

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 121/TL/2012
With I.A.No. 5/2013**

Coram:
Dr. Pramod Deo, Chairperson
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member

Date of Hearing: 9.4.2013
Date of Order: 9.5.2013

In the matter of

Application under Section 14 read with Section 15(1) of the Electricity Act, 2003 read with Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of transmission licence and other related matters) Regulations, 2009 for grant of Transmission Licence to Nagapattinam-Madhugiri Transmission Company Limited.

And in the matter of

POWERGRID NM TRANSMISSION LIMITED
Vs

Applicant

IL&FS Tamil Nadu Power Company Limited, Chennai

Respondent

The following were present:

Shri M.G.Ramchandran, Advocate, PGCIL
Shri U.K. Tyagi, PGCIL
Shri B.Vamsi, PGCIL
Shri RVMM Rao, PGCIL
Shri Sumod Tom Thomas, PGCIL
Shri Y.K.Sehgal, CTU
Shri Dilip Rozeker, CTU
Shri Param Kumar Mishra, Advocate
Shri Piyush Joshi, Advocate
Ms. Nimisha Dutta, Advocate
ShriYadava, Advocate
Shri Hazig Beg, ITPCL
Shri S.C. Misra, ITPCL
Shri V. L. Dua, ITPCL

ORDER

The Applicant Nagapattinam-Madhugiri Transmission Company Limited has filed this application under Section 14 of the Electricity Act, 2003 (the Act) to establish transmission system for "Transmission system associated with IPPs of Nagapattinam/Cuddalore Area-Package-A" on Build, Own, Operate and Maintain basis comprising the following elements:

S. No.	Transmission line	Completion Target	Conductor per phase
1.	Nagapattinam Pooling Station-Salem 765 kV D/C line	36 months from effective date	6xzebra ACSR or AAAC, Transmission line design should be corresponding to 85 ⁰ C conductor temperature operation
2.	Salem-Mahugiri 765 kV S/C line	36 months from effective date	6xzebra ACSR or AAAC, Transmission line design should be corresponding to 85 ⁰ C conductor temperature operation

2. The applicant has made following prayers:
- (a) Declare the applicant as a deemed licensee and also issue a clarification that a Government Company shall be deemed to be a transmission licensee if it emerges as a successful bidder in bidding process undertaken in accordance with the competitive bidding guidelines as notified Government of India; or
 - (b) Issue transmission licence to the applicant; and
 - (c) Allow the Transmission system associated with IPPs of Nagapattinam/Cuddalore Area-Package-A to be part of Transmission Service Agreement (TSA) approved by Commission under PoC Charges

Regulations (Sharing of Inter-State Transmission Charges and Losses)

Regulations, 2010; and

- (d) Pass such other order/orders, as may be deemed fit and proper in the facts and circumstances of the case.

3. The applicant was incorporated on 20.5.2011 under the Companies Act, 1956 as a wholly owned subsidiary of PFC Consulting Limited (hereinafter referred to as 'PFCCL') with the objective to "plan, promote and develop an integrated and efficient power transmission system network in all its respects including planning, investigations, research, design and engineering, preparation of preliminary, feasibility and definite project reports, construction, operation and maintenance of transmission lines, sub-station, load dispatch stations and communication facilities and appurtenant works, coordination of integration operation of regional and national grid system, execution of turn key jobs for other utilities/organizations, wheeling of power, purchase and sale of power in accordance with the policies, guidelines and objectives laid down by the Central Government from time to time".

4. The applicant vide its affidavit dated 25.9.2012 has informed that the name of the company has been changed from Nagapattinam-Madhugiri Transmission Company Limited to POWERGRID NM TRANSMISSION LIMITED with effect from 13.9.2012. The certificate of change of name from Nagapattinam-Madhugiri Transmission Company Limited to POWERGRID NM TRANSMISSION LIMITED dated 13.9.2012 issued by Registrar of Companies, National Capital Territory of Delhi and Haryana has been placed on record.

5. Ministry of Power, Government of India initiated a scheme for development of Independent Transmission Projects through private sector participation for evacuation of power from the generating station and transmission of power from pooling station to other grid stations up to load centers and system strengthening in India. The said projects were to be awarded to developers selected on the basis of tariff based competitive bidding process. Government of India, Ministry of Power, vide its Resolution No. 11.5.2005-PG(i) dated 17.4.2006 notified the 'Tariff based Competitive-bidding Guidelines for Transmission service' (hereinafter referred to as "the Guidelines") under Section 63 of the Act. In accordance with the Guidelines, the PFC Consulting Limited (PFCCL) was notified by Government of India, Ministry of Power vide Notification No. 15.1.2011-Trans dated 15.3.2011 as the Bid Process Coordinator (BPC) for the purpose of selection of bidder as Transmission Service Provider (TSP) to establish the transmission system for "Transmission system associated with IPPs of Nagapattinam/Cuddalore Area-Package-A" through tariff based competitive bidding process.

6. PFC Consulting Limited (PFCCL) in its capacity as BPC initiated the bid process and completed the process on 6.3.2012 as per the Guidelines. M/s Power Grid Corporation of India Limited was selected as the successful bidder having quoted the lowest levelised transmission charge in order to establish the transmission project for Transmission system associated with IPPs of Nagapattinam/Cuddalore Area-Package-A on build, own, operate and maintain basis and provide transmission service to IL&FS Tamil Nadu Power Company Limited (identified long-term transmission customer of the project).

7. The applicant has submitted that the 18 bidders submitted their offer at RFP stage. The RfP documents were made available by the Bid Process Coordinator with effect from 20.10.2011. The pre bid conference was held on 20.10.2011 to address the queries from the qualified bidders and clarification was furnished by the Bid Process Coordinator to all concerned on 9.11.2011. Only 5 (five) qualified bidders participated in the final selection process and submitted their proposals. The applicant has submitted that as per the Bid Evaluation Report dated 29.2.2012, Nagapattinam-Madhugiri Transmission Company Limited (NMTCL) emerged as the successful bidder with the lowest levelized transmission charges of 987.02 Million/annum.

8. Consequent to its selection as the lowest bidder, Letter of Intent (LOI) was issued to Nagapattinam-Madhugiri Transmission Company Limited by the BPC on 6.3.2012 which has been accepted by NMTCL. Under the terms of Request for Proposal (RFP) and the Letter of Intent, the successful bidder is obligated to accomplish the following tasks:

- (a) Provide contract performance guarantee in favour of Long Term Transmission Customer (LTTC);
- (b) Execute Share Purchase Agreement;
- (c) Acquire, for the Acquisition Price, 100% share equity share holding of Jabalpur Transmission Company Ltd. from PFC along with all its related assets and liabilities;
- (d) To execute RFP project document including transmission service agreement with LTTC.

- (e) Make application to the Central Commission for adoption of transmission charges, as required under Section 63 of the Electricity Act, 2003
- (F) To apply to the Commission for grant of transmission licence.

9. The applicant has submitted that the PGCIL has acquired hundred percent equity holding in NMTCL on 29.3.2012. The applicant has further submitted that TSA between the TSP and the LTTC who are the beneficiary of the transmission project was executed 2.2.2012 and has become effective on the date of acquisition of the applicant by NMTCL. The events subsequent to issue of Lol have already been narrated while taking note of the factual matrix. Meanwhile, the Commission by its order dated 13.12.2011 in Petition No. 154/2011 had accorded regulatory approval for establishment of the transmission system as part of the High Capacity Transmission Corridor-XI.

10. Accordingly, the petitioner, Nagapattinam-Madhugiri Transmission Company Limited has approached the Commission for grant of transmission licence for execution of the project. In the application, the petitioner has prayed that it should be declared as a deemed transmission licensee under fifth proviso of Section 14 of the Electricity Act, 2003

11. The first issue that arise for our consideration is whether the petitioner should be declared as a deemed transmission licensee under the fifth proviso of Section 14 of the Act.

12. During the course of hearing on 14.6.2012, learned counsel for the petitioner submitted as under:

(a) As per Section 14 of the Electricity Act, 2003 (the Act), a Government company or the company referred to in sub-section (2) of Section 131 of Act and the company or companies created in pursuance of the Act specified in the Schedule, shall be deemed to be a licensee under Act;

(b) As per Section 2(31) of the Act, "Government Company" shall have the meaning assigned to it in section 617 of the Companies Act, 1956;

(c) Further, Section 617 of the Companies Act, 1956 provides that "Government company, means any company in which not less than fifty one per cent of the [paid-up share capital] is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary of a Government company."

(d) Presently, 69.42% of the paid up share capital of Power Grid is held by Government of India and the balance 30.58 % is held by the public, therefore, Power Grid is a Government Company. Since, NMTCL is a 100% wholly owned subsidiary of Power Grid and therefore, NMTCL is a government company within the meaning of section 617 of the Companies Act, 1956;

(e) In terms of said provisions including Section 14 of Act, by virtue of it being a Government company, declare NMTCL as a deemed licensee and

if a government company participate in tariff based competitive bidding and become successful bidder, the transmission service provider should be considered as a deemed transmission licensee.

13. According to the petitioner, it is a Government company within the meaning of Section 617 of the Companies Act, 1956 as it is wholly owned subsidiary of PGCIL, a Government company, and, therefore, a “deemed licensee” under fifth proviso to Section 14 of the Act. Accordingly, in the first place the petitioner seeks a declaration that it is a deemed transmission licensee. It has been further submitted that in future also PGCIL shall be participating in the competitive bidding process for selection of the Transmission Service Provider and on being declared as successful bidder may acquire the Special Purpose Vehicle formed for the purpose. Therefore, it seeks a clarification to the effect that a Government company shall be deemed to be a transmission licensee if it emerges as a successful bidder in bidding process undertaken in accordance with the competitive bidding guidelines as notified by Gol.

14. In accordance with Section 12 of the Electricity Act, 2003 (in short “the Act”), no person can undertake, among others, transmission in electricity unless he is authorised to do so by a licence issued under Section 14 or is exempt under Section 13 of the Act by the Appropriate Commission. There are provisos below Section 14 which carve out certain exceptions to the main provision of that section. In the present case, the interpretation of the fifth proviso is in issue, which for the sake of reference is reproduced below along with the main provision:

“14. Grant of licence:

The Appropriate Commission may, on an application made to it under Section 15, grant a licence to any person –

- (a) to transmit electricity as a transmission licensee; or*
- (b) to distribute electricity as a distribution licensee; or*
- (c) to undertake trading in electricity as an electricity trader,*

.....
Provided further that the Government company or the company referred to in sub-section (2) of Section 131 of this Act and the company or companies created in pursuance of the Acts specified in the schedule shall be deemed to be a licensee under this Act.”

15. Before considering the ambit and scope of the fifth proviso to Section 14 of the Act, it is necessary to consider the provisions of Section 172(a) and 131 (1) and (2) of the Act since the fifth proviso is to be construed in the light of these statutory provisions under the Act. According to Section 172(a), a State Electricity Board constituted under the repealed laws shall be deemed to be a State Transmission Utility and a licensee under the provisions of the Act for a period of one year from the appointed date or such earlier date as the State Government may notify, and shall perform the duties and functions of the State Transmission Utility and a licensee in accordance with the provisions of the Act and rules and regulations made thereunder. The proviso to Clause (a) of Section 172 further lays down that the State Government may, by notification, authorise the State Electricity Board to continue to function as the State Transmission Utility or a licensee for such further period beyond the said period of one year as may be mutually decided by the Central Government and the State Government.

16. According to sub-section (1) of Section 131 of the Act, with effect from the date on which a transfer scheme prepared by the State Government to give effect to the objects and purposes of the Act, is published or such further date as may be stipulated by the State Government, any property, interest in property, rights

and liabilities which immediately before that date belonged to the State Electricity Board shall vest in the State Government on such terms as may be agreed between the State Government and the Board. According to sub-section (2), any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee as the case may be.

17. The scheme of the Act thus provides that the State Electricity Board is a licensee from the date of commencement of the Act. The State Government under the Act was required to prepare a transfer scheme to give effect to the objects and purposes of the Act under which any property, interest in property, rights and liabilities of the State Electricity Board immediately before the effective date shall vest in the State Government. Any property, interest in property, rights and liabilities vested in the State Government as aforesaid shall be further vested by the State Government in a Government Company or in a company or companies in accordance with transfer scheme. Thus, by reading sub-sections (1) and (2) of Section 131 of the Act, it is envisaged that any property, interest in property, rights and liabilities vested in the State Electricity Board shall ultimately be transferred to a Government Company or a company or companies as may be created by the State Government under the transfer scheme. Thus, under Section 131 (2) of the Act, a pre-existing Government Company or a company or companies created

under the transfer scheme shall be the successor(s) of the State Electricity Board. Therefore, the term "Government Company" referred to in the fifth proviso to Section 14 shall mean the pre-existing Govt. company to which the property, assets and liabilities of the Electricity Board are transferred. Therefore on a proper construction of the fifth proviso to Section 14 in the light of Section 131 of the Act, the following will be listed as deemed licensees under fifth proviso:

- (a) an existing Government company to which rights, properties, liabilities in assets and liability of electricity Board are transferred under section 131 (2) of the Act;
- (b) A company or companies created under transfer scheme to which property, interest in property, rights and liabilities are transferred from the State Electricity Board under Section 131 (2) of the Act; and
- (c) The companies created in pursuance to the Reforms Acts mentioned in the Schedule to the Act.

18. The case of petitioner company is not covered under any of the above provisions and it cannot be treated as a deemed transmission licence under fifth proviso to Section 14 of the Act.

19. In view of our decision that the petitioner cannot be treated as a deemed licensee, we next proceed to consider the case of the petitioner for grant of transmission licence.

20. Section 14 of the Act provides that the Appropriate Commission may, on an application made to under section 15 of the Act grant a licence to any person to transmit electricity as a transmission licensee in any area as may be specified in

the licence. The word 'person' has been defined in section 2(49) of the Act to include any company or body corporate or association or body of individuals whether incorporated or not or artificial juridical person. The Applicant has been incorporated under the Companies Act, 1956 and as such is eligible to make application for licence. Section 15 (1) of the Act provides that every application under section 14 shall be made in such manner and in such form as may be specified by the Appropriate Commission and shall be accompanied by such fees as may be prescribed. The Central Commission has specified the Central Electricity Regulatory Commission (Procedure, Terms and Conditions of Transmission Licence and other related matters) Regulations, 2009 (hereinafter "transmission licence regulations"). Regulation 3 of the transmission licence regulations provide that the Empowered Committee shall identify the projects included in the transmission plan to be developed under the guidelines for competitive bidding. Regulation 4 of transmission licence regulations provides that in case of projects identified by the Empowered Committee for development under the guidelines for competitive bidding, selection of the project developer shall be made in accordance with the procedure laid down in the guidelines. The transmission project under consideration has been identified by the Empowered Committee. The selection of the project developer, M/s Nagapattinam-Madhurigi Transmission Company Ltd., has been made in accordance with the guidelines for competitive bidding.

21. Regulation 7 of the transmission licence regulations provides for the procedure for grant of transmission licence as under:

“(1) The application for grant of licence shall be made to the Commission in Form-I appended to these regulations and shall be accompanied by such fee as may be prescribed by the Central Government from time to time.

(2) In case of the person selected for implementation of the project in accordance with the guidelines for competitive bidding, the application shall also contain such additional information, as may be required under these guidelines.

(3) The application shall be supported by affidavit of the person acquainted with the facts stated therein.

(4) Before making an application, the applicant shall serve a copy of the application on each of the long-term customers of the project and shall submit evidence to that effect along with the application and shall also post the complete application along with annexures and enclosures on its web site, the particulars of which shall be given in the application.

(5) The application shall be kept on the web site till such time the licence is issued or the application is rejected by the Commission.

(6) Immediately on making the application, the applicant shall forward a copy of the application to the Central Transmission Utility.

(7) The applicant shall, within 7 days after making the application, publish a notice of its application in Form-II attached to these regulations, in at least two daily newspapers, one in English language and one in vernacular language, having circulation in each State or Union Territory where an element of the project or a long-term customer is situate, in the same language as of the daily newspaper in which the notice of the application is published.

(8) As far as possible, within 7 days of receipt of the application the Secretariat of the Commission shall convey defects, if any, if noticed on preliminary scrutiny of the application for rectification and the defects conveyed shall be rectified by the applicant in such time as may be indicated in the letter conveying the defects.

(9) In the notice published in the newspapers under clause (7) it shall be indicated that the suggestions and objections, if any, on the application, may be filed before the Secretary, Central Electricity Regulatory Commission, Third Floor, Chanderlok Building, Janpath, New Delhi-110001 (or the address where the office of the Commission is situated), with a copy to the applicant, by any person, including the long-term customers, within 30 days of publication of the notice,

(10) The applicant shall within 15 days from the date of publication of the notice as aforesaid submit to the Commission on affidavit the details of the notice published, indicating the newspapers in which the notice has been published and the date and place of their publication and shall also file before the Commission the relevant copies of the newspapers, in original, in which the notice has been published.

(11) The Central Transmission Utility shall send its recommendations, if any, to the Commission on the proposal made in the application within a period of thirty days from the date of receipt of application by it:

Provided that copy of the recommendations, if any, made by the Central Transmission Utility shall always be forwarded to the applicant;

Provided further that the recommendations of the Central Transmission Utility shall not be binding on the Commission.

(12) The applicant may file its comments, duly supported by an affidavit, on the recommendations made by the Central Transmission Utility and the suggestions and objections, if any, received in response to the public notice published by him, within 45 days of service of copy of the application on the Central Transmission Utility or publication of notices in the newspapers, with an advance copy to the Central Transmission Utility or the person who has filed the suggestions and objections on the proposal made in the application, as the case may be.

(13) The Commission after considering the suggestions and objections received in response to the public notice published by the applicant and the recommendations, if any, of the Central Transmission Utility may, propose to grant the licence or for reasons to be recorded in writing, reject the application.”

22. The Applicant has approached the Commission by a separate application for adoption of tariff in respect of the transmission system which is presently under consideration of the Commission. The Applicant has filed the present application for grant of transmission licence in accordance with the transmission licence regulations. The Applicant has submitted proof of service of the copies of the application on the LTTC and Central Transmission Utility and proof of web posting of the complete application. The Applicant has further undertaken to pay the applicable licence fee upon the grant of Transmission Licence in terms of Central Electricity Regulatory Commission (Payment of Fees) Regulations, 2008. The Applicant has prayed for grant of transmission licence to Nagapattinam Madhugiri Transmission Company Limited with respect to the transmission system as per the details given in para 1 above.

23. The Applicant has made the application as per Form-1 and paid the fee of ₹1 lakh as prescribed by the Government. On perusal of the application, it is revealed that the Applicant has served copy of the application on the Long Term Transmission Customer (LTTC) for the project which is scheduled to be

commissioned 36 months from the effective date under the TSA. The levelised tariff charges quoted by the Applicant which have been recommended by the Bid Evaluation Committee for acceptance, is ₹ 987.02 million. The Applicant has also enclosed copies of the Bid Evaluation Committee recommendations for selection of the Applicant as the selected bidder and proof of making the evaluation report public by the Bid Process Coordinator as per the Guidelines.

24. The Applicant vide its affidavit dated 9.5.2012 has placed on record the relevant copies of the newspapers in original in which notice of its application has been published. The Applicant has published the notices in The Hindu Business Line and Dinamalar having publication from Mangalore, Bengaluru, Chennai, Thiruchirapalli. The Applicant has complied with the requirement of Regulation 4(7) of transmission licence regulations.

25. In response to the application, no reply has been received from the respondent. No objection has been received from the general public in response to the public notice.

26. As per para 12.1 of the guidelines, finally selected bidder shall make an application for grant of transmission licence within one month of selection. Though NMTCL was declared as the successful bidder and Lol was issued on 6.3.2012. Accordingly, the applicant file application for grant of transmission licence on 4.4.2012.

27. The Applicant had served a copy of the application on Central Transmission Utility (CTU) as required under Section 15 (3) of the Act and Regulation 4(6) of the

transmission licence regulations. The CTU in its letter dated 22.5.2012 has forwarded its recommendations in terms of Section 15(4) of the Act. In the recommendations it has been stated that the petitioner be declared as a deemed licensee or be granted transmission licence to Nagapattinam Madhugiri Transmission Company Limited under Section 15(4) of the Act.

28. The applicant has been selected on the basis of the tariff based competitive bidding as per the guidelines issued by Government of India, Ministry of Power. The applicant has been issued with the Lol as the selected bidder. Power Grid Corporation of India Limited on 29.3.2012 has furnished the Contract Performance Guarantee of Rs. 45 crore to the identified LTTC in accordance with clause 2.21 of RFP documents and PGCIL has acquired the applicant on 29.3.2012 after execution of the Share Purchase Agreement. The applicant has complied with the provisions of the transmission licence regulations for grant of inter-State transmission licence. The CTU has also recommended the applicant for grant of transmission licence. Considering all the material on record, we are *prima facie* of the view that the applicant satisfies the conditions for grant of inter-State transmission licence for planning, construction, operation and maintenance of the transmission system as described in para 1 of this order. We, therefore, direct that a public notice under clause (a) of sub-section (5) of Section 15 of the Act be published to invite suggestions or objections to grant of transmission licence aforesaid. The objections or suggestions, if any, be filed by any person before the Commission by 25.5.2013. The petition shall be listed for hearing on 30.5.2013 for further directions.

29. The petitioner has also prayed that the transmission system be allowed as a part of Transmission Service Agreement approved under the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 (the 2010 regulations). Prior to acquisition of the Nagapattinam-Madhugiri Transmission Company Ltd by PGCIL. TSA had entered on 2.2.2012 with the respondent. After pre-bid conference, it was clarified by the BPC that TSA would merge with the TSA as notified by this Commission under the 2010 regulations. Thus, merger of the TSA signed by the parties with the TSA notified by this Commission is a condition of bid and bidding on all concerned. Further, the Commissions in its order dated 13.12.2011 in Petition No. 154/2011 has already clarified that the scheme under the High Capacity Transmission Corridor are part of the coordinated planning of the transmission system by CTU and CEA, they are part of the TSA approved by this Commission under the 2010 regulations

30. The petitioner has filed I.A No. 5/2013 with following prayers to:

- (a) Direct that the transmission project awarded to Power Grid under the Tariff Based Competitive Bidding be implemented by the applicant with extension of time and with cost increase and cost over-run;
- (b) Extend the time for implementation of the project to 36 months from the date of grant of transmission licence, adoption of the tariff and allowing the cost increase and cost over-run;
- (c) Direct that the transmission charges shall be payable under the PoC regime by respondent and in the event of failure on the part of

respondent, to pay such transmission charges, decide the course of recovery of all such transmission charges as the system is being planned as a coordinated scheme;

- (d) Direct that the transmission charges shall be payable even in the absence of the power project of respondent being commissioned by the time of the commissioning of the transmission system by the extended period and even in the circumstances where the Respondent is unable to evacuate the power for any reason whatsoever.

31. During the hearing of IA on 9.4.2013, learned counsel for the petitioner submitted that clarity is required regarding the implementation of the generation project in view of the order of the National Green Tribunal. Learned counsel for the respondent submitted that with the issue of Ministry of Environment and Forests corrigendum dated 14.8.2012, in compliance with the direction of the National Green Tribunal, the environmental issue has been settled and there is no uncertainty regarding execution of the project. Noting the statement of learned counsel of the respondent, we are of the view that the petitioner should go ahead with the execution of the transmission project.

32. Certain issues have been raised in I.A. No.5/2013 filed by the petitioner which are outside the scope of the petition which was filed for grant of transmission licence. Basically, these are implementation issues and the petitioner should first try to resolve the issues in consultation with the respondent in terms of the TSA. In case the issues are not resolved, the petitioner is at liberty to approach the Commission in accordance with law.

33. With the above I.A. is accordingly disposed of.

Sd/-

(M. DEENA DAYALAN)
MEMBER

sd/-

(V.S.VERMA)
MEMBER

sd/-

(DR. PRAMOD DEO)
CHAIRPERSON