

**CENTRAL ELECTRICITY REGULATORY COMMISSION**  
**NEW DELHI**

CQram

1. Shri D.P. Sinha, Member
2. Shri G.S. Rajamani, Member
3. Shri K.N. Sinha, Member  
(on 15/5/2001 only)
4. Shri D.V. Khera, Member (EO)

**(DATES OF HEARING: 20-4-2001 & 15-5-2001)**

**Petition No.111/2000**

**In the matter of**

Grant of Transmission License - Procedure, Terms and Conditions of License, etc.

**Petition No.118/2000**

**In the matter of**

Petition for notification of the terms and conditions, forms and fee of transmission license.

**And In the Matter of**

Power Grid Corporation of India Limited ..... Petitioner

The following were present at the hearings:

1. Dr. Surat Singh, Advocate, POWERGRID
2. Shri Pramod Dayal, Advocate, POWERGRID
3. Shri Pawan Khatana, Advocate, POWERGRID
4. Shri Ashwani Jain, DGC I/C(UP&C), POWERGRID
5. Shri Arun Kumar, AGM, POWERGRID
6. Shri T.S.P. Rao, DGM (Law) POWERGRID
7. Shri S. Garg, DGM (IPTC), POWERGRID
8. Mr. Roger Woods, Country Director, National Grid
9. Shri H.L.Tayal, Country Manager, National Grid

10. Shr Sanjay Bhandarkar, Asstt. Director, National Grid
11. Shr Satjit Singh, Dy. Director (ISB), PSEB
12. Shr A.K. Asthana, Director, CEA
13. Shr V. Raghuraman, CII
14. Shr A. Ray Choudhary, Director (Tech), DVC
15. Shr T.K. Ghosh, SE, DVC
16. Shr K. Ramanathan, Sr. Fellow, TERI
17. Shr M.C. Gupta, S.E (Liaison), MPEB, New Delhi.
18. Shr G.S. Dhir, Manager (Law), PTC
19. Shr P.K. Mahajan, Manager, PTC
20. Shr N. Sundaresan, Resident Manager, TNEB
21. Shr R.S. Deswal, DGM, Tata Power
22. Shr H. Sengupta, AGM, Tata Power
23. Shr H.C. Aggarwal, Adviser, Tata Power
24. Ms. C. Baliga, Sr. Manager, Tata Power

## **ORDER**

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### **Petition No. 111/2000**

The Central Government issued a policy of private participation in power sector during October, 1991, which was considered to be the first step to change from a policy of State monopoly in the fields of power generation, transmission and distribution to a policy involving private sector investment. The meetings of the Chief Ministers of the States were convened during 1996 by the Central Government to discuss and deliberate upon the issues pertaining to power sector so that a lasting solution could be found to the problem of shortages in power sector. In the said meetings of Chief Ministers, a "Common Minimum Action Programme" was agreed upon. It was recognised that future expansion and improvement of the power sector could not be fully through public resources alone, and, therefore, it was essential to encourage private sector in generation,

transmission and distribution. It was also agreed to make necessary amendments in the relevant Acts/Rules to allow private participation in transmission and distribution of electricity. The decisions arrived at the meetings of the Chief Ministers formed the very basis for the reforms and comprehensive change of policies from one of the State's monopoly in the power sector to private participation under a regulated regime. The conference, therefore, amongst other things, resolved that independent Central and State Regulatory Commissions be established. As a follow up to this resolution, an independent Act, Electricity Regulatory Commissions Act, 1998 (hereinafter referred to as the Act) was enacted to provide for establishment of Central and State Regulatory Commissions. The Central Commission has been established in pursuance of Section 3 of the Act. The power and functions of the Central Commission are set out in Section 13 of the Act, which, inter alia, assigns it the function " to regulate the inter-state transmission of energy including tariff of the transmission utilities" and " to promote competition, efficiency and economy in the activities of electricity industry".

2. The Electricity Laws (Amendment) Act, 1998 was enacted by Parliament, which recognised transmission as an activity distinct from generation and the need for grant of licences for undertaking the transmission activities. In terms of Section 27 A of the Indian Electricity Act, 1910, as amended in 1998 (hereinafter referred to as the 1910 Act), a Central Transmission Utility (CTU) was created, whose functions are defined in Section 27 A (2) of the 1910 Act.

Power Grid Corporation of India Limited (POWERGRID), a Government of India undertaking, has been declared as the CTU under Section 27 A of the 1910 Act. Through the Electricity Laws (Amendment) Act, 1998, Section 27C was also introduced in the 1910 Act which provides for grant of transmission license by the Commission to a person for undertaking inter-state transmission of energy. The transmission licensee may be authorised to construct, maintain and operate any inter-state transmission system under the direction, control and supervision of the CTU. Section 27 C of the 1910 Act further empowers the Central Commission to prescribe the terms and conditions, form and fees for grant of transmission license. As provided in clause (4) of Section 27C, an application for grant of transmission license for inter-state transmission has to be approved by CTU in the manner notified by the Central Commission in this behalf. The law further authorises the Central Commission, if it considers it in public interest, to grant exemption to any person from obtaining a transmission license for inter-state transmission. Thus, the Commission enjoys plenary powers and absolute jurisdiction over grant of transmission license or exemption from obtaining the same.

3. In view of the above statutory provisions, the Commission is to prescribe terms and conditions for grant of license for transmission as also the "manner" in which an applicant has to obtain the approval of the CTU for grant of inter-state transmission license. Accordingly, a document containing the draft procedure for grant of transmission license, including the procedure for obtaining approval of

the CTU, the terms and conditions, application form and fees for license was prepared by the staff of the Commission. The draft document was widely circulated to elicit views of the stakeholders (66 approximately) in the electricity sector and forms the subject matter of petition 111/2000. The following organisations have responded to the draft circulated:

- (a) Power Grid Corporation of India Limited (POWERGRID)
- (b) Uttar Pradesh Power Corporation Limited (UPPCL)
- (c) Neyveli Lignite Corporation (NLC)
- (d) Confederation of Indian Industry (CII)
- (e) National Grid International Ltd. (National Grid)
- (f) Karnataka Power Transmission Corporation Limited (KPTCL)
- (g) Associated Chamber of Commerce and Industry (ASSOCHAM)
- (h) Maharashtra State Electricity Board (MSEB)
- (i) Tata Energy Research Institute (TERI)
- (j) Central Electricity Authority (CEA)
- (k) Tata Power Companies Ltd. (Tata Power)
- (l) Madhya Pradesh State Electricity Board (MPSEB)

4 Before dealing with the respective submissions of the parties on merits, it is necessary to deal with certain preliminary issues. In its order dated 30.10.1999, in Petition No. 1/99, the Commission in para 2.2(b) has prescribed an interim procedure for new investment in transmission sector till the terms and conditions, etc. under Section 27C of the Act were finally notified by the Commission. On an appeal filed by POWERGRID (FAO No.337/2000), the High Court of Delhi had granted interim stay against the operation of para 2.2(b) of the order dated 30.10,1999. PGCIL in its reply to petition No. 111/2000 has also

adverted to the stay granted by the High Court and has averred that the public hearing on the draft document is pre-mature. In the light of these facts, a question is raised whether the Commission should proceed with the hearing of the petition. Since the interim stay granted by the High Court of Delhi is confined to para 2.2(b) of the order dated 30.10.1999, we are of the view that the Commission can proceed further to prescribe the final procedure, terms and conditions of license, etc. by virtue of its statutory powers under Section 27C of the Act.

5. POWERGRID in its response has raised a preliminary objection that prescription of procedure for obtaining approval of the CTU under clause (4) of Section 27C of the 1910 Act is beyond the purview and jurisdiction of the Commission. It has been submitted that the Central Government in Ministry of Power has issued guidelines on 31.1.2000 prescribing the procedure for private sector investment in the power sector. According to POWERGRID, it is bound by these guidelines and these guidelines do not mandatorily require the concurrence or approval of the Commission for selection of IPTC/JV partner and, therefore, it is for the POWERGRID to take its own administrative decisions in the matter. POWERGRID has filed the following documents alongwith its reply:

- (a) Criteria for project identification for private sector participation in transmission;
- (b) Procedure for private participation in transmission, and

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- (c) Critical components of Implementation Agreement, Transmission Service Agreement and Shareholders' Agreement.

6. We propose to deal with the preliminary objection taken by the POWERGRID. Clause (4) of Section 27 C of the 1910 Act legislates that an application for grant of transmission license for inter-state transmission shall not be entertained by the Central Commission unless the applicant has obtained the approval of the CTU in such "manner" as may be notified by the Central Commission. The Supreme Court in *Asnew Drums Vs. Maharashtra State Finance Corporation* [ (1971) 3 SCC 602] had the occasion to interpret and construe the word "manner". It held that "manner" means " method of procedure". As held by Allahabad High Court in *Rama Shankar Vs Official Liquidator* [AIR 1956 All 222] the word "manner" refers to "the procedure to be followed". Clause (4) of Section 27 of the 1910 Act is explicit, therefore, that the procedure for obtaining the CTU's approval for grant of the transmission license, has to be prescribed by the Commission.

7. The issue raised by POWERGRID can be looked into from another angle also. It is undisputed that the power conferred carries with it all other powers which are incidental to exercise of this power in order to make exercise of the power effective. This proposition of law is established through a catena of judgments of the Supreme Court and these are referred to hereinafter.

8. In the Income Tax Officer Vs M.K. Mohammad Kunhi [(1969) 2 S.C.R 65] the Supreme Court held as under :-

*"It is firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, Third Edition, Arts, 5401 and 5402). The powers which have been conferred by s.254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. In Domat's Civil Law Cushing's Edition, Vol. 1 at page 88, it has been stated:*

*"It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it."*

*Maxwell on Interpretation of Statutes, Eleventh Edition, contains a statement at p.350 that "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit." An instance is given based on Ex.parte Martin that "where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced."*

9. In V.T. Khanzode V. Reserve Bank of India [(1982) 2 SCC 7] on the question of exercise of incidental/consequential powers, Supreme Court observed that :-

*"The doctrine of ultra vires in relation to the powers of a statutory corporation has to be understood reasonably and so understood, "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires". (See Attorney-General v. Great Eastern Rly.Co.)*



10. In another case, reported as Savitri v. Govind Singh Rawat [ (1985) 4 SCC 337], the Supreme Court similarly held as under :-

*"Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim ""ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest (where anything is conceded, there is conceded also anything without which the thing itself cannot exist). (Vide Earl Jowitt's Dictionary of English Law, 1959 Edn., p. 1797.) Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible, in the present case, however, would advance the object of the legislation under consideration."*

11. In still another case of Khargram Panchayat & Others v. State of West Bengal & Others [(1987) 3 SCC 82], following observations of the Supreme Court are pertinent :-

*"It is well accepted that the conferral of statutory powers on these local authorities must be construed as impliedly authorising everything which could fairly and reasonably be regarded as incidental or consequential to the power itself. See " De Smith's Judicial Review of Administrative Action, 4<sup>th</sup> edn., p.95, HWR Wade's Administrative Law, 5<sup>th</sup> edn., p.217, Craies on Statute Law, 6<sup>th</sup> edn., p.276, Attorney General v. Great Eastern Railway, Baroness Wenlock v. River Dee Co. De Smith in his celebrated work Judicial Review of Administrative Action, 4<sup>th</sup> edn., at p.95 puts the law tersely in these words :*

*The House of Lords has laid down the principle that "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.*

*This principle was enunciated by Lord Selborne in Attorney General v. Great Eastern Railway, in these words :*

*The doctrine of ultra vires ought to be reasonably and not unreasonably, understood and applied and whatever may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.*

*These words have been quoted by Professor Wade in this monumental work Administrative Law, 5<sup>th</sup> edn., at p.217 and also be Craies on Statute Law, 6<sup>th</sup> edn., at p.276. Craies also refers to the observations of Lord Watson in Baroness Wenlock v. River Dee Co., to the effect:*

*Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which, the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions."*

12. In Reserve Bank of India v. Pearless General Finance and Investment Co. Ltd [(1996) 1 SCC 642] similar observations have been made by the Supreme Court in the following words :-

*"It is well accepted canon of statutory construction that "it is the duty of the court to further Parliament's aim of providing a remedy for the mischief against which the enactment is directed and the court should prefer a construction which advances this object rather than one which attempts to find some way of circumventing it". (See Francis Bennion on Statutory Interpretation, 2<sup>nd</sup> Edn., p. 711.)"*

13. The Commission, through the proposed procedure, intends to inject transparency in the selection of transmission licensee and the operations in the power sector with the ultimate aim to promote competition, efficiency and

economy in the activities in the electricity industry. A careful review of the above-noted authorities establishes that the procedure for private sector investment in the Inter-State Transmission Sector (ISTS) is within the exclusive domain of this Commission firstly, by virtue of powers under clause (4) of Section 27C of the 1910 Act. Secondly, such a power is considered incidental for effective exercise of power under clause (d) of Section 13 of the Act to "promote competition, efficiency and economy in the electricity industry". No express provisions of law have been brought to our notice expressly conferring power on the Central Government or the CTU to prescribe procedure for grant of transmission license for inter-state transmission of power. Accordingly, we hold that the guidelines issued by the Central Government in the Ministry of Power on 31.1.2000 under No. 9/3/98-PG are *de hors* the Commission's statutory powers.

14. Some of the respondents, have raised the issue of insulation of role of the CTU as a neutral agency from that of the POWERGRID, in the process of selection of a transmission licensee, in view of their being and interested party because of the commercial self-interest of the POWERGRID. In para 3.17 of our order dated 30-10-1999 in petition No. 1/1999, we have already given a direction for ring-fencing of CTU functions within the POWERGRID. However, the para is presently stayed by the High Court of Delhi on an appeal filed by the POWERGRID (FAO No. 344/2000). Therefore, we refrain from expressing any views on this issue in these proceedings.

15. In February, 1997 the Central Government had constituted an expert committee under the Chairmanship of Shri D. Sankaraguruswamy, a former Chairman of Power Finance Corporation. POWERGRID in its response has made repeated references to the recommendations made by this Committee in support of its submissions. Nothing has been brought on record to show, if any, of the recommendations of Sankaraguruswamy Committee were accepted and implemented by the Central Government. Interestingly, POWERGRID itself is pleading against the recommendations made by the Committee on some of the issues, like the target availability of the transmission system. Under these circumstances, reliance placed by POWERGRID on the recommendations by Sankaraguruswamy Committee shall not deter us from arriving at our own independent conclusions, unless the submissions are supported by strong logic. We now propose to deal with the submissions of the parties on the draft document.

### **PROCEDURE FOR GRANT OF TRANSMISSION LICENSE**

16. The aim of the notification proposed to be issued by the Commission is to set out fundamental guidelines on the subject. The further details relevant to the powers and functions of the Commission may be finalised while approving the RfP & RfQ documents including the bid evaluation procedure that may be submitted by the CTU. The Commission is also in the process of finalising regulations for competitive bidding separately. A final decision on the regulations

for competitive bidding shall be taken after the public hearing, which may have a bearing on the procedure for grant of transmission license. Therefore, the proposed notification may be read in the light of the regulations for competitive bidding to be notified by the Commission.

17. The draft procedure envisages identification and selection by the CTU of the elements of ISTS, which may be constructed by an agency other than POWERGRID, for which the CTU is ordained to evolve a transparent procedure with the approval of the Commission. POWERGRID has submitted that a basket of projects for private participation shall be identified by it from time to time in consultation with and with the approval of the Central Government. The criteria for selecting projects for private participation that POWERGRID proposes to apply, has been submitted by POWERGRID and it has further suggested deletion of the provision regarding submission of the procedure for approval of the Commission. CI I and Tata Power have stated that the Commission should not leave to the CTU to determine the projects which will be in domain of POWERGRID and those with other agencies. KPTCL has suggested consultation with the beneficiaries for identification of the projects. We hold that the identification of the elements of the ISTS, which are to be constructed by POWERGRID and other agencies has to be done in a transparent manner with a view to promoting competition, efficiency and economy. An improper selection of the projects may lead to higher tariffs. It may even fail to invite sufficient investment from private entrepreneurs, thereby leading to severe transmission

congestion and defeating the very policy of involvement of private sector. However, we feel that the CTU should have enough latitude to enable it to expedite urgent action to cover the critical lines within a shorter period in meaningful and constructive cooperation with private investors as indicated in para 24 of our order dated 29<sup>th</sup> May 2001 in petition No. 23/2001. Therefore, we direct that within 60 days of issuance of this order, the CTU shall formulate the criteria for selection of the elements of the ISTS to be undertaken by POWERGRID vis-a-vis other agencies and make it public. At this stage, the approval of the Commission on the above procedure may not be necessary. However, the Commission shall review the progress of private investment in the ISTS by March 2004, when, if necessary, the directions for revision of the procedure may be issued to the CTU. However, in case of any objection to any of the provisions of the criteria prescribed, the affected party may approach the Commission.

18. The major transmission projects have to be well structured and packaged into reasonably sized distinct segments and the bids have to be invited package-wise. POWERGRID while agreeing with this principle, has submitted that the decision in this regard shall be that of POWERGRID. The structure and size of the project shall have a major bearing on the number of participants in the bidding process and hence on the competition. We, therefore, direct that the CTU shall have to take these factors into account while inviting the bids. However, for

the present, this issue is being left to the discretion of the CTU till the proposed review by the Commission by March, 2004

19. According to the proposed procedure, POWERGRID shall seek in-principle clearance from CEA and consult the beneficiaries for execution of identified transmission projects by other agencies. The procedure also envisages a public announcement by the CTU of its intentions of seeking participation of other agencies in the construction of the identified elements of ISTS. POWERGRID is opposed to the idea of public announcement as it is not required as per the guidelines issued by the Central Government (Ministry of Power) on 31-1-2001, as well as Sankaraguruswamy Committee Report. NLC has suggested that consultation with generating stations should also be mandatory. TERI has submitted that the requirement of seeking "in-principle clearance" from CEA and consultation with beneficiaries may lead to procedural delays and deadlocks. While we have already held that the guidelines issued by the Central Government, Ministry of Power are *de hors* of the Commission's power, it may have to be stressed that points contained in the guidelines have been kept in mind while finalising the regulation. Secondly, once a basket of the projects to be taken up for private sector participation has been identified by the CTU as provided above in this order, there should not be any problem in making it public. This would not only ensure transparency but would also allow interested agencies to carry out ground work, thereby facilitating increased participation leading to better competition. The consultation with the beneficiaries has been

provided because of their liability to pay the transmission charges. The consultation with generating stations on this issue is not considered necessary. "In-principle clearance" from CEA may be obtained, if otherwise necessary.

20. In the draft procedure, two routes namely, the "competitive route" and the "Joint Venture Company route" have been identified for implementation of transmission projects by agencies other than POWERGRID. According to POWERGRID, the "competitive route" should be named as "IPTC route" since "Joint Venture Company route" is also the competitive route. We feel that in addition to IPTCs, other agencies like STUs, the generating companies may also compete in the bidding process for the inter-state transmission projects. Hence the route other than the "Joint Venture Company route" has been named as the competitive route. In the case of JVC route also, bidders may be allowed to bid on TSC basis, as and when the scheme is suitably patterned. However, we do not propose to effect any change in the label, particularly when this does not affect the merits of the procedure.

21. The procedure also envisages submission of periodic reports by the CTU to the Commission on the progress of construction of the projects selected for execution by the licensees. It provides for submission of quarterly progress reports, while the construction is in progress and submission of annual reports on completion of the project to assess the performance of the licensee. Some of the parties feel that submission of quarterly reports to the Commission on the progress of construction may amount to micro managing the process and are,



therefore, unnecessary. In addition, POWERGRID has submitted that the construction of the project shall be monitored through the provisions of agreements. It is pleaded that the submission of periodic reports should be dispensed with. In accordance with the provisions of Section 27C of the 1910 Act, the licensee is to construct, maintain and operate the project under the supervision and control of the CTU. Therefore, the job of monitoring the performance of the licensee is necessarily of the CTU. We leave it to the CTU to report to the Commission, such of the developments as it considers appropriate and it may not be necessary for the CTU to submit the quarterly and annual reports provided in the draft procedure.

22. In the procedure contained in the draft, it is provided that the bidding process shall enter into next stage beyond the stages for RfQ and RfP, only if a minimum of three valid bids are available for these two stages. It has been pointed out by some of the respondents that it may not always be possible to have minimum of three bids and, therefore, a prayer has been made that this aspect be clarified by the Commission in its order. We have considered the matter. We hold that ideally a minimum of three bids should be available for the bidding process to enter into next stage. However, in case the number of bids available is less than three, the CTU shall approach the Commission with proper justification for appropriate directions of the Commission. It has also been contended that the licensee should make available to POWERGRID the entire capacity of the assets not limited to transmission capacity alone. We leave this

issue open to the parties to consider it while entering into agreement. We, however, direct that in case the assets are used for a purpose other than transmission of electricity, prior approval of the Commission shall always be obtained by the licensee and the benefits likely to be accrued to the licensee from the usage of the assets for furthering any other business should be passed on to the users of the transmission project. The question of payment of Transmission Service Charges by the beneficiaries to the transmission licensee has also been raised before us. The draft procedure provides that these charges would be paid by POWERGRID who in turn shall recover the same from the beneficiaries. On consideration of the submissions of the parties, we direct that the issue shall be addressed in the RfP document, to be submitted to the Commission for its approval. The procedure contained in the draft document further provides that on expiry of the period of agreement, the assets shall be transferred to POWERGRID for a nominal consideration. Some of the parties suggested that the transfer of assets should be at a value based on earning potential of the line and its residual life. Some of the beneficiaries have suggested that the assets should be transferred to them on expiry of the period of agreement. We hold that the transfer value of the assets after expiry of license period shall be assessed in the manner agreed to between in terms of provisions of the agreement that may be entered into by the CTU with the licensee. The bidders shall take into account the manner of assessing the transfer value while submitting their bids.

23. In accordance with the procedure contained in the draft document, model RfQ and RfP documents are to be prepared by the CTU and submitted to the Commission for its approval. It is further provided that in case of deviation from these model RfQ and RfP documents, prior approval of the Commission shall be obtained. POWERGRID in its response has submitted that RfQ and RfP documents may be required to be reviewed at the various stages of the bidding process and deviations from the approved document may become necessary, keeping in view the special circumstances. According to POWERGRID, the approval of the Commission for these deviations shall delay the entire bidding process. The basic intention of the Commission in providing for the Commission's approval is that the bidding documents should not be restrictive so as to hamper the competition, efficiency and economy. Accordingly the provision for approval of the Commission for the RfQ and RfP documents is considered necessary. It may not be desirable to give authority to the CTU to make deviations from the procedure approved by the Commission; otherwise the approval of RfQ and RfP documents by the Commission will lose its significance. The model RfP and RfQ shall be submitted within 60 days of issue of this order.

24. The draft documents provide for the main criteria for selection of bidders at RfQ stage. POWERGRID has submitted its own procedure in this regard. The procedure proposed by POWERGRID may be incorporated in the RfQ and RfP documents with the proviso that the CTU shall be submitting to the Commission for approval.

25. According to draft document, the preference for annual Transmission Service Charges on the levelised pattern for the entire period of agreement may be indicated in the RfP document, though the bidders have the option to quote TSC on front loaded or back loaded pattern as well. Since the bidder has the option to quote TSC on front loaded and back loaded pattern, and evaluation is to be based on Net Present Value, it may not be necessary to indicate preference for levelised tariff. We, therefore, direct that the provisions regarding preference for levelised tariff may be deleted. We further direct that in addition to discount rate, the foreign exchange rate and the foreign exchange variation rate to be used for bid evaluation shall also be clearly mentioned in the RfP document by the CTU. Since the prior approval of the Commission shall be obtained for RfP document, the provisions regarding the discount rate, the foreign exchange rate and foreign exchange variation rate shall automatically get approval of the Commission.

26. As provided in para 2.1 (vii), of the draft procedure, the process of evaluation of annual Transmission Service Charges shall be undertaken by the CTU and the details of evaluation shall be submitted to the Commission by the CTU while recommending the application for grant of transmission license. According to POWERGRID, submission of the details of evaluation to the Commission may be construed as breach of confidentiality, besides involving micro managing the activities of POWERGRID. We are not impressed by the

submission made by POWERGRID. The Commission as the final authority to grant a transmission license has to be satisfied that it will finally promote competition, efficiency and economy. We, therefore, reject the contention raised by POWERGRID. POWERGRID has also taken objection to the word "recommend" used in this sub-para since according to it as per Clause (4) of Section 27C of the 1910 Act, it is to approve the application for grant of transmission license. We make it clear that though the application for grant of the transmission license is to be approved by the CTU (and not POWERGRID), the approval of the CTU of the application amounts to recommendation to the Commission since the final authority to grant the transmission license is vested in the Commission. Nevertheless, the provision contained in this sub-para shall be appropriately modified to make it in conformity with Clause (4) of Section 27C of the 1910 Act. We further direct that the application submitted to the Commission for grant of transmission license shall be accompanied with a fee of Rs.1 lakh.

27. The draft procedure provides for holding a public hearing by the Commission before grant of transmission license. POWERGRID has objected to holding of a public hearing for the purpose and has accordingly suggested that this provision should be deleted. It has also referred to the observation of Sankaraguruswamy Committee Report according to which no public inter face is involved in licensing for the transmission sector. We have already held that a bald reference to the Sankaraguruswamy Committee Report is not of much consequence. We take note of the fact that the Sankaraguruswamy Committee

Report was submitted prior to enactment of the Act. Section 37 of the Act mandates that the Commission while exercising its powers and discharging its functions shall ensure transparency. We, however, make it clear that it may not always be necessary to hold public hearing. The public hearing may be held only in such cases as the Commission may consider appropriate.

28. Para 2.2(i) provides for selection of the "Joint Venture Company route". It also provides that POWERGRID should have enough equity holding in the Joint Venture Company to exercise the effective control over its functioning. In the responses filed by the parties, it has been suggested that since construction, maintenance and operation of the ISTS shall be under the direct control and supervision of CTU, the provision for control of POWERGRID by way of equity holding may not be considered necessary. Some of the parties have suggested that the guidelines to decide the projects to be executed through "competitive route" or the "Joint Venture Company route" be specifically laid down. We have considered these arguments. We are satisfied that it may not be necessary to specify that POWERGRID should have enough equity holding in the Joint Venture Companies. Accordingly, we direct that the provision for equity holding by POWERGRID shall be deleted. The guiding factors for taking up a project through "Joint Venture Company route" have been stated in this para and no further guidelines in this regard are considered necessary. We reiterate that the competitive route is an ideal route wherein the agency other than POWERGRID is responsible for mobilisation of entire resources needed for the project.

However, we leave the decision regarding the selection of route of investment i.e. whether competitive route or "Joint Venture Company route" for a particular project to the CTU for the present. However, this direction shall be reviewed by March 2004 while considering other related issues. Para 2.2(i) shall be amended in the light of above directions.

29. In para 2.2(v), it has been provided that annual Transmission Service Charges for Joint Venture Company shall be on cost plus basis, based on tariff notification of the Commission. However, in the case of JVC route also, bidders may be allowed to bid on TSC basis, as and when the scheme is suitably devised. This will strengthen the competitive environment. A provision has also been made for approval of the complete capital cost by the "competent authority". The suggestions have been made that the "competent authority" should be properly defined. This aspect has been separately considered by the Commission and a notification under Section 28 of the Act has been issued on 26<sup>th</sup> March 2001. We, therefore, decide that this sub-para should be properly amended to provide for the bidding on TSC basis also.

## **TRANSMISSION LICENSE**

### **GENERAL:**

30. The words "CTU" and "POWERGRID" have been interchangeably used in the document. We take note of this anomaly. In accordance with Clause (4) of

Section 27 C of 1910 Act, the CTU is assigned the function of approving the application for grant of transmission license by the Commission. Therefore, all references in the transmission license document should generally relate to the CTU, unless it is specifically intended to refer to POWERGRID.

31. KPTCL has stated that many provisions of the draft license give an impression of too much control by the Commission and the CTU. It has also been stated that licensee shall inform SLDC regarding outage schedule and financial health and functioning of the licensee be informed to concerned States at regular intervals. It has proposed that performance of the licensee be assessed by CTU in consultation with the beneficiaries. It has further been suggested that the Commission may consider grant of exemption from license for the various utilities like SEBs, Corporations, etc. No specific provisions of the document providing for the excessive control by the Commission or the CTU have been highlighted by KPTCL. The provisions made in the draft license are in accordance with the statutory powers conferred by the statute. Further, as the transmission license is to be granted by the Commission and the licensee has to operate under direction, control and supervision of the CTU, the licensee has to report to the CTU and the Commission only. So far as the exemption from obtaining the license is concerned, the Commission is empowered to grant such an exemption under Clause (5) of section 27 C of the 1910 Act and changes to no other provisions in the document dealing with terms and conditions of license are considered necessary.



## **PART I - GRANT OF TRANSMISSION LICENSE**

32. The draft on terms and conditions of license provides that it shall continue to be in force for a period of 25 years. National Grid has submitted that the term of license should be consistent with the life of the project and accordingly, has suggested a period of at least 30 to 35 years for its validity. CII & Tata Power have also proposed that the period may be considered as 30 years instead of 25 years or alternatively, the depreciation rate may be increased to 7.84% in case period of license is kept as 25 years. On the contrary, KPTCL has suggested that license period be reduced from 25 years to 10 years or for a period of 1 or 2 years more than the loan repayment period. The two major equipments used in transmission are transformer and lines, the fair life of transformer is 25 years and that of transmission line is 35 years. However, in actual practice, the life of these equipment is may be more than this. We are of the opinion that the term of the license should be relatable to life so that normally no major capital investment is required on replacement of the equipment during the license period. Accordingly, we direct that the term of the License should appropriately be 30 years.

33. POWERGRID has suggested redrafting of the provisions regarding "exclusivity". For sake of clarity the relevant para of the document shall be modified suitably. CII has stated that there are no transparent guidelines for grant

of second license in the same area. No further amendment to accommodate the suggestion made by CII is considered necessary.

## **PART II - TERMS & CONDITIONS**

34. In the interpretation clause POWERGRID has suggested amendments of the terms 'Electricity Regulations' 'Financial Year" and Transmission Service Charges (TSC)'. It has also suggested certain additional definitions, such as - License, Licensee and Regulations. The amendments suggested by POWERGRID shall be appropriately dealt with in the final document to be notified by the Commission.

35. On the issue of obligations of the licensee, CII has suggested for incorporation of the provision of extension of commissioning time to take care of reasons beyond the control of implementing agency. We are of the opinion that this aspect should be dealt with in the implementation agreement and hence no changes in the document are considered necessary. POWERGRID has suggested one additional para to clarify that the licensee shall discharge all of its obligations under the direction, supervision and control of CTU. We feel that intent of this additional para is adequately taken care of in the existing provisions. CEA has suggested three additional paras in connection with obligations of the transmission licensee. The first one is regarding provision of exclusivity. The second suggestion is to provide for that the licensee shall not dispose of or

relinquish operational control over any asset unless permitted by the CTU or the Commission. The third suggestion is to indicate that the licensee shall provide all assistance to Electrical Inspector or any person authorized by the CTU or the Commission. The aspect of "exclusivity" has been adequately taken care of in the existing draft. The other suggestions of CEA shall be taken note of while dealing with the provisions regarding "Prohibited activities" and "obligations of licensee".

36. POWERGRID has proposed that the use of the entire assets should be available to the CTU for any other associated business. National Grid has suggested that since the assets would be owned by JVC, prior approval of the Commission should not be necessary for additions/modification such as laying of fiber optic cables. According to CEA, the use of transmission assets for communication purpose is a standard practice and the modalities for this activity should be laid down. MSEB has suggested that in case of other use of transmission asset, there should be equivalent reduction in Transmission Service Charges (TSC). TNEB has also stated that the policy for use of transmission facility for telecom and the procedure for collection of royalty for the beneficiaries, needs to be made clear. We appreciate the views expressed by the parties. The Commission is aware that with the rapid advancement in technology, there is a possibility of multi sector utilisation of the transmission assets. The Commission is not averse to the use of transmission assets for purpose other than transmission of electricity, such as communication. However, as the

beneficiaries are paying the charges for the transmission assets and therefore, any additional benefits accruing to the licensee from the use of these assets for the activities other than transmission of electricity, should be appropriately shared between the beneficiaries and the licensee. The Commission shall decide the manner of sharing of the benefits while approving usage of transmission assets for any other purpose.

37. CEA has also suggested that for augmentation/modification of the Project, prior approval of CEA would be desirable to ensure technical compatibility. As per para 2.0(b) of the document, the licensee shall have to comply with the various statutory provisions. No further stipulation on the suggestion made by CEA is considered necessary. POWERGRID has suggested redrafting of the provision which prohibit the augmentation/modification of the projects so that the Commission's approval is not a pre-requisite for changes which have no bearing on basic elements of transmission system covered in the license. As the license shall be granted for a specific project, any augmentation/ modification should be carried out with the prior approval of the Commission. POWERGRID has also proposed that a provision be made for license to remain valid even if it is issued to a project specific Shell company to initiate forest clearance etc. It has also proposed a modification that the acquisition of shares of the Shell company by the licensee, should not be considered as transfer of undertaking. As the transmission license shall be granted for construction, maintenance & operation of ISTS only after the agency has been duly selected, we are of the opinion that

the need for modifications suggested by POWERGRID does not arise. National Grid and POWERGRID have pointed out that for projects based on limited recourse financing, a provision may be made for transfer/assignment of license to the lenders in the event of default by Licensee. A similar view has been expressed by CII that non-transferability of license will rule out the raising of debt on non-recourse basis. We have considered the matter. We direct that a provision may be made in the terms and conditions of license for its assignment to the nominee of the lenders in case of default by the licensee, subject to approval of the Commission.

38. It has been pointed out on behalf of the parties that the license fee of 1% of Annual TSC is very high and needs to be reviewed. It has been suggested that a provision also should be made to clarify whether the license fee would be a pass through for tariff purposes in case of JV route. Taking note of the views expressed by the parties on the issue of license fees, we feel that annual license fee should be 0.05% of annual TSC, subject to a minimum of Rs. 50,000/- (Rs. Fifty thousand only) and a maximum of Rs. 2,00,000/- (Rs. Two lakh only). The license fee shall be a pass through in the tariff in case of investment through JV route. POWERGRID has highlighted the issue of payment of license fee for part year, at the time of commencement of commercial operation as well as the end of term of license or its assignment. The aspect of payment of license fee for the period between the date of commercial operation and end of respective financial year has been addressed in the draft document. We direct that a similar provision

be made to cover the cases in which the license is terminated whether by effect of time or otherwise before expiry of the financial year. National Grid has enquired whether the license fee shall be paid in advance or in arrears based on actual Annual TSC. POWERGRID has proposed a new para for annual adjustment required in license fee due to adjustment in annual TSC on account of incentives, penalties, etc. We would like to clarify that the annual license fee shall be deposited in advance, based on the TSC fixed by the Commission irrespective of the actual payment received by the licensee including incentives, penalties, etc. TNEB has expressed a view that the penal interest of 2% per month for delayed payments is high, considering the PLR of 12% and this may be reduced to 1.5% per month. The provision has been made to ensure timely payment of the dues, so that the payment of penal interest acts a deterrent. The payment of penal interest cannot be linked to any other parameter. Accordingly, we do not consider it appropriate to modify the provision.

39. CI I & Tata Power have submitted that data regarding accounts for projects awarded on competitive bidding basis with the committed tariff, should not be required to be submitted to the Commission. This information is not intended to monitor performance of the licensee in case of investment through competitive route wherein the tariff shall be fixed through the bidding for the entire term of the license. Such reports would enable the Commission to ascertain the impact of private sector participation in the transmission sector. This information would be useful for future decisions in the area of private sector

participation in transmission sector. We do not consider any departure necessary from the provisions contained in the draft document.

40. National Grid has suggested that the scope, extent and nature of information to be provided by licensee on periodic basis, should be clearly determined and defined. The format for furnishing the information to the Commission shall be notified in due course of time and the suggestion made shall be appropriately addressed while issuing the notification.

41. POWERGRID has suggested redrafting of para 7.1(c) in the following manner-

"There is a change (pursuant to agreements) in major share holding or, ownership or, management of the Licensee or its parent or group companies or of such entities of the companies constituting the Licensee."

We are of the view that the Commission need not be concerned with the shareholding, management or ownership of the parent or group companies.

Further, the issue of such change in the partner company of the POWERGRID in case of JVC should be appropriately covered in their agreement and need not be mentioned in the Terms and Conditions of the License.

42. POWERGRID has suggested modification of certain provisions relating to operation and compliance audits to indicate that the required documents/information are to be submitted at the end of every financial year or

as sought by the CTU or the Commission. The existing provision in the draft document clearly indicates that the information is to be submitted on annual basis and hence no change is required. Under para 8.1(a) of the draft terms and conditions of license, POWERGRID has suggested deletion of the words 'transmission losses'. It has been argued that it may not be possible for the licensee to know the transmission losses as the licensee may not be operating all the elements involved in calculation of transmission losses. We are not inclined to agree with the suggestion made by POWERGRID as the licensee can well seek the required information from CTU/system operator for calculation of transmission losses.

43. On the question of provisions for dispute resolution, POWERGRID has suggested modification of the provision contained in the draft document to state that disputes between CTU and Transmission Licensee may be referred to the Commission in case all the contracting parties agree. The basis for the suggested modification is that for such contractual matters there is a conclusive dispute resolution mechanism as provided in the 'Arbitration & Conciliation Act,1996' and for such cases mandatory arbitration by Commission should be avoided. We are of the view that as far as possible the disputes between the CTU and the licensee shall be settled by mutual consultation/reconciliation. Only in the event of failure of the parties to resolve the disputes through consultation/reconciliation, these shall be referred to the Commission for adjudication/arbitration. POWERGRID has also pointed out that arbitrator may



not be the final authority to resolve the disputes and the aggrieved party should have opportunity to approach the competent court of law. TNEB has also sought clarification as to whether the decision of the Commission in this regard, can be appealed in a court of law. The issues raised by the parties should not detain as the Act already provides for appeal against the Commission's order.

44. On the question of revocation of license, National Grid has expressed that the events under which license is to be revoked, should be specified in objective terms to maintain transparency. It has also been suggested that before revocation, the licensee should be given an opportunity to be heard in compliance with the principles of natural justice. CII has suggested that sufficient time be allowed to the licensee for rectification of faults prior to issue of any notice of revocation. The circumstances under which license can be terminated/revoked, have been explicitly stated under para 10.1 of draft document. Further, as per para 10.2 the licensee shall be given three months notice stating the grounds on which the license is proposed to be revoked. By these provisions, the licensee shall have the ample opportunity to present the facts before the Commission. However, in view of the above suggestions we direct that a suitable provision for giving ample opportunity to the licensee to rectify the situation leading to revocation may be inserted. POWERGRID has suggested that default in compliance of agreement should also constitute a condition for revocation. We direct that the consequences of breach of agreement should be covered in the agreement itself and there is no need to provide for in the terms

and conditions. POWERGRID has pointed out that prior approval of the Commission for termination of agreement(s) may not be insisted upon since the termination will be as per the procedure defined in contractual document. We are of the opinion that as the termination of agreements has the consequence of revocation of license granted by the Commission, therefore, the existing provision is in order. POWERGRID has expressed that para 10.5 of draft document indicates compulsion on the CTU to take over the Project consequent to revocation of license and this may pose financial liability on the CTU. As per the Section 27 A (2)(a) of the 1910 Act, the function of inter-state transmission of energy has been entrusted to CTU and hence we are convinced that the existing provision in para 10.5 is in order. The issue of financial liability, if any, shall be taken care of while determining the tariff.

45. On the question of communication; CII & Tata Power has expressed a view that para 11.2 does not account for postal delays and strikes. Para 11.2(a) lists the alternative means of communication in the event of postal strike and the period of 15 days allowed for as per para 11.2(b) is considered to be adequate and caters to the exigencies arising out of postal delays. Therefore, no change is considered necessary in the draft document under this head.

### **APPLICATION FORM FOR TRANSMISSION LICENSE**

46. Comments have been received from UPPCL and POWERGRID have submitted the modified Draft Application Form. UPPCL has suggested that the

documents (if any) related to registration with Income Tax Department and Import License, should also be enclosed with the particulars by the applicant. We accept the suggestion made by UPPCL. The modifications suggested by POWERGRID have been accepted except the following:

Deletion of word 'JVC' and addition of words 'other than POWERGRID' in the sentence following "Past experience of the applicant" on page 27 and "Details of Financial Data of Applicant" on page 29 of draft document.

Addition of words 'or its promoters' in item (i) under "Details of Financial Data of Applicant" on page 29 of draft document.

47. We direct that the notification on procedure, terms and conditions etc. shall be finalised in the light of the above directions. This disposes of Petition No.111/2000.


**Petition No.118/2000**

48. The petition has been filed by POWERGRID, seeking notification of the terms and conditions, form and fees of transmission license. In view of our directions in petition No.111/2000, the Petition No. 118/2000 has been infructuous and is disposed of accordingly.

( D.V. Khera )  
Member(EO)

(K.N.-Smtoty  
Member'

(G.S. Rajamani)  
Member

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~~(D.F.~~  
Sinha)  
Member

New Delhi dated the 14<sup>th</sup> June, 2001