

**Central Electricity Regulatory Commission  
New Delhi**

**Coram:**

- 1. Shri Ashok Basu, Chairman**
- 2. Shri G.S. Rajamani, Member**
- 3. Shri K.N. Sinha, Member**

**Review Petition No. 115/2002**

**In the matter of**

Review of notification dated 24.8.2001 on CERC (Procedure, terms and conditions for grant of transmission license and other related matters) Regulations 2001

**And in the matter of**

Power Grid Corporation of India Ltd

Review Petitioner

**The following were present:**

1. Shri B. Bhushan D (O), PGCIL
2. Shri Ashwani Jain, AGM (IPTC), PGCIL
3. Shri Akhil Kumar DGM (IPTC), PGCIL
4. Shri V.K. Sharma, Manager, PGCIL
5. Shri MS Chawla, NTPC
6. Ms Madhu Dogra, Legal Assistant, Delhi Transco
7. Ajay Kr. Gupta, AM(SO), Delhi Transco

**ORDER**

(Date of Hearing 13.2.2003)

The Commission in its order of 14.06.2001 in Petitions No. 111/2000 and 118/2000, passed in exercise of powers under Section 27C of the Indian Electricity Act, 1910 had approved the procedure, terms and conditions, etc for grant of transmission license. Subsequently, based on the said order dated 14.6.2001, the Commission notified on 24.8.2001 the Central Electricity Regulatory Commission (Procedure, terms and conditions for grant of

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transmission license and other related matters) Regulations 2001, hereinafter referred to as "the Regulations".

2. Power Grid Corporation of India Ltd, hereinafter referred to as "PGCIL", had filed an appeal against the said order dated 14.6.2001 before the Hon'ble High Court of Delhi. During pendency of the appeal, Ministry of Power, hereinafter referred to as "the Ministry", wrote a letter dated 20.02.2002 to the then Solicitor General of India, conveying its views on some of the issues raised in the appeal filed by PGCIL with a request that the views of the Ministry be brought to the notice of the Hon'ble High Court. The Commission in its affidavit before the Hon'ble High Court, conveyed its acceptance to the views of the Ministry. The Hon'ble High Court in its order dated 26.09.2002 observed that in view of the affidavit filed by the Commission, the petition filed by PGCIL did not survive, which was accordingly disposed of. The Hon'ble High Court, however, observed that if PGCIL had still any grievance in respect of any other matter, it was at liberty to approach the appropriate authority as may be permissible in law. Against this background, PGCIL has filed the present application for review with the prayer to consider its submissions on the Regulations and pass appropriate order. We may notice that PGCIL has sought review on several aspects covered by the Regulations but not covered in the said letter of the Ministry. The issues raised by PGCIL and our decisions thereon are discussed in the succeeding paragraphs.

3. PGCIL has questioned the need for issuing detailed procedure for transmission licensing by the Commission, by placing reliance on the Ministry's views as contained in the letter dated 20.02.2002. It has been prayed that the Commission may restrict itself to issuing guidelines only and leave the procedural aspects to PGCIL.

4. The Ministry in the said letter dated 20.2.2002 stated, inter alia, that "It may not be possible to hold that CERC has no jurisdiction to issue guidelines for

competitive bidding as well as to determine the criteria for inducting private participation in the transmission sector in a fair and transparent manner." The Ministry's observations, which are in the context of question of jurisdiction raised by PGCIL cannot be construed to limit the power of the Commission to issuing guidelines only, in view of specific provisions of Section 27C of the Indian Electricity Act, 1910, according to which the Commission is duly empowered under the law to specify procedure and terms and conditions for grant of transmission license. Therefore, we are not taking any cognisance of the submission made by PGCIL.

5. PGCIL has submitted that it has already taken certain steps, one project each through JV and IPTC routes, for undertaking two pilot transmission projects. As for the IPTC route, PGCIL has stated that since the bidding process is almost complete, it shall be submitting the petition for approval of the tariff proposal, along with all the necessary details, after due analysis of the bids. As regards JV route, according to PGCIL, the Regulations give liberty to the Central Transmission Utility, hereinafter referred to as "CTU", to take a final decision in adoption of JV route in appropriate cases. It is stated that PGCIL shall be approaching the Commission for grant of transmission license to the JV Company, with all the relevant details, at an appropriate time. Although no specific prayer is made by PGCIL, the issue needs some elaboration.

6. The Ministry's letter dated 20.2.2002 makes it clear that in respect of ongoing current projects, where PGCIL has already taken the initiatives and moved ahead, petitions will be submitted by PGCIL to the Commission for approval of procedure adopted thus far and the proposed steps for completion of the bidding process. The Commission in paragraph 14 of the order dated 09.05.2002 on competitive bidding has also directed that in cases of the projects already in progress, the Commission be approached for the exemption of the steps already completed. Thus, it is clear that views of the Ministry are in consonance with the directions of the Commission and no review is required on

this ground. CTU shall have to take necessary steps in accordance with the view of the Ministry and the Commission which are congruent so far as the ongoing projects are concerned.

7. The Commission in its order dated 14.06.2002 and in Clause (i) of Regulation 3 had directed CTU to prepare criteria for selection of projects for private investment and make it public. Further, Clause (iii) of Regulation 12 enjoins upon CTU to ensure that procedure published for selection of elements of Inter-State Transmission System, hereinafter refers to as "ISTS", has been followed. On this issue, the Ministry in its said letter dated 20.2.2002 has stated that there should be no objection to PGCIL making available to the Commission the criteria for selection of projects as well as deciding whether the project would be undertaken through private sector route or by PGCIL directly. PGCIL has placed an updated copy of the criteria on record as Annex-III to the present application for review. PGCIL has submitted that publishing the criteria may create complications by encouraging parties to go in for frivolous litigation, thereby stalling the process of private sector participation. PGCIL has, therefore, prayed for amendment to Clause (i) of Regulation 3 and deletion of Clause (iii) of Regulation 12.

8. In order to ensure transparency in the process of involving private sector in transmission projects, the Commission in its order dated 14.6.2001 as also in the Regulations had directed CTU to make public the criteria for selection of transmission projects by private sector participation. The apprehension expressed by PGCIL in regard to parties resorting to litigation should not deter any one from taking steps in the interest of transparency of operations, since the judicial system in the country, including the forum of quasi-judicial bodies, like the Commission is properly equipped to deal with frivolous litigation. In our considered view, lack of transparency may derail the process of private sector participation. This also underlines the need for selection of the projects for private route with due care. We have noticed that PGCIL has placed a copy of the

procedure as Annex-III to the application for review, which has been sent to the stakeholders in compliance to Commission's order, dated 26.12.2002. Thus, the procedure is within the knowledge of the stakeholders, which include the associations of private entrepreneurs, like ASSOCHAM, FICCI, PHD Chamber of Commerce, IPPAI, etc. In view of this, we consider that publication of this procedure may not be required at this stage and we decide accordingly.

9. Clause (ii) of Regulation 4 provides that selection of the implementing agency in IPTC route shall be done on global tender basis. PGCIL has prayed that the choice of inviting tenders, etc., whether global or domestic, should be left to it, depending upon package size, earlier responses and other relevant facts. According to PGCIL, this will avoid unnecessary expenditure of calling International Competitive Bids for all the projects.

10. On reconsideration of the issue, we tend to agree with the suggestion made by PGCIL. We grant liberty to CTU to go for domestic or global competitive bidding on the basis of the size of the project and past experience. Regulation 4 shall be amended accordingly.

11. Clause (ii) of Regulation 5 provides that model RfQ and RfP documents shall be prepared by CTU, which after approval by the Commission shall be adopted for the bidding process. On this issue, the Ministry in its letter dated 20.2.2002 has stated that PGCIL will submit to the Commission the framework as well as the principles for drawing up detailed RfQ/RfP documents for individual projects. After approval of the Commission, this will provide the guideline for RfQ/RfP documents for all future projects. Further, PGCIL has been advised by the Ministry to submit a copy of the RfQ/RfP documents already drawn up to the Commission. PGCIL has stated that the Commission has already issued the guiding factors for preparation of RfQ and RfP documents vide its Order dated 27.3.2002. It is further stated that copy of RfQ/RfP documents have already been submitted in the past by PGCIL to the Commission. In view of these

developments, it may not be necessary to submit to the Commission the principles for drawing RfQ/RfP documents.

12. In a separate application for review (No. 85/2002) filed by PGCIL, we have heard PGCIL on ""Guiding factors for preparation of RfQ and RfP documents" issued by the Commission. The application for review against the order of the Commission dated 27.3.2002, PGCIL has indicated its preference to the approach of preparing RfQ/RfP documents based on the guiding factors approved by the Commission. We are, therefore, of the opinion that direction to CTU for submission of RfQ/RfP documents to the Commission for its approval has become redundant. The order in review petition No. 85/2002 is being issued separately wherein we will be considering the suggestions made by PGCIL for amendment of guiding factors. Once these guiding factors are finalised, CTU can prepare RfQ and RfP documents for use in different projects based on these guiding factors. The Commission's approval shall not be required as long as there is no deviation from the guiding factors approved by the Commission. In view of this clause (ii) Regulation 5, which provides for approval of model documents, needs to be amended.

13. Clause (iii) of Regulation 8 provides that RfP is to be issued only when minimum three parties have qualified. The Commission has reserved to itself the power to relax the requirement at its discretion on an application to this effect by CTU. Similarly, Clause (i) of Regulation 10 prescribes that CTU will proceed with evaluation of proposals only when minimum of three valid bids are available. In case of less than three bids, permission of the Commission is to be obtained before final selection of the implementing agency is made. PGCIL has submitted that it may not always be possible to obtain at least three valid proposals at every stage. Number of proposals received may depend on various factors like ability of the investors to invest the required equity, arrangements for the required loan, past experience of the bidder in developing transmission projects, various risks factors involved in investment, Return on Equity/Investment, etc. PGCIL has

further stated that it may not be possible to give any justification for the limited response of bidders. PGCIL has prayed for deletion of this stipulation.

14. We are not impressed by the arguments put forward by PGCIL. We are of the opinion that the requirement of minimum number of three valid bids is provided to ensure a level of competition in the bidding process. However, as directed by us earlier, in case number of valid bids is less than three, CTU shall approach the Commission for approval with relevant facts and requisite details of the case. Therefore, no amendments to Regulations 8 and 10 are called for.

15. Clause (iii) of Regulation 10 stipulates that the detailed evaluation report shall be submitted by CTU to the Commission. The Ministry, in its letter has expressed a view that the detailed evaluation of RfP/RfQ need not be made available to the Commission, unless malafides are alleged and the Commission is required to look into these documents in order to take a view on the allegations of malafide. PGCIL has stated that publicizing the detailed evaluation is likely to create complications by encouraging various parties to go for frivolous appeals. PGCIL has pointed out that the Commission's order dated 09.05.2002 on the competitive bidding also provides for calling of evaluation report only in case of allegations of malafides by any of the parties. Accordingly, PGCIL seeks review of the clause (iii) of Regulation 10.

16. In view of the Commission's order dated 09.05.2002 and the affidavit filed before the Hon'ble High Court, agreeing to the Ministry's views on the issue, Clause (iii) of Regulation 10 shall be suitably amended.

17. Clause (iii) of Regulation 13 provides that the Commission may call for additional information from the applicant for grant of transmission license, as it deems necessary. PGCIL has submitted that the Commission may identify the additional information, which it may call for from the applicant, as the current provision brings in uncertainty in the process.

18. The Commission has already prescribed the information to be submitted by the applicant for transmission license, which can be envisaged at this point of time as necessary. However, based on the facts and circumstance of a case, need for further information may be felt, which cannot be foreseen at this stage. It is precisely for this reason that the provision has been made in clause (iii) of Regulation 13. The Commission will be calling information only considered to be absolutely relevant in order to fulfill its statutory obligation of grant of transmission license. We, therefore, do not feel any need for specifying the further information that may be called for at the stage of consideration of the application for grant of transmission license.

19. Clause (b) of Regulation 16 stipulates that the assets of the transmission project may be used for a purpose other than transmission of electricity only after obtaining approval of the Commission and that the additional benefits accruing from such use shall be shared between the beneficiaries and the licensee in such a manner as may be directed by the Commission. PGCIL has submitted that the licensee is required to make available the entire assets of the project for use of PGCIL pursuant to Transmission Service Agreement. PGCIL may invest or cause to invest risk capital to make any other use of the assets of the project along with associated business and commercial risk. PGCIL shall be making the capital investment and taking the risks associated with any other usage of the Project. Therefore, according to PGCIL, any benefit or loss accruing from such usage shall be to the account of PGCIL.

20. It is a standard practice to share benefits in case of multi-purpose utilisation of the assets. As per Section 27C(2) of the Indian Electricity Act, 1910, the transmission licensee is to construct, maintain and operate ISTS, under the direction, control and supervision of CTU. Thus, in our opinion, CTU's authority is limited to the issue of transmission of energy only and does not extend to use of the assets for any other purpose. However, before making any investment towards any additional use of the assets for which license has been issued,

PGCIL may be required to enter into an agreement with the licensee, which may, inter alia, provide for sharing of revenue accruing to licensee from such additional use. As far as the Commission is concerned, while deciding the manner in which the benefits accruing as a result of alternative use of the transmission assets are to be shared between the beneficiaries of transmission service and the licensee/PGCIL, the Commission shall take into account the risks to be taken by various parties. We do not find any merit in the arguments of PGCIL that loss or benefit should accrue to PGCIL only.

21. Duration of the license has been pegged at 30 years from the date of its issue in Clause (1) of Regulation 17. PGCIL has submitted that validity of the license needs to be for 30 years from the actual date of commercial operation, as this includes the time spent on construction as well. This way the successful bidder is assured of the recovery of tariff over a period of full 30 years from the actual date of commercial operation. PGCIL has pointed out that this needs to be made explicitly clear so as to allay the apprehensions of the bidders. PGCIL has, therefore, prayed for amendment of the stipulation.

22. The Commission in its order dated 26.4.2002 in IA 28/2002 in Petition No. 111/2000 has already agreed that the license shall be valid till 30 years from the date of commercial operation. The notification shall be amended accordingly.

23. PGCIL has also objected to Clause (2) of Regulation 23, which stipulates that agreement between CTU and the licensee can be terminated only with the prior approval of the Commission. PGCIL has submitted that approval of the Commission, as a pre-requisite may not be insisted upon, as termination shall be as per the procedure defined in the agreements, which carry contractual obligations. PGCIL has prayed that the stipulation may be deleted.

24. We do not agree with the contention of PGCIL. Since termination of these agreements has the effect of revocation of license, prior approval of the Commission is considered necessary for termination of the agreements, which shall always be obtained.

25. On the issue of dispute resolution, Clause (1) of Regulation 24 provides that only in the event of failure of the parties to resolve their disputes or differences as per provisions of the agreement, the matter shall be referred to the Commission for arbitration and adjudication under Section 13(h) of the Electricity Regulatory Commissions Act, 1998. PGCIL has prayed for suitable amendment of this provision.

26. Section 13(c) of the Electricity Regulatory Commissions Act, 1998 empowers the Commission to regulate inter-state transmission of energy including tariff of transmission utilities. Further, Section 13(h) of this Act empowers the Commission to arbitrate and adjudicate the disputes. In terms of Section 27C of the Indian Electricity Act, 1910 the Commission is mandated to grant transmission license. In view of these statutory provisions, it is obligatory on the Commission to arbitrate and adjudicate on not only the disputes related to tariff and license but also on any matter affecting inter-state transmission. We, therefore, conclude that disputes related to inter-state transmission of energy, including tariff and those related to licensing shall be referred to the Commission for arbitration/adjudication. The provision may be modified accordingly, if necessary.

27. Item No. 3 of the certificate by CTU (page 58 of the Regulations), to be enclosed with the application for grant of transmission license, seeks information as to whether the element of ISTS proposed to be executed by the applicant is part of the pre-identified and notified elements of ISTS for execution by agencies other than PGCIL. PGCIL has prayed for deletion of this item drawing sustenance from on its view on the issue of criteria for selection of ISTS.

28. The issue of publication of the criteria for identification of elements of ISTS to be undertaken by PGCIL vis-a-vis other agencies and publication of the list of elements for execution by agencies other than PGCIL (arrived at by applying this criteria) are two separate issues. In our opinion, once the elements have been identified, there should be no objection to making them public. This would not only ensure transparency but would also allow interested parties to carry out ground work, thereby facilitating increased participation of private parties, leading to better competition. This has been so mentioned in the Commission's order dated 14.6. 2001. The representative of PGCIL during the hearing stated that the transmission system identified for execution during particular time frame may keep on changing in view of the changing need of the grid. Therefore, publication of such list of ISTS will not serve any purpose. We agree with PGCIL. The notification may be amended accordingly.

29. Item No. 4 of the certificate by CTU (page 58 of the Regulations) seeks information as to whether the procedure for selection of the elements to be undertaken by agencies other than PGCIL has been followed in case of element of ISTS proposed to be executed by the applicant. PGCIL has prayed for deletion of this item in view of the its observations on the issue of criteria for selection of ISTS.

30. We may observe that the item fails to convey the intended meaning as the words "evolved been published by CTU" are inadvertently appearing, which need to be deleted. This item, therefore, shall read as under:

" Has the procedure for selection of projects to be taken up by the agencies other than PGCIL been followed? "

31. Thus, a reference to publication of the procedure has been deleted, in line with the direction contained in earlier part of this order.

32. With this Petition No. 115/2002 stands disposed of.

33. We direct that necessary steps for amendment of the Regulations shall be taken expeditiously.

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**XK.N, KINHA)**  
**MEMBER**

**(G.S. RAJAMANI)**  
**(ASHOK « ASU)**  
**MEMBER**

**CHAIRMAN**

New Delhi dated the 21<sup>st</sup> May, 2003