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

**Appeal No. 154 of 2010**

**Dated: 28th March, 2011**

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

**In the matter of**

**Indian Energy Exchange Limited,**
**100A/1, Ground Floor,**
**Capital Court, Olof Palme Marg,**
**Munirka, New Delhi-110 067 ... Appellant**

**Versus**

1. **Central Electricity Regulatory Commission,**
   **3rd & 4th Floor, Chanderlok Building,**
   **36, Janpath, New Delhi-110 001**

2. **Power Exchange India Limited,**
   **3rd Floor, 'B'Wing, Exchange Plaza,**
   **Bandra Kurla Complex, Bandra (East)**
   **Mumbai-400 051 ....Respondent(s)**

**Counsel for Appellant(s): Mr. M.G. Ramachandran,**
**Mr. Anand K. Ganesan,**
**Ms. Swapna Seshadri,**
**Mr. Sneha Ventakaramani,**
**Ms. Ranjitha Ramachandran,**
**Mr. Sanjay Sen,**
**Ms. Surbhi Sharma,**
**Ms. Sikha Ohri,**

**Counsel for Respondent(s)** **Mr. Jayant Bhushan,Sr.Adv.**
**Mr. Buddy A. Ranganadhan,**
**Mr. Sugam Seth,**
**Mr. Arjit Mitra,**
**Mr. S Venkeatesh**
**Mr. Hemant Sahai,**
**Mr. Sumantha Ghosh**
**Ms. Payal C. Singh,**
**Mr. Sangta Nath Mitra,**
**Mr. Dharmesh Mishra,**
**Mr. Anuj Bhandari,**

## JUDGMENT

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**

1. Indian Energy Exchange Limited is the Appellant. Central Electricity Regulatory Commission (Central Commission) is the first Respondent. Power Exchange India Limited is the second Respondent.

2. The Central Commission on 3.6.2010 passed the impugned order holding that the professional Members of the Appellant Exchange dealing with the money from their clients

have violated the Regulations as well as its earlier order dated 24.12.2009 and thereby directing them to implement the same with immediate effect.

3. After the impugned order, was passed, the Appellant filed a petition before the Central Commission seeking extension of time for implementation of the said order. However, the Central Commission dismissed the said petition by the order dated 15.7.2010.

4. The Appellant has challenged both these orders dated 3.6.2010 and 15.7.2010 in this Appeal. The short facts that are relevant for disposal of this Appeal are as follows:-

(i) The Appellant is engaged in the activities of operating the power exchange in India providing for dealings in electricity and related contracts.

(ii) The Appellant provides a platform where the electricity can be bought and sold by others. Under Section 66 of the Electricity Act, 2003, the Appropriate Commission shall endeavour to promote the development of a market including trading in power and the same shall be guided by the National Electricity Policy.

(iii) The National Electricity Policy notified by the Central Government, emphasized the need to promote the power market development that would make it feasible to finance projects with competitive generation cost outside the long term power purchase agreement framedwork. The power exchanges have been recognized as one of the avenues of power market development helping the buyers and sellers to carry out transactions on the power exchange.

(iv) On 6.2.2007, the Central Commission issued guidelines for grant of permission for setting up of power exchanges. In pursuance of these guidelines, the

Appellant on 15.3.2007, filed an application before the Central Commission for permission to set-up a Power Exchange.

(v) The Central Commission examined the aspects of membership of the exchange, transparency in operation and decision making, clearing and settlements operation, settlement guarantee funds and other relevant aspects and ultimately gave final approval to the Appellant as it was satisfied that the Appellant fulfilled the requirement of the guidelines by the order dated 31.8.2007.

(vi) Pursuant to the above, the Appellant finalized the Bye-Laws and rules in accordance with the guidelines issued by the Central Commission and filed the same with the Central Commission. After hearing all the interested parties, the Central Commission approved Bye-Laws and rules of the power Exchange.

(vii) Based on the above approval, the Appellant Power Exchange started functioning as per the guidelines and orders issued by the Central Commission, in accordance with Bye-Laws, Rules etc notified by the power exchange.

(viii) On 23.6.2009, the TATA Power Trading Company Limited, a trading licensee, filed a petition before the Central Commission u/s 66 of the Electricity Act complaining against the Appellant that the professional members of the Appellant have been carrying on the business of trading in electricity without obtaining the trading license in violation of the provisions of the Electricity Act, 2003. On receipt of notice from Central Commission, the Appellant filed an affidavit of reply stating that its professional members have not been carrying out the activities of trading in Electricity.

(ix) The Central Commission, after enquiry, ultimately passed the order dated 24.12.2009 holding that the

professional members of the Appellant were not engaged in trading of electricity. However, through the said order, the Central Commission directed the Appellant that in future it should not allow its Professional members to take the risk of delivery/off take of underlying units of electricity relating to the transactions and services of the Professional members and should not provide any credit or financing or working capital facilities to their clients.

(x) Accordingly, the Appellant followed the directions contained in the order dated 24.12.2009 by amending its Bye-Laws, Rules and regulations clearly indicating that professional members should not take trading in electricity and should not provide any credit or financing or working capital facilities to their clients.

(xi) Pursuant to the order dated 24.12.2009, the Central Commission on 20.1.2010 notified the Power Market Regulation, 2010.

(xii) Thereupon the Central Commission, in order to verify whether their order dated 24.12.2009 has been properly complied with by the Power Exchanges, initiated suo motu proceedings and gave directions to the Appellant and the Power Exchange India Ltd, the Respondent No.2 to file their compliance report before the State Commission.

Accordingly, on 9.3.2010, the Appellant submitted all the relevant details as called for and filed the compliance report of the order dated 24.12.2009. However, the Central Commission on being not satisfied with the said compliance report, issued a show cause notice on 30.3.2010 to the Appellant under section 142 of the Electricity Act, 2003 holding that there has been contravention on the part of the Appellant of its order dated 24.12.2009 and calling upon the Appellant to show cause as to why penalty be not imposed.

(xiii) On receipt of the said notice, the Appellant appeared before the Central Commission and filed a detailed reply on 5.4.2010 explaining the entire position and bringing out the fact that professional members of the Appellant were not acting contrary to the order dated 24.12.2009. After considering the said reply, the Central Commission passed the impugned order dated 3.6.2010 giving a finding that the Appellant has acted contrary to the order dated 24.12.2009 and directed the Appellant to stop the practice of calling for the deposit of the money of clients in the settlements funds accounts of the members with immediate effect as this is in violation of the Power Market Regulation, 2010. However, the Central Commission thought it fit to drop the proceedings without penalizing the Appellant U/S 142 of the Electricity Act, 2003 and accordingly ordered.

There upon, on 21.6.2010, the Appellant filed a Petition before the Central Commission praying for the extension of time for implementation of the said order dated

3.6.2010. Rejecting this prayer, the Central Commission dismissed the said Petition by the Order dated 15.7.2010.

(xiv) Challenging both the orders dated 3.6.2010 and 15.7.2010, the Appellant has filed the present Appeal.

5. The Learned Counsel for the Appellant while challenging the impugned orders has raised the following grounds:

(i) The impugned order dated 3.6.2010 passed by the Central Commission has proceeded on a wrong basis that in the earlier order dated 24.12.2009, the Central Commission had directed that funds should not be provided by the clients to the Facilitator Members and the provision of such funds by the clients to the Facilitator Members would enable the Facilitator Members to undertake obligation of risk of delivery/off take of the underlying units of electricity and/or otherwise undertake un-licensed

trading activity. The said finding of the Central Commission is without application of mind.

(ii) The Central Commission failed to appreciate that the purpose of prohibition contained in the order dated 24.12.2009 directing the facilitators members not to provide any credit or financing or working capital facilities to their client was to avoid the Facilitators Members towards undertaking the transaction of sale and purchase of electricity for their own benefit by using clients as a frontage and the Facilitator Members towards assuming the obligations of risk of delivery/off take. The said prohibition contained in the order dated 24.12.2009 was in order to prohibit the Facilitator members from indirectly undertaking the activities of electricity trader using the client's name. Such a position does not exist when the Facilitator Members undertake the transactions entirely with the clients' money and without taking any financial risk of delivery or off take.

(iii) The order dated 24.12.2009, does not prohibit the services prescribed as banking transaction facilities unless it results in the Facilitator Members providing credit or finance to the working capital to the clients and, therefore so long as the Facilitator Members had ensured that the clients maintain sufficient funds to discharge its liabilities to the Exchange, there cannot be any question of the Facilitator Members funding the liabilities of the client.

(iv) The order dated 24.12.2009 and Regulations 26 (2) of the Power Market Regulation need to be interpreted based on the objection raised. The objection is that the professional members should not be undertaking the obligation of risk of delivery/off take of the underlying units of the electricity relating to transactions as it would lead to an element of mischief as noted in the preceding para. So long as the above risk of delivery does not exist, there is no rationale or justification in preventing the Professional

Members handling or dealing with the money of clients entirely on behalf of and for benefit of the clients.

6. Refuting the above grounds, the Learned Senior Counsel appearing for the Central Commission as well as the Learned Counsel for the 2nd Respondent, defended the impugned orders by justifying the reasonings given in the impugned orders to arrive at the findings rendered by the Central Commission against the Appellant.

We have considered the rival contentions urged by both sides and gone through the impugned orders as well as the other materials available on record.

7. The short question that arises in these Appeals is as follows:-

" Under the orders passed and the Regulations framed by the Central Commission, what is the role that the Professional Members of the Power Exchange can perform if such Professional Members are not licensed traders under the Electricity Act, 2003 ?"

8. The Appellant's main contentions are two fold:

(i) Facilitator Members of the Appellant are carrying on the activities of handling moneys of clients which ought to mean that the Facilitator Members do not provide any credit facilities or financing.

(ii) The activities that they are carrying on are not barred through the negative injuction issued either by the order passed or the Regulations framed by the Central Commission.

9. While dealing with these contentions, it may be proper to take note of the order dated 24.12.2009 passed by the State Commission in the Petition filed by the Tata Power Company Limited complaining against the activities of the Appellant. The relevant portion i.e. Para 16, 17 and 18 of the order dated 24.12.2009, passed by the Central Commission is as follows:

> *"16……*
> *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."*

10. The above portion of the order contains two parts. The first part is a positive mandate directing that the Facilitator Members to do only the activities contained in Para 16 (a), (b) and (c) of the order. The second part as contained in para 17, is a negative injunction to the effect that the Facilitator Members should not provide any credit or financing or working capital facilities, etc., to their clients.

11. In the light of the directions given by the Central Commission in the order dated 24.12.2009, it would be appropriate to deal with the two fold conditions urged by the Learned Counsel for the Appellant.

12. In regard to the first contention, it is to be stated that the Appellant has not taken note of Para 16 of the Order dated 24.12.2009 which mandates that the Facilitator Members can do only three types of activities mentioned in (a), (b) and (c) of Para 16.

13. Handling the money of the clients does not fall within any of the three types of activities permitted by the Commission as mentioned in Para 16 of the Order. Any activity, carried on by the Facilitator Members must come within the permitted activities enumerated in the aforesaid Para 16 and must not fall foul of the Para 17 which provides for a negative injunction. In other words, unless any such activity satisfies both the parts of the order, such activity can not be undertaken by the Facilitator Members.

14. As a matter of fact, through Para-18, the Central Commission specifically directed to the effect that the Power Exchange shall incorporate the role of the members as stated in Para 16 and 17 by amending their Bye-Laws, business rules and

other related documents immediately and submit the compliance within a period of one month till that time the above directions have to be complied with. Admittedly, the Order dated 24.12.2009 had not been challenged as such, the directions on the basis of the findings rendered by the Central Commission has attained finality.

15. The Appellant has strenuously contended that the directions containing in the restrictions that the clients shall not deposit money in the Settlement Banking Account of the Facilitator Members, were issued only for the first time only in the impugned order dated 3.6.2010 and not earlier and therefore, the same could not be immediately implemented. According to the Respondent, this contention is wrong and factually incorrect for the following reasons:

(i) Specific delineation of the Facilitator Member's activities has already been stipulated in December, 2009 and not for the first time in June, 2010.

(ii) In the Order dated 30.3.2010, the Central Commission directed as follows:

> *"In case of First Respondent, clients have deposited money in the Settlement Bank Account of the Facilitators who in turn, have transferred the money to the bank account of the exchange. This is in contravention of our order which does not permit the Facilitators to handle the money on behalf of the clients".*

It may kindly be noted that the reference to 'our order' in the aforesaid Para is to be the Order dated 24.12.2009.

(iii) Despite this order passed on 30.3.2010 referring to the earlier Order dated 24.12.2009, the Appellant did not implement the same and therefore, the Central Commission was constrained to issue a 'Show Cause Notice' to the Appellant which has culminated into the impugned Order dated 3.6.2010. Therefore, it is not correct to contend that the restriction was issued only in the impugned order.

16. Admittedly, as mentioned above the Appellants have not chosen to challenge these orders dated 24.12.2009 and 30.3.2010 referred to above but are seeking to challenge only the implementative order of the Central Commission dated 3.6.2010. As such, the reasons projected by the Learned Senior Counsel for the Respondents to refute the contentions urged by the Appellant, in our view, are legally sustainable.

17. Besides this, it has been brought to our notice that the Central Commission has notified CERC, Power Market Regulations, 2010 on 20.1.2010. On perusal of these Regulations, in particular Regulation 26, it is evident that only three specific functions have been permitted to be carried out by the Facilitator Members which are as follows:-

> "*Regulation 26*
>
> *"(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 Dispatch Centre standing clearances, coordination with National load Dispatch Centre etc).*

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

18. The perusal of these Regulations would reveal that the directions regarding specific functions contained at para 16 of the order dated 24.12.2009 have been repeated and reiterated in Regulation 26 (ii) of the 'Power Market Regulations 2010, which were notified on 21.1.2010. Similarly, the Professional Members were precluded from providing any credit facilities to their clients as directed in para 17 of the order dated 24.12.2009 as well as in Regulation 26 (ii) of the Power Market Regulation, 2010.

19. From these, it is clear that the actions of the Appellant permitting the clients of Facilitator Members to undertake the

deposition of the money into the settlement bank account of the facilitators and transfer of this money subsequently to the bank account of the Power Exchange does not conform to the Statutory Regulations notified by the Respondent/ Central Commission.

20. The Appellant has strenuously contended that the Bye Laws of the Exchange which are duly placed and approved by the Central Commission specifically provided for the said facilities banking role on the part of the professional members for their clients including the deposit of the money. The Learned Counsel for the Appellant has quoted paras 22 to 28 of the Business Rules of the Appellant. It is also contended that the Appellant published its draft Bye laws, Rules and Business Rules and clause 12.1.13 of the rules which provide for certain processes which include collection of money by Professional members. These Bye-Laws are of no use to the Appellant as the activities of the Facilitator Members are circumscribed by the order passed by the Central Commission on 24.12.2009

and Statutory Regulations notified on 21.1.2010. It cannot be disputed that the By-Laws and Business Rules which are relied upon by the Appellant are not consistent with the order dated 24.12.2009 and the Regulation notified on 21.2.2010. Further, the second proviso to Regulation 14 requires the Appellant to realign its Bye laws, Rules and Business Rules to make the same in conformity with the Regulations in a time bound manner. The Central Commission by its order dated 24.12.2009 also directed the Appellant and other Power Exchange to incorporate the role of the members as stated in para 16 and 17 of the order by amending their By-Laws, business rules and other related documents within a period of one month.

21. As a matter of fact, the Central Commission through its order dated 26.8.2010 approved the bye laws of the Exchange directing that its Bye-Laws to be attended in line with the aforesaid orders and regulations of the Central Commission.

The relevant portion of the Order and Regulation are extracted below:-

> *"Provided further that the Power Exchanges in operation shall realign their Bye-laws, Rules and Business Rules to make the same in conformance with these regulations and shall submit the same for approval of the Commission within three months from the date of notification of these Regulations".*

22. The Bye Laws of the Appellant's Exchange states as follows:

> *"7.3.6 (a) Every Exchange Member shall be fully responsible for all his commitments to the Exchange, and his clients irrespective of whether one or more Clients with whom he has dealings have defaulted."*
>
> *18.8……Any trade undertaken by a Client via direct access will be done in the name of the Member and the Member shall be fully responsible for all orders entered by the Client and for the conduct of all such trades as principal".*

23. The aforesaid clauses would make it clear that the absorption of risk by these Professional/Facilitator members ensures that in case any client of the Member defaults on his obligation to the trade, the Professional Member's security

deposit will be used to make good the payment. In other words, the Facilitator Members are wholly and solely responsible for all trades of their clients. This would mean that the Professional members would become the owner of the Electricity and thereby indulging in trading without a license.

24. The assumption of risk can only be taken by an Electricity Trader who has obtained a license from the Appropriate Commission under section 14 of the Act for sale and purchase of the electricity. Thus, where a professional member is facilitating a transaction of sale and purchase it would be the client which has to take the responsibility for its obligation/risk and not the Professional members. Irrespective of the Bye-Laws of the Appellants Exchange which have been relied upon by the Appellant, there are some other clauses of the Bye laws which indicate that if there is any conflict between the clauses of the Bye-Laws of the Exchange and Regulation framed by the Central Commission, then Regulation alone shall prevail over the Bye-Laws. The relevant clauses are quoted below:

> "*Clause 1.4: These Bye Laws shall at all times be read subject to the provisions of the Electricity Act, 2003 hereinafter referred to as "EA, 2003) as amended from time to time and directives, orders, guidelines, norms and circulars issued by the Central Electricity Regulatory Commission or Government of India from time to time.*
>
> *Clause 1.5: In case of any conflict between the provisions of any Rules, Business Rules or Bye-Laws of the Exchange and the provisions of EA, 2003 and Rules and Regulations framed there under, the provisions of EA, 2003 and Rules and Regulations framed there under, shall prevail".*

25. These Bye-Laws would clearly reveal that the Appellants even under their own Bye-laws are bound by the orders and the Regulation of the Central Commission, who is in turn is liable to ensure the implementation of the Central Commission orders. In this context, it would be worthwhile to refer to the order of the Central Commission dated 26.8.2010 which had been passed recently approving the bye-laws of the Appellant Exchange with the following remarks:

> *"The Professional members can only provide the services as mentioned in Regulation 26(ii) of Power Market Regulation which does not include handling money of the clients. Clause 12.1.13 of the Rules provides for certain processes which include collection of money by professional members. This is not in conformity with the Power Market Regulations and needs to be modified. Similar modification may be carried out wherever the Rules, Bye-Laws and Business Rules provide for handling of money of the clients by Professional Members".*

26. This Order would clearly indicate the mandate to the effect that when the Bye-laws are not in conformity with Power Market Regulations, the said Bye-laws have got to be modified by the Appellant to come in line with the Regulations.

27. The Appellant has contended that the Central Commission has misdirected itself by interpreting its order dated 24.12.2009 to include prohibition on the Facilitator Members to accept deposit of money in its account. He has projected the following reasons:

(a) The prohibition was on the financing facilities to be provided by the facilitator members to its client and not vice versa.

(b) The intent of the order dated 24.12.2009 directing the facilitator members not to provide any financing, credit or working capital facilities to their clients is served when the client provides the entire money to the facilitator members in regard to the transaction and the Facilitator Members do not use any part of its money for such transactions.

(c) When the client maintains sufficient funds to discharge its liabilities to the exchange, there can not be any question of the facilitator members funding the liabilities of the clients.

(d) There is a clear distinction between the deposit of money by the client with the Facilitator Members and the Facilitator members giving financial facilities or assuming financial exposure on behalf of the clients.

(e) Para 16 of the order permitting Facilitator Members to provide IT infrastructure and facilitation of procedure include transaction services.

(f) The scheme of deposit of money by the clients with the Facilitator Members is necessary to enable the clients to successfully accomplish transaction on power exchange without specialization, expertise and understanding the nuances of dealing and handling infrastructure etc.

(g) Prohibition contained in the order dated 24.12.2009 does not include transaction services including banking transaction services where the client pre-deposit the entire amount in a designated account under the control of members.

28. These reasonings can not be accepted in the light of the facts as indicated above. The paras 16 and 17 of the order dated 24.12.2009 as mentioned earlier explicitly provide for the positive mandate of what a Facilitator Members should do and for negative mandate as to what the Facilitator Members should not do. It is the contention of the Appellant that use of settlement account of the Facilitator Members by its clients is not covered under the negative injunctions under para 17 of the order. This contention is not tenable. If this contention of the Appellant is accepted, it would mean to saying that the functions of the Facilitator members is not covered by any of the positive mandate under para 16 of the order. Therefore, this submission can not be countenanced.

29. The Appellant has further contended that the provision of "IT Infrastructure" for bidding on electronic exchange would include the handling of monies on behalf of their clients. In

advancing this contention, the Appellant has relied upon the Regulations 31 (ii) of the Power Market Regulations.

30. We are not able to accept this submission for the following reasons. Firstly "IT Infrastructure" is the provision of hardware and not the provision of a service. Secondly nothing in Regulation 31 of the Power Market Regulations could even remotely indicate that IT Infrastructure would include the handling of monies. Let us indicate these Regulations. Regulation 31 of the Power Market Regulations is quoted below:-

> *"31. Information Technology Infrastructure and Trading System of Power shall comply with the following:*
>
> *(i) Power Exchange shall use electronic trading system and telecommunication network;*
>
> *(ii) The orders entered by a Member of Power Exchange shall be first checked against availability of funds/collateral in the risk management system before being accepted in the order book of the Power Exchange. This process shall be continued even after separation of clearing function to the Clearing Corporation;*

*(iii) Automated audit trail of bids, offers, and the matching of orders or the execution of transactions on the facility shall be maintained;*

*(iv) The algorithm of the software application for price discovery and market splitting shall be in compliance with the methodology mentioned in Bye laws, Rules and Business Rules of Power Exchange as approved by the Commission;*

*(v) The Commission may audit or appoint an agency to audit the Software application used by the Power Exchanges in operation for price discovery and market splitting on a random basis. The Power Exchanges shall produce the test results of test cases and scenarios provided by the Commission;*

*(vi) Power Exchange shall also carry out periodic IT system audit for data security, data integrity and operational efficiency and submit its reports to the Commission annually;*

*(vii) Power Exchange shall build a Disaster recovery site and alternate trading facility in case of emergency".*

31. The reliance of the Appellant on this Regulation revolves around the assumption that the clients are depositing sufficient money in the Settlement Funds account of the Facilitator Members for discharging their obligation to the power exchange.

This is not correct because the clients pool account of the Facilitator Member is the interface between the member's settlement account and the client accounts. Being a pooled account, it is difficult to identify whether a client has maintained sufficient funds to discharge its obligations to the exchange through the settlement account. Moreover, the client pool account being in the name of the Facilitator Member, there is no embargo on him to deposit or withdraw money from the said account. There is every possibility that the Facilitator Member may deposit money in client pool account which can be used for settling the client's obligations for power purchased through the power exchange. In this context, it is proper to refer to the order passed by the Commission dated 15.7.2010 as under:-

> *" The letter of authority given by the member to the clearing bank does not lead us to conclusively conclude that the member can not deposit money in this account so that there is no possibility of his giving credit to any of his clients. This is significant in view of the fact that the account is in name of the facilitator member.*

32. Pursuant to this Mandate, the Appellant issued a letter to M/S Manikaran power Limited, one of the Facilitator Members for ensuring the compliance with the direction of the commission. Para 9 of the letter dated 23.6.2010 are as follows:-

> *"9. In case funds in Member's Current Account/Settlement Account are short, then Exchange would utilize Member's Margin to meet total obligation. Amounts so utilized from the Margin will have to be replenished by the Member along with any additional Margin Call, before next day's trading".*

33. From the above, it is clear that the Facilitator Members have the liability to allow its Margin maintained with the power exchange to be utilized to meet the shortfall in the Member's Current Account/Settlement Account and to replenish the amount so utilized before the next day's trading. It is also further clear that the Facilitator Members have the liability to fund the transactions of the clients through its margin money which is nothing other than providing financing to the clients which is prohibited under Regulation 26 (ii) of the Power Market

Regulations. The Facilitator Members by allowing its account with the clearing bank to be used by its clients has the opportunity of extending financing facility in contravention of Regulation 26 of the Power Market Regulation.

34. Another contention urged on behalf of the Appellant is that the Regulation 30 and 31 of the Power Market Regulations clearly support the Facilitator members acting on behalf of the clients and accepting money on behalf of the clients. On the other hand, it is submitted by the Learned Counsel for the Respondent that the Regulation 30 and 31 can not be read in isolation and have to be read and interpreted with Regulation 26 which provides for the membership of the exchange. In the light of the rival submissions we will now refer to the Regulation 30 and 31 which are extracted hereunder below:-

> *"30. Default remedy mechanism on Power Exchange or Clearing Corporation*
> *(i) A member may be declared a defaulter by direction or circular of the Power Exchange or Clearing Corporation if:*

*(1) he is unable to fulfill his clearing or settlement obligations; or*

*x x x x*

*(4) he fails to pay any sum due to the Power Exchange or Clearing Corporation which may be prescribed by them from time to time; or*

*x x x x*

*31. Information Technology Infrastructure and Trading System of Power Exchange shall comply with the following:*

*x x x x*

*(ii) The orders entered by a Member of Power Exchange shall be first checked against availability of funds/collateral in the risk management system before being accepted in the order book of the Power Exchange. This process shall be continued even after separation of clearing functions to the Clearing Corporation;*

*x x x x*

35. Regulation 30 deals with the Defaulter. The member other than the grid connected member of trading licensee is not authorized to discharge their functions beyond what is specified in Regulation 26 (ii) of Power Market Regulations. In other words, such a member is not authorized to undertake the clearing and settlement obligations. In that event, he can not be declared as a defaulter under Regulation 30 on this account.

36. Regulation 31 as indicated above mandates the Power Exchanges to check the order entered by a member against the availability of funds/collaterals before being accepted in the order book. As the Facilitator Member is authorized to provide only three services as specified in Regulation 26 (ii) , he is not required to maintain any funds for clearing but the Power Exchange is required to check the orders against the funds/collateral maintained by the clients of such members. The Power Exchange is required to make appropriate modification in the risk management procedures delinking clearing and settlement functions from the Facilitator Members.

37. As indicated earlier, in para 16 of the order dated 24.12.2009 it has been clearly specified that the role of the Facilitator Members would only be to provide three services which clearly establish that nothing other than that three services are permitted. The services of allowing settlement funds account of the facilitator members to be used by the

clients for depositing money for onward transfer to the exchange is not covered under any of the specified services. This point was further clarified by its order dated 30.3.2010 in suo-motu proceedings in petition No.26/2010. The said order is as follows:-

> *"In case of First Respondent, clients have deposited money in the Settlement Bank Account of the facilitators who in turn have transferred this money to the bank account of the exchange. This is in contravention of our order which does not permit the facilitators to handle money on behalf of their clients".*

38. That apart, as mentioned earlier Regulation 26(ii) of the Power Market Regulations prohibits the Professional Members from extending the credit facility in any form to the regulators to the effect the findings has been given by the Central Commission in the impugned order dated 3.6.2010 which is as follows:-

> *"The Commission is of the view that the following practices are contrary to the Commission's Order dated 24.12.2009:- (i) banking transaction services provided by members other than trading licensees and grid connected entities to their clients, (ii) depositing of money by clients in the settlement bank account of such members and (iii)*

*transfer of such money by such members to the bank account of the exchange".*

39. It must be noted in this context, as indicated above that neither the order dated 24.12.2009 nor the order dated 30.3.2010 nor the Regulation 26 (ii) of the Power Market Regulations have been challenged. In this appeal, the only challenge is only in respect of the order dated 3.6.2010 and not other orders. It can not be disputed that this order dated 3.6.2010 only confirmed what was referred in the Regulations framed and observed in the order dated 24.12.2009 and 30.3.2010 by the Central Commission. Therefore, the order dated 3.6.2010 does not call for interference.

40. After the impugned order, the Appellant filed an application before the Central Commission seeking some more time for implementation of its order dated 3.6.2010 pointing out that the directions of the Commission in the said order has already been complied with in respect of the members with lesser number of clients but the said directions have not been complied with

respect to one member having large number of clients base and so some more time is required for the completion of the implementation of the said order. This request was also rejected by the Central Commission by the order dated 15.7.2010 in view of the fact that their bonafide was not established.

41. It is quite strange to notice that both these orders have been challenged in this Appeal. If the appellant is aggrieved as against the impugned order dated 3.6.2010, the Appellant should have filed an Appeal before this Tribunal by confining itself to the challenge of the said order. Without challenging the same, the Appellant rushed to the Central Commission and filed an application indicating the Appellant has already started the process of implementing the order in respect of some members and sought for some more time for completing the implementation in respect of one more member. Under those circumstances the rejection of this prayer by the Central Commission by the order dated 15.7.2010 in our view does not suffer from any infirmity.

**42. SUMMARY OF OUR FINDINGS.**

**(i) The para 16 of the order dated 24.12.2009 passed by the Central Commission gives positive mandate that the Facilitator Members can do only 3 types of activities mentioned in (a), (b) and (c) of the Para 16. Handling the money of clients does not fall within any of the 3 types of activities permitted by the Central Commission as mentioned in para 16 of the order. Unless any such activity is permitted by para 16 of the order and does not fall foul of the para 17, such activity cannot be undertaken by the Facilitator Members of the Appellant.**

**(ii) In the order dated 30.3.2010 the Central Commission held that in case the Indian Energy Exchange (Appellant), clients have deposited money in the Settlement Bank Account of the Facilitator Members who in turn have transferred the money to the bank account of the exchange and this act would mount to the contravention of the**

**Central Commission order dated 24.12.2009. Since both the orders dated 24.12.2009 and 30.3.2010 have not been implemented in letter and in spirit, the Central Commission had correctly issued show cause notice to the Appellant which culminated into impugned order.**

**(iii) The Actions of the Appellant do not confirm to the Statutory Regulations so long as the Appellant permits the clients of the Facilitator Members to undertake to deposit the money in the settlement bank account of the Facilitator Members and subsequent transfer of this money to the bank account of the Power Exchange.**

**(iv) Subsequent to the order passed on 24.12.2009, the Central Commission had notified CERC Power Market Regulations 2010 on 20.01.2010. The Regulation 26 (ii) of this Power Market Regulations clearly specifies the functions which have been permitted to be carried out by the Facilitator Members of the Appellant which are**

**contained in the order dated 24.12.2009. So by virtue of the Regulations also the action of the Appellant permitting the clients of the Facilitator Members to undertake deposition of the money into the bank account of the Facilitator Members and transfer this money to the bank account of the Power Energy Exchange (Appellant) is not in accordance with the orders dated 24.12.2009, 30.3.2010 and the Regulations.**

**(v) According to the Appellant, the Bye-Laws of the Exchange approved by the Central Commission provide for the facilities relating to the banking role on the part of the Professional Members for their clients including deposit of the money and as such the same is not illegal. These Bye-Laws would not be of any help to the Appellant in as much as the activities of the professional or Facilitator Members specifically demarcated in the order passed by the Central Commission on 24.12.2009 and the statutory Regulations notified on 20.01.2010. Both Bye-Laws as well as**

**Regulations would clearly provide in the case of conflict between the provisions of the Bye-Laws and the Regulations the Regulations framed under the Act shall prevail. Therefore, the reliance by the Appellant on the Bye-Laws is misplaced.**

**(vi) Appellant's contention is that the provisions relating to IT infrastructure for bidding or electronic exchange would include handling the moneys on the basis of the Regulation 31. This cannot be accepted. The IT infrastructure is the provision for hardware and not for the provision of service. Nothing in Regulation 31 would indicate that IT infrastructure would include the handling of the moneys. Further, Regulations 30 and 31 cannot be read in isolation and they have to be read together along with the Regulation 26 which provides for membership of the Exchange.**

**(vii) The conditions relating to provisions referred to in the impugned order dated 3.6.2010 passed by the Central Commission is only a restatement of what was stated in the orders dated 24.12.2009 and 30.3.2010 and the Regulation 26(ii) of the Power Market Regulations. In the absence of the challenge to these orders and Regulations, the findings on these aspects have attained the finality. Therefore, Impugned Order dated 3.6.2010 which alone is challenged does not call for interference.**

**(viii) In regard to the order dated 15.7.2010 passed by the Central Commission rejecting the prayer of the Appellant praying for the extension of time for compliance of the implementation of the order dated 3.6.2010 it is noticed that the Appellant who was required to show sufficient reason for extension of time has not convinced and demonstrated to the Central Commission that the Appellant has been complying with the portion of the directions of**

**the Commission. Therefore, Central Commission has correctly rejected the prayer for extension of time.**

44. In view of our above findings we do not find any merit in this Appeal. Therefore, the Appeal is dismissed. However, there is no order as to costs.

**(Rakesh Nath)** **(Justice M. Karpaga Vinayagam)**
**Technical Member** **Chairperson**

Dated: 28th March, 2011

REPORTABLE/NON-REPORTABLE



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