is beyond the Sections 1(2) and 79(1)(j) and Section 76(1) of the Act and it is also violative of Section 2(26) of the Electricity Act and Section 2(58) of the General Clauses Act and Article 245 of the Constitution of India. The Commission has misdirected itself to conclude that it has the authority to institute and impose international policy-making decisions which is within the purview of only the Central Government.

E) The Power Purchase Agreements were entered into between the two countries in respect of two projects in Bhutan for a long-term of 25 years. They do not fall under short-term transactions not exceeding one year. Therefore, the Regulations 2006 are not applicable to these

transactions. Moreover, any regulation and order issued by it cannot be retrospective and cannot interfere with the vested rights created pursuant to the contracts which have been executed prior to the specific regulations coming into force.

21. In support of their contentions, the Counsel for the Appellant has cited a number of authorities which are as under:

21.1 ***AIR 1957 SC 532 (para 14 & 15), Newspaper Ltd. Vs. Industrial Tribunal***

21.2 It has been held in this decision that in order to get the true import of the Section, it is necessary to view the enactment as a whole. The intention shall be determined by construing all the constituent parts of the Act together and not by taking detached Sections.

21.3 ***AIR 1955 SC 604 (para 20) M.K.Ranganatha Vs. Govt. of Madras***

21.4 In this decision, it has been delivered that the Statement of Objects and Reasons is not admissible as an aid to the constitution of the statute, but it can be referred to for the limited purpose of ascertaining the conditions prevailing at that time which actuated to bring the statute.

21.5 *Civil Appeal No. 5722/2006 dated 13/8/08, Gridco, Orissa Vs. Gajendra Haldea*

21.6 The Supreme Court ruled in this case that where electricity was sold by Gridco, Orissa to PTC and onwards by PTC to beneficiaries in Orissa, the same could not be treated as inter-State trading.

21.7 2002 Vol.6 SCC 600, Haridas Exports Vs. All India Float Glass Manufacturers Association (para 33)

21.8 It has been ruled in this case that a reading of Section 1(2), 2© and 14 together would indicate that the MRTP Act has no extra-territorial operation.

21.9 2001 Vol.7 SCC 71 (para 13), Jagannathan Vs. Jamulu Ramulu

21.10 In this decision, it has been held that the Courts shall proceed on the assumption that the Legislature did not make a mistake and the Court could not add words to the Statute or read words into it which are not there, especially when a literal reading produces an intelligible result.

21.11 1984 Vol.2 SCC 500 (para 18 to 22), A.R.Antulay Vs. Ramdas Srinivas Nayak.

21.12 It is held in this decision that the Court should read into the provision as it is. The Court cannot re-write it to suit its convenience.

21.13 2003 Vol.3 SCC 186 (para 29 and 37), Cellular Operators Association of India Vs. Union of India

21.14 The Court has held in this case that the jurisdiction conferred on a Court of a Tribunal should be construed in terms of the statute alone.

22. Shri Nikhil Nayyar, the Learned Counsel for the Respondents-Commission, made the following contentions in reply to the submissions made by the Appellants:

A) The Appellant's contention that the activity is being regulated and controlled by the Ministry of Power through their communication and the Trading Regulations 2006 framed by the Central Commission with regard to the trading margin would not apply to the Appellant, as the transactions have taken place outside India, is wrong. It is true that the Power Purchase Agreement (PPA) was entered into between the Governments of India and Bhutan, but those PPAs relate only to the purchase of power generated at Chukha and Kurichhu Hydel Power Projects and the same would not apply to the sale of this power within India.

B) Once electricity is imported into India, it would cease to have the character of an imported commodity. The Appellant is a holder of Category 'F' license under the Trading License Regulations 2004, which permits the Appellant to indulge in inter-State trading of electricity. In the light of the said license, the Appellant entered into agreements with the various utilities in various States like Jharkhand, Orissa, West

Bengal, Bihar, Sikkim etc. When the Appellant is indulging in the inter-State trading activity as per the license under the Regulations, the Appellant has to follow the regulations of 2006 by which he can collect the trading margin not exceeding 4 paise/kiwh.

C) Even as per the Reports sent to the Commission by the Appellant, he admitted that he has been charging 5 paise/kwh as service charge from the various utilities of India. Therefore, the letters relied upon by the Appellant, issued by the Ministry of Power, Govt. of India with regard to regulation of their activity, and collection of service charges would not entitle the appellant to carry out the transaction once the Electricity Act 2003 came into force, and the provisions of the Act and regulations introduced thereon, only are applicable.

D) The mere fact that electricity is delivered to the Appellant in Bhutan is of no consequence in pursuance of the Agreements executed between the parties outside India, since the consequence of such agreements are felt within this country as the sale is effected to the ultimate consumers who are in India. In other words, even assuming that the delivery of electricity is completed outside India, on the application of the 'effects' doctrine, i.e. the consequence of such agreements within the country will confer jurisdiction to the Central Commission.

E) The fixation of trading margin is necessary in public interest. The preamble of the Act outlines as 'protecting the interest of consumers'. If the Central Commission does not step in to curb electricity trading margin, it will have a cascading effect on the cost of electricity which will have ultimately, to be borne by the end-consumer.

F) The plea of the Appellant that the impugned order has sought to give retrospective effect is incorrect because the Order of the Commission would indicate that the Appellant was directed to rectify its position only for the future transactions by entering into revised PPAs with the utilities in India. Further, the Appellant's contention that the regulations which came into effect on 27/1/06, fixing the rate of trading margins cannot apply to the agreements entered prior to that, is again untenable, in view of the fact that the Appellant admittedly entered into a fresh PPA on 11/12/07 for the sale of electricity to the utilities, even though the trading margin regulations came into effect on 27/1/06.

23. In order to substantiate his plea, the Counsel for the Respondent the Central Commission has cited the following authorities which are as follows:

23.1 2008 Vol.3 SCC 264 (para 7 and 18), Commissioner of Customs, Kolkata Vs. Biaco Lawrie Ltd.

23.2 It is held by the Court in this case that once goods are imported into the country, they cease to be imported goods.

23.3 1991 Supplementary Vol.I SCC 81 (para 22), Orient Paper Industries Ltd. Vs. State of Orissa

23.4 The Court has ruled in this case that it is well-settled that any right or interest, even if it is contractual and original cannot survive superseding the valid Legislation brought later.

23.5 2002 Vol.2 SCC 203 (para 29), State of A.P. Vs. N.T.P.C.

23.6 The Court has held that electricity as goods comes into existence and is consumed simultaneously. The event of sale in the sense of transferring property in the goods merely intervenes as a step between the generation and consumption. In such a case, when the generation takes place in one State wherever it is supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another, occasioned by the sale or purchase of goods.

23.7 2002 Vol.6 SCC 600 (para 44 and 45), Haridas Exports Vs. All India Float Glass Manufacturers' Association

23.8 It has been held by the Court that even if an agreement is executed outside India or the parties to the agreement are not in India, and the agreement may not be registerable in India, even an outside agreement nevertheless, if any restrictive trade practice as a consequence of any such outside agreement is carried out within India, then the Commission shall have jurisdiction as per Section 37(1) in respect of that restrictive trade practice, if it comes to the conclusion that the same is prejudicial to public interest.

24. We have heard both the counsel for the parties at length. We have given our anxious consideration to the respective submissions made by the Counsel for either side and perused the available records.

25. The main question which arises for consideration is as to whether the power of regulation with regard to the sale of power, which was purchased by the Appellant from the projects in Bhutan, to the power utilities in the Eastern Region of India is within the jurisdiction of the Central Commission.

26. Before dealing with this issue, let us see the crux of the finding rendered by the Central Commission:

A) The sale of power purchased by the Appellant PTC from Bhutan and its onward sale to the power utilities in the Eastern Region constituents is within the jurisdiction of the Central Commission.

B) The import of electricity by PTC from Bhutan and the import of electricity to India from Bhutan and its resale within India amounts to inter-State trading in electricity.

C) The Central Commission Regulations 2006 apply to the licensee which includes all electricity trading. PTC is a licensed electricity trader and hence, it has to follow trading margin regulations. As per the Regulations, the Appellant PTC cannot charge trading margin exceeding 4 paise/kwh, irrespective of its source of purchase of power, so long as its resale is within the territory of India.

D) The Trading Margin Regulations are in the nature of subordinate regulations and do not make any distinction between short-term and long-term transactions. These regulations are applicable to all the transactions, irrespective of the length of such transactions.

27. Let us now deal with the issue raised in this case.

I) There is no dispute in the fact that the Appellant is a trading licensee, and the license had been issued by the Central Commission on 30/6/04.

II) There is no dispute in the fact with regard to the Regulations having been framed by the Central Commission directing the licensees

including the Appellant not to collect trading margin charges exceeding 4 paise/kwh.

III) There is no dispute in the fact that as a trading licensee, in pursuance of the regulations framed by the Central Commission, the Appellant has been sending periodical reports to the Commission.

IV) There is no dispute in the fact that in pursuance of the direction for providing further information after perusing the Reports, the Appellant sent the reply admitting that it has been collecting 5 paise/kwh as service charge.

V) It is also not disputed with regard to the fact that the Appellant entered into PPAs with the utilities in India mentioning about the service charges @ 5 paise/kwh for sale to those utilities.

28. In the light of the above undisputed facts, we have to consider the submissions made on behalf of the appellant. It is mainly contended by the Senior Counsel for the Appellant that since it purchases power in Bhutan and thereafter such electricity is sold to various utilities in India, the regulations framed by the Central Commission do not come within its purview especially when both the purchase and delivery of electricity is completed in Bhutan itself, which forms international trading.

29. The term 'trading's defined in Section 2(71) of the Electricity Act, 2003:

“Trading means purchase of electricity for resale thereof and the expression ‘trade’ shall be construed accordingly”.

30. Here, in this case, though the purchase is effected in Bhutan, resale is effected in India. Admittedly, the Appellant entered into the PPAs dated 2/8/02 and 21/8/02 with power utilities in the Eastern Region of India, namely West Bengal EB, Damodar Valley Corporation, Eastern Region Electricity Board, Kolkata, Bihar State EB, Jharkhand State EB, Gridco, Orissa etc.

31. A reading of these PPAs entered into by PTC, the Appellant with various States of the Eastern Region of India would clearly indicate that the same are for resale of electricity which was purchased from Bhutan. As such, the resale of electricity takes place within India.

32. Once electricity enters the territory of India and is sold to the utilities of India, then the Regulations framed by the Central Commission would begin to apply to the transactions of sale inside India. The order impugned passed by the Central Commission has not given any direction to interdict the commercial arrangements between the Governments of India and Bhutan as far as the purchase of power produced in Bhutan is concerned.

33. On the other hand, after purchase, the Appellant has been indulging in trading of electricity by effecting resale of power to the various utilities in India as permitted by the Commission through the license in the name of the Appellant for trading. When the Appellant is a licensee trading or selling power to the utilities of India, then the Appellant has to follow the conditions of license which has been issued by the Commission as well as the Regulations which have been framed by the Commission.

34. The license which has been issued in favour of the Appellant would provide that in Condition No.2 issued on 30/6/04, “the trading margin in the inter-State trading of electricity fixed by the Commission, if considered necessary shall apply to the licensee.”

35. Now let us see, the regulations framed by the Central Commission as ‘fixation of trading margin’ and notified on 23/1/05. The relevant observation by the Central Commission with reference to the fixing of trading margin is as follows:

Para 32: ***“The facts that risks and returns go hand in hand is well-established in the field of business and economy. Thus, having removed the major risk faced by the traders during the period 2004-05, when they were charging trading margin of 5 paise/kwh or less, we have come to the conclusion that the trading margin should be less than 5 paise/kwh and therefore, we have decided to fix the ceiling of trading margin at 4 paise/kwh”.***

Para 33: ***“Based on the above observations, we are satisfied that it would be reasonable to limit these trading margins to 4***

paise/kwh including all charges, except the charges for scheduled energy and open access. As already brought out, the transmission losses and UI charges are not applicable to the electricity traders and we order that the final regulations on fixation of trading margins shall be notified accordingly”.

36. The above regulations would make it clear that a decision has been taken to limit trading margins to 4 paise/kwh including all charges except the charges for scheduled energy and open access, only after consulting all parties concerned.

37. In pursuance of the Regulations, the notifications through which the Regulations came into force, were issued on 23/1/06. The relevant portion of the notifications is as follows:

“These regulations shall come into force from the date of their publication in the Official Gazette”.

“Trading Margin: the licensee shall not charge the trading margin exceeding 4 paise/kwh on the electricity trade including all charges, except the charges for scheduled energy, open access and transmission losses.”

38. It is pointed out that the above Regulations were earlier challenged before the Tribunal, but however, the Orders passed by the Commission notifying the Trading Margin Regulations and fixing the trading margin was confirmed by the Tribunal. Even though, it is stated that some Appeals are pending before the Supreme Court, there is no stay of the operation of the Regulations framed by the Commission. This means that the Regulations are in force. When those regulations fixing the trading margins are in force, then it is the duty of the Central

Commission to verify whether those regulations have been properly followed by the licensees or not.

39. It cannot be disputed that trading margin regulations apply to the licensee which includes an electricity trader. As an electricity trader, as defined in Sub-section 2(26) of the Act, the Appellant has to follow these regulations.

40. As an electricity trader, and as a licensee, a responsibility has been cast on the Appellant to comply with the trading margin regulations without any distinction with regard to the place of generation, whether indigenous or foreign. In other words, the Appellant cannot charge trading margin exceeding 4 paise/kwh irrespective of its source of purchase of power, so long as its resale is within the territory of India.

41. Since after the Act came into force, regulation of trading margins is a statutory function of the Commission, the Appellant cannot be absolved of the obligations under law to comply with the trading margin regulations specified by the Commission in exercise of its statutory powers.

42. It is only in compliance with the conditions of the license issued in favour of the Appellant, the periodical reports were sent to the

Commission by it. Only on perusal of the reports, further information was collected from the Appellant PTC, as admitted by it in its reply that it has been collecting 5 paise/kwh as service charges. In view of the specific wordings contained in the notification that the licensee shall not charge the trading margin exceeding 4 paise/kwh on the electricity traded, including all charges, the Appellant cannot collect 5 paise/kwh from the various utilities as surcharge, claiming that the same is different from the trading margin.

43. Neither the term 'service charge' nor a phrase 'trading margin' is defined anywhere in the Act or regulations. In the absence of any such definition, the phrase has to be understood in its ordinary sense. As used in Clause (f) of sub-section (1) of Section 79 of the Act, the Central Commission will fix the trading margin under the inter-state trading of electricity. This term unambiguously refers to the fee or remuneration or charges levied by the electricity trader for the services rendered to the buyers of the electricity. Apparently, the phrase 'trading margin' or 'service charge' in the context of the payment received by the trader over and above its purchase price, can only be related to the trading margin collected by the trader for the services rendered by him. Accordingly, the trading margin or service charges collected by the trader are also in fact, the trading margins. Therefore, it means that the wordings contained in the notification would mean that the service charges would

also include trading margin or that the service charges would otherwise mention trading margin.

44. It is contended by the Learned Senior Counsel for the Appellant that the impugned transaction does not constitute inter-State trading for which the license has been issued as it is delivered in Bhutan itself. This is not tenable. As indicated above, admittedly, the Appellant is a holder of Category 'F' license issued by the Commission under the Regulations 2004 and under that license, he is permitted to indulge in inter-State trading of electricity and only in pursuance of the same, he entered into the various PPAs with the utilities in the constituent States of the Eastern Region of India. Thereby, the activities of the Appellant involve inter-State trading activities.

45. Neither the letters issued by the Government nor the Agreements entered into between the utilities in India and the Appellant, the PTC can override the statutory provisions of the Act and the regulations made therein which prohibit the licensee from collecting more than 4 paise/kwh as trading margin charges. Even though some agreements were entered into prior to Regulations, the last agreement being entered into between the Appellant and the power utilities in the Eastern Region of India on 11/12/07, in spite of the fact that the regulations had come into effect on 27/1/06.

46. It is true that the contracts were initially entered into between the two countries in respect of the purchase for resale of the power produced and delivered to the Appellant in Bhutan. The mere fact that such an agreement was entered between these countries in respect of the power purchase would not oust the jurisdiction of the Central Commission. Since the Appellant entered into the agreements with the local utilities for the sale of electricity within the territory of India as a licensee under the regulations, the Appellant, the PTC is liable to follow the directions given in the Regulations issued by the Central Commission to the licensee.

47. Apart from the above, as correctly pointed out by the Counsel for the Respondent, the 'effects' doctrine would apply in this case. To refer to the Judgment delivered by the Supreme Court in *Haridas Exports Vs. All India Float Glass Manufacturers Association*, 2002 Vol.6, SCC 600, even if an agreement is executed outside India, when the consequences of such an agreement are felt within the country, then the jurisdiction of the Commission would not be ousted. The relevant portions are paras 44 and 45 of this Judgment:

Para 44: ***“In other words, where the goods are already in India, then any agreement which has the effect of limiting competition or a competitive sale of those goods existing in India would be a restrictive trade practice and it would be immaterial as to where the agreement takes place in relation to the sale of those goods. The ‘effects doctrine’ would be applicable only***

in relation to those goods which are within the territory of India.”

The above observation would make it clear that the ‘effects doctrine’ would apply to the transaction carried out by the Appellant with the local utilities in India.

Para 45: ***“Even if an agreement is executed outside India or the parties to the agreement are not in India and the agreement may not be registerable under Section 33 being outside India, the agreement nevertheless, being a restrictive trade practice, as a consequence of such an outside trade agreement if carried out within India, then the Commission will have jurisdiction u/s 37(1) in respect of that restrictive trade practice, if it comes to the conclusion that the same is prejudicial to public interest”.***

48. The above observations in our view, would clearly apply to the present facts of the case. It is also made clear from these observations that even assuming that the Appellant’s contention is to be accepted that the delivery of electricity is completed outside India, on the application of the ‘effects doctrine’, namely ‘sale in India’, it has to be held that the Commission has jurisdiction in public interest to regulate the electricity that is traded within the country.

49. It cannot be debated that the fixation of trading margin is necessary in public interest as the preamble of the Act clearly outlines one of the stated objectives as protecting the interest of the consumers. The protection of consumers’ interests is one of the objectives of the National Electricity Policy which is published under Section 3 of the Act.

By virtue of Sections 66 and 79(4) of the Act, the Commission is to be guided by the National Electricity Policy. As pointed out by the Counsel for the Respondent Central Commission, if the Commission does not step in to curb the fixation of trading margin, it would have a cascading effect on the cost of electricity which ultimately is to be borne by the end-consumer.

50. It is contended by the learned Senior Counsel for the Appellant that the Commission has tried to give retrospective effect, which is not permissible under law. This contention also is not correct, because the Commission observed that the Appellant is directed to rectify its position for the future transactions by entering into revised PPAs with the power utilities in India. The relevant operative portion of the impugned order reads as under:

Para 19: “We feel that on the facts and in the circumstances of the case, ends of justice will be met if the Respondent (PTC) rectifies the position for the future by entering into revised PPAs with the utilities concerned in the Eastern Region. We direct accordingly.”

51. The above directions do not refer to the past transaction and it only mandates the appellant to follow the Regulations only for the future transaction. According to the Counsel for the Appellant the PTC, trading margin regulations would not apply to this case because these regulations are applicable only to the short-term transactions not

exceeding one year. This submission also does not deserve acceptance for the reason that the Commission has rightly observed in the impugned order that the trading margin regulations are of the nature of subordinate legislation and they do not make any distinction between the short term and long-term transactions.

52. The Counsel for the Appellant cited a number of authorities to show as to how the Tribunal or the court has to interpret the provisions of law. There is no dispute with reference to the law laid down by the Supreme Court to the effect that as long as there is no ambiguity in the statutory provisions, any attempt to resort to any interpretative process to unfold the legislative intent becomes impermissible. The words contained in the provisions have to be construed strictly and according to their ordinary and only meaning. Only on this basis, the Commission has categorically held that the trading margin regulations are applicable to all the transactions irrespective of the length of time, the said agreements were entered into.

53. Further, once electricity as a commodity enters into India, and is sold locally in India, the commodity ceases to be an imported good as laid down by the Supreme Court in *2008 Vol.3 SCC 264 (para 18)*. The Supreme Court, while dealing with the duty imposed upon the goods under Customs Act would make the following observations:

Commissioner of Customs, Kolkata Vs. Biaco Laurie Ltd.

Para 18: ***“Section 15(1) provides for the rate of duty and tariff valuation applicable to any imported goods. The term ‘imported goods’ is defined in Section 2(25) of the Act to mean any good brought into India from a place outside India, but does not include goods which have been cleared for home consumption. In view of the fact that the imported goods in the present case had been cleared for home consumption on 28/5/98, they cease to be imported goods within the meaning of the Act and the provisions of Section 15(1)(b) would not be applicable.”***

If the above principle is applied to the present facts of the case, then it can be safely concluded that even though the electricity has been purchased from Bhutan and brought to India, it ceases to be an imported goods the moment it enters India for being resold locally.

54. All the other authorities cited by both the parties need not be referred to since the facts and issues in those decisions are not relevant with reference to the issues raised in this case. As indicated above, it is to be pointed out that the Commission has merely directed the Appellant to follow the regulations in future. As a matter of fact, the Central Commission has only taken a lenient view by giving a mere direction to the Appellant to follow the guidelines at least in the future in its transactions with the utilities of India.

55. In view of the above discussions, we are of the opinion that the impugned order does not suffer from any infirmity and as such the same is liable to be confirmed.

56. Hence the Appeal is dismissed as devoid of merits. No costs.

(A.A.Khan)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Date: 18th February, 2008

Reportable/Non-Reportable