

**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. 85/2002
In
Petition No 111/2000**

In the matter of

Review of order dated 27.03.2002 regarding “ Guiding Factors for preparation of RfQ and RfP documents”

And in the matter of

Power Grid Corporation of India Ltd

Review Petitioner

The following were present:

1. Shri Ashwani Jain, AGM, PGCIL
2. Shri Akhil Kumar, DGM, PGCIL
3. Shri Vijay Kumar, PGCIL
4. Shri V.K. Sharma, PGCIL
5. Shri B. Bhushan, D(O), PGCIL
6. Shri T.P.S. Bawa, SE, PSEB
7. Shri Pramod Singh, BSES

ORDER

(Date of Hearing: 3.12.2002)

The Commission, in its order dated 14.06.2001 in Petitions No 111/2000 and 118/2000 had directed the Central Transmission Utility, (hereinafter referred to as “CTU”), to submit RfQ and RfP documents for its approval before inviting applications/bids for undertaking Inter-State Transmission System, (hereinafter referred to as “ISTS”), through IPTC route. These documents were, however, not submitted by CTU within the time granted. In view of this, an order laying down “Guiding Factors for preparation of RfQ and RfP documents”, (hereinafter

referred to as “The Guiding Factors”), was issued by the Commission on 27.03.2002. Power Grid Corporation of India Ltd, (hereinafter referred to as “the petitioner”) has filed the present application for review of certain aspects of the said order dated 27.3.2002, (hereinafter referred to as "the order under review")

2. The Commission, vide its order dated 04.10.2002, while admitting the application for review had directed the petitioner to serve copy of the application along with a copy of the order under review to the stakeholders. Accordingly, the petitioner had circulated these documents to 69 parties. Only Kerala State Electricity Board (KSEB), Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (RVPNL) and Consumer Education and Research Society (CERS) have responded to the application for review. The issues raised by the petitioner, responses of the three stakeholders and the directions of the Commission thereon are discussed in the succeeding paragraphs. It is, however made clear that despite notice to the stakeholders on the issues raised in the application for review, considering the general significance of the issues raised, the proceedings before the Commission have not been conducted in the manner of adversarial proceedings. The aim of the proceedings was to sort out the difficulties that the parties might come across.

Request for Qualification

3. Clause 2.0 (Scope of Work) of Section-I of the guiding factors, *inter alia*, stipulates that the project cost as approved by the competent authority shall be indicated in the RfQ document. The petitioner has submitted that the approved project cost may not be available at the time of issuance of RfQ document. Therefore, it may not be possible to indicate the approved project cost in RfQ document. It has further been submitted that although, the

petitioner will be having the estimated project cost but the same should not be indicated in RfQ as (i) the estimated project cost is not approved by any authority, and (ii) disclosure of the estimated project cost may prejudice the bidders. The petitioner has further submitted that the estimated cost of the tender packages is normally not indicated in the bid documents. The petitioner has, therefore, prayed for suitable modification of the provision. CERS has expressed similar views.

4. On a somewhat related issue of disclosure of benchmark price in petition No. 54/2001 (procurement of electricity and electricity transmission services through competitive bidding), the Commission in its order dated 9.5.2002 had directed that the benchmark price should be kept secret. On the same analogy, the project cost need not be disclosed to the prospective bidders in RfQ document. We, therefore, direct that the provision to indicate approved project cost in RfQ document shall be omitted.

5. Clause 5.0 (Detailed Qualifying Requirements), Section-II, *inter alia*, stipulates that experience in all the areas including development, design, finance (arranging equity capital and debt), construction and maintenance of transmission system for the same voltage level as specified in the proposed project, shall be the qualifying requirement. The petitioner has submitted that the qualifying requirements stipulated by the Commission may disable the Indian parties to participate in the bidding process for transmission lines of 400 KV class. This will limit the competition to foreign parties only. It is submitted by the petitioner that in order to promote competition and encourage Indian parties, it is necessary that bidders having experience at 220 KV level or above may also be qualified for participation in 400 KV level. CERS has supported views of the petitioner.

6. In view of the fact that there is not much difference in the design and technology in the 400 KV and 220 KV systems, we accept the submission made by the petitioner and direct that the parties having experience of development, design, finance, construction and maintenance of transmission system at 220 KV shall also be eligible to participate in the bidding process for 400 KV transmission systems. However, with regard to transmission systems of higher voltages such as 765 KV AC and HVDC System, it would be preferable that the bidders have requisite experience in the systems of same voltage level.

7. Clause 6.0 (Allocation of Responsibilities), Section-II, *inter alia*, stipulates that RfQ document shall indicate that obtaining of forest clearance for the project will be the responsibility of CTU. The petitioner has submitted that obtaining forest clearance should be the responsibility of the owner of the project, that is, the licensee. Since obtaining forest clearance is a lengthy process, the petitioner can, at best, initiate the process for obtaining forest clearance by applying in the name of a Shell Company. According to the petitioner, the ultimate responsibility for the purpose should rest with the licensee. The petitioner has also assured necessary help to the licensee in the form of recommendatory letters to various authorities. The petitioner has pointed out that obtaining forest clearance has also been listed as the responsibility of the licensee elsewhere in the document. CERS and RRVPNL have also expressed the views similar to that of the petitioner. During the course of hearing, it was pointed out by the petitioner that there were difficulties in transferring the forest clearance obtained by the petitioner to the private entrepreneurs as the procedure followed for awarding forest clearance for central projects is different.

8. We have carefully considered the submissions made by the parties. We agree to the suggestion of the petitioner that obtaining the forest clearance shall be the responsibility of the licensee. The guiding factors shall be amended accordingly.

9. 2nd bullet point of Clause 4.0 (Validity of proposals), Section-III, stipulates that an amount of Rs.5 lakh shall be deposited as refundable interest free security deposit along with the application. The petitioner has prayed that instead of the security deposit, a bank guarantee may be sought, as the former will unnecessarily block the funds of the bidder. CERS has supported this argument of the petitioner. However, RVPNL is of the view that cash security should always be there to discourage non-serious bidders entering the bidding process. It has further been submitted that the security should be a percentage of the estimated cost (say 1% or 0.5%) and part of it (say 1/5th but not less than Rs. 5 lakh) be in cash and the balance in the form of Bank Guarantee.

10. On reconsideration of the issue, we are convinced that even a bank guarantee of Rs.5 lakh shall serve the purpose of restricting non-serious bidders. The provision of the guiding factors may, therefore, be amended accordingly.

11. Last paragraph of Section- IV provides that at RfQ evaluation stage, in case number of qualified bidders is less than three, RfP process shall be initiated only after approval of the Commission. The petitioner has submitted that having three or more qualified bidders may not always be possible as it depends upon various factors, including the market forces. Besides, according to the petitioner, the qualifying requirements stipulated by the Commission may result in disqualifying all Indian parties. In such a scenario, approaching the Commission for

approval will elongate the process. It is further submitted by the petitioner that specifying such provisions in RfQ document will create an environment of uncertainty in the bidding community, which may act as a deterrent, leading to limiting the competition. The petitioner has prayed for deletion of this provision. CERS has suggested that minimum number of bidders be limited to 2 instead of 3. It has also been suggested by CERS that in case number of bids is less than 2, the Commission should give approval within 30 days.

12. We are of the opinion that the requirement of minimum number of valid bids is provided to ensure a level of competition in the bidding process. We would like to point out that a similar provision has been approved by the Commission in the order dated 09.05.2002 in petition No. 54/2001 in the matter of regulations for procurement of electricity and electricity transmission service through competitive bidding. The apprehension of the petitioner that obtaining approval of the Commission if number of valid bids falls below 3, shall elongate the process is not very well-founded. The Commission is sensitive to the need for involvement of private sector in transmission of electricity and shall accord the highest priority in disposal of application, as and when filed.

Request for Proposal (RfP)

13. 10th bullet point of Section-II provides that each bidder shall furnish a bid security (0.25% of the estimated capital cost) in the form of bank guarantee. It is further provided that the bid security shall be returned to unsuccessful bidders within 15 days of date of the expiry of the proposal and the bid security of the successful bidder shall be adjusted towards the "Project Implementation Guarantee Deposit" (henceforth referred as "the implementation guarantee"). The petitioner has suggested that the bid security and the implementation

guarantee should not be linked and bid security of the successful bidder should also be returned after submission of the implementation guarantee by the bidder. CERS and RVPNL have supported the existing stipulation in the guiding factors issued by the Commission.

14. The basic purpose of the provision was to avoid operation of the two bank guarantees simultaneously. The petitioner has not pointed out any reason for de-linking of these two bank guarantees. However, we understand that bank guarantees are provided for a specific purpose, and, therefore, it may not be possible to adjust the bank guarantee provided for bid security against that for the implementation guarantee. We, therefore, direct that bid security of the successful bidder shall also be returned after deposition of implementation guarantee.

15. 16th bullet point of Section-II stipulates that if number of valid bids is less than 3, the evaluation shall proceed with the prior approval of the Commission. The petitioner has put forward arguments similar to those against the similar provision directed to be contained in RfQ document discussed above at paragraph 11 of this order. KSEB has stated that in case of proposals fewer than 3, the Commission may ensure that the evaluation and the project cost are fair.

16. For the reasons already recorded in paragraph 12 above, we are satisfied that the stipulation does not call for any modification.

17. 17th bullet point of Section-II prescribes that confidentiality clause should clearly state that the evaluation report and additional information, if required by the Commission, shall be submitted to the Commission. The petitioner has requested for deletion of this stipulation in

view of acceptance of views of the Central Government (as expressed in Ministry of Power letter dated 20.2.2002) by the Commission. While CERS has supported views of the petitioner, RVPNL has expressed its agreement with the existing provision in the interest of transparency.

18. This Commission, in the affidavit filed before the Hon'ble High Court of Delhi, has accepted views of Ministry of Power that evaluation report may be sought by the Commission only if malafides are alleged by any of the parties. Thus, evaluation report may be required to be submitted to the Commission only in such cases. Therefore, the stipulation contained in 17th bullet point of Section-II needs to be amended accordingly.

19. First bullet point of Section-III stipulates that the functional specifications should cover minimum requirements, including voltage level and power (current) carrying capacity under the specified conditions. The petitioner has submitted that there is need to delete the provision regarding power (current) carrying capacity. It has been suggested that the power (current) carrying capacity can be specified by specifying the type of conductor to be used in the transmission line, thus, reducing the overall inventory level. The petitioner has prayed that the choice of type of conductor to be used in the transmission line may be left to CTU. CERS and RVPNL have also expressed similar views.

20. We are of the view that only functional specifications should be included in the bid documents and the bidders should be given the opportunity to optimize the design and work out detailed specifications so as to meet these functional specifications. This will ensure that the specifications are non-restrictive, leading to better competition. However, in line with our

policy of not to involve in micro-management of affairs of CTU, we leave to CTU the issue of parameters to be specified.

Model Implementation Agreement

21. First bullet point of Clause 3, Section-IV, provides that Implementation Agreement (IA) shall expire on any mutually agreed date, unless terminated earlier in accordance with the provisions of this agreement. The petitioner has submitted that IA can expire on completion of the term, that is, on actual commercial operation of the project or be terminated by either party by giving a notice. Even during the force majeure conditions, either party shall give a notice of termination to the other party. The petitioner has prayed for deletion of this stipulation. CERS and RVPNL have also expressed similar views.

22. In our opinion there is no conflict between the existing stipulation and that suggested by the petitioner. If both the parties agree that IA shall expire on the date of commercial operation (unless terminated earlier as per other provisions of IA) this becomes the mutually agreed date within the meaning of the existing stipulation. Therefore, no change is required in the existing stipulation.

23. 2nd bullet point of Clause 3, Section-IV, specifies that the liquidated damages (LD) for delay in financial closure shall be stipulated on per day basis and the amount shall be commensurate with the financial losses, which will accrue on account of delay in financial closure, subject to a ceiling to be specified by CTU. The petitioner has requested for amendment to this stipulation, as according to the petitioner, it will be very difficult to estimate the financial losses on account of delay in achieving financial closure of the project to be

undertaken through IPTC. It has been submitted that LD for delay in financial closure should be linked to estimated project cost as a percentage. CERS and RVPNL have also supported contention of the petitioner.

24. On reconsideration of the issue, we are inclined to agree with the views of the petitioner as specifying a number will be germane to clarity and simplicity. The provision may be modified accordingly. We also direct that LD or the implementation guarantee received from the licensee shall first be utilised to set off the liability of the project. The balance amount, if any, shall be adjusted towards the cost of the project.

25. In the 3rd bullet point of Clause 3, Section-IV, it is stipulated that in case delay exceeds more than the specified number of days (based on the criticality of the project) the “Project Implementation Guarantee Deposit” shall be forfeited. The petitioner has submitted that Project Implementation Guarantee Deposit shall be forfeited only if the delay exceeds the specified number of days due to the fault of the licensee. However, this guarantee shall not be forfeited for delay beyond a specified period due to the fault of CTU or force majeure. CERS has supported views of the petitioner.

26. The suggestion made by the petitioner is logical and fair. We, therefore, direct that the provision in the guiding factors may be suitably modified accordingly.

27. 4th bullet point of Clause 3, Section-IV stipulates that termination of agreement shall be done only after the approval of the Commission, since termination of agreement has the effect of termination of license. The petitioner has prayed for modification of this provision as,

according to the petitioner, immediate termination may become absolutely necessary in certain situations and, therefore, obtaining prior approval of the Commission may cause serious problems. During hearing, we asked the representative of the petitioner to explain the situations, which might require immediate termination of the agreement. It was pointed out abandonment of the project was one such condition.

28. We are not convinced by the argument put forward by the petitioner on this issue. Normally the agreements provide for cure period to remedy the default before actual termination of the contract. CTU can use this cure period for obtaining approval of the Commission for such termination. Hearing may be required as this will involve assignment/transfer of license to another agency or transfer of assets to CTU. However, to allay any apprehensions regarding delay in approval of such requests, we state that such petitions shall be given the highest priority by the Commission. As regards the specific situation of abandonment of the project, the notification of the Commission on terms & conditions of the license already provides for handing over the project to CTU. Since, the licensee shall not be present to hand over the project under such a situation, we direct that the stipulation may be modified to the effect that the project shall be taken over by CTU in case of abandonment of the project.

29. 2nd bullet point of Clause 4, Section-IV, *inter alia*, provides for obtaining environmental and forest clearance as CTU's conditions precedent. The petitioner has submitted that its conditions precedent in RfP document should not include environmental and forest clearance. The petitioner has put forward the arguments, which are essentially same as mentioned in paragraph 7 of this order. RVPNL and CERS have also expressed similar views.

30. As already directed at paragraph 8 above, the responsibility to obtain these clearances shall rest with the licensee and, therefore, this should be deleted from the condition precedent of CTU.

31. 2nd bullet point of Clause 4, Section-IV, provides that each party shall make all reasonable endeavor at its own cost and expense to cause the conditions precedent for, which it is responsible, to be satisfied within 6 months after the date of the agreement. Further, 3rd bullet point of this clause provides that if the conditions precedent are not fully satisfied or are waived within 8 months from the date of the agreement, either party may terminate the agreement by giving a notice of not less thanmonths to the other party. The petitioner has submitted that this period should be 6 months for satisfying all the conditions precedent except financial closure, for which a further period of 3 months should be provided. The reason put forward by the petitioner for providing an additional period of 3 months for financial closure, is that meeting of all other conditions precedent is a prerequisite for financial closure. RVPNL has supported the views of the petitioner. CERS, on the other hand, has submitted that total duration should remain 6 months out of which, period of 4 months should be provided to cause the conditions precedent except financial closure. Period of next 2 months should be utilised for causing financial closure. The petitioner has suggested that the notice period for termination of the agreement should not be less than a month. RVPNL and CERS have supported the petitioner's contention.

32. The Commission had deliberately left open the notice period in the document so that CTU can decide suitable time period. However, on reconsideration of the issue, we hereby

decide to allow a total of 9 months, including the notice period (after the date of the agreement) after which the agreement should be terminated if conditions precedent are not satisfied.

33. Clause 5 of Section-IV provides that the licensee shall provide additional bank guarantee of the required amount over and above the bid security amount of RfP and the combined bank guarantee shall be taken as Project Implementation Guarantee Deposit. It further provides that this amount shall be forfeited in case of delay in financial closure or delay in completion of the project or failure of the licensee to develop the project in accordance with the functional specifications. Otherwise, the amount shall be released by CTU to the licensee after 1 year of the date of commercial operation of the project, without any interest on such deposit. The petitioner has submitted that the bid security and the implementation guarantee should not be linked together. The bid security should be returned to the successful bidder after the submission of the implementation guarantee. The petitioner has further submitted that the implementation guarantee shall be forfeited, only if the delay exceeds more than specified number of days due to the fault of the licensee or licensee fails to develop the project in accordance with the functional specifications. However, this guarantee should not be forfeited for delay beyond a specified period due to the fault of CTU or force majeure. The implementation guarantee should be valid till one year after the date of commercial operation. The implementation guarantee may be released within a month of the expiry of one year from the date of commercial operation of the project. RVPNL has expressed similar views. CERS has supported the existing provision of additional bank guarantee over and above the bid security for the purpose of the Implementation guarantee but on all other issues, it is in agreement with the views of the petitioner.

34. We have already directed in paragraph 14 above of the order that the bid security of the successful bidder shall be returned after deposition of implementation guarantee. In line with this decision, we agree with the suggestion of the petitioner that the implementation guarantee should be forfeited only if the delay is attributable to the licensee. We also accept the suggestion of the petitioner regarding additional time of one month for release of implementation guarantee. The guiding factors shall be modified accordingly.

35. Clause 6, of Section-IV, *inter alia*, stipulates that Liquidated Damages (LD) for delay in commercial operation shall be stipulated on per day basis. The petitioner has sought amendment of this provision on the ground that it would be difficult to estimate the financial losses due to delay in the date of commercial operation of the project. It has been submitted that LD for delay should be linked to the estimated project cost as a percentage. CERS and RVPNL have expressed similar views.

36. On reconsideration of the issue, we are inclined to agree with the views of the petitioner for the sake of clarity and simplicity. The provision may be modified accordingly. We also direct that LD or the implementation guarantee received from the licensee shall first be utilised to set off the liability. The balance amount, if any, shall be adjusted towards the cost of the project.

37. Clause 10 of Section-IV stipulates that not later than 3 months prior to the scheduled date of commercial operation of the project or an element of the project, the licensee shall effect and maintain during the operation period insurance against various risks. The petitioner

has stated that this stipulation, as made, seems to apply for the operation phase of the project. It has been submitted that the licensee shall have to maintain requisite insurance during the implementation stage also in addition to insurance during operation stage. The petitioner seeks suitable stipulation to this effect as well. RVPNL and CERS have supported the petitioner on this issue.

38. We are in agreement with the suggestion of the parties and accordingly direct that the insurance provision should be applicable from the date of financial closure and should be applicable throughout the term of the IA as well as the Transmission Service Agreement (TSA).

39. Second bullet point of Clause 13, Section-IV, stipulates that cessation of the petitioner's status as CTU shall not constitute CTU's event of default. According to the petitioner, POWERGRID as CTU shall be entering into agreement with IPTC. The Transmission Service Charges (TSC) payment to IPTC would be on back-to-back basis with the beneficiaries, that is, POWERGRID would be paying TSC to IPTC upon receipt of the same from the beneficiaries. In this context, if POWERGRID's status as CTU is terminated the agreement will still remain valid, then TSC payment obligation and all other obligations of POWERGRID should also be passed on to the new CTU, as otherwise POWERGRID becomes a party, which will be alien to the agreement. It has further stated that since the agreements are to be executed by POWERGRID and POWERGRID and CTU are inseparable, this stipulation needs amendment. CERS has also expressed that obligations of POWERGRID should be passed on to the new CTU in such a situation.

40. It appears that difference is over the choice of words and not intent. There is no doubt that even if POWERGRID ceases to be CTU, the agreements should continue in interest of continuity of the license. So we clarify that in such an event, all the responsibilities/ obligations of POWERGRID shall be transferred to the entity succeeding POWERGRID as CTU. We are of the opinion that role of the POWERGRID in the process of licensing is solely due to its status as CTU. We, therefore, direct that this fact should be suitably incorporated in the agreements.

41. The provision in the 3rd bullet point of Clause 13, Section-IV, and the argument of the petitioner against this provision are similar to those at paragraph 27 of this order. We reiterate our direction that the agreement shall not be terminated without prior approval of the Commission for the reasons already deliberated upon in paragraph 28 above.

42. 2nd bullet point of Clause 14, Section-IV 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. The petitioner has submitted that the dispute resolution mechanism provided in the agreements would be conclusive. In case there are disputes related to the license or tariff, the matter shall be referred to the Commission. The petitioner has prayed for suitable amendment in this stipulation. CERS has supported the existing provision but RVPNL has supported views of the petitioner.

43. 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, direct that only 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.

Transmission Service Agreement

44. Clause 3 of Section-V provides that term of the agreement shall be such that the agreement shall get terminated at the expiry of the license period unless it is terminated earlier as per the applicable provisions of the agreement. The petitioner has submitted that the transmission license issued by the Commission should be valid for a period of 30 years from the actual date of commercial operation, to match with the TSC quotations being asked, as otherwise there would be a mis-match between TSC payment period and the period of license.

45. 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 guiding factors, therefore, shall be amended accordingly.

46. Clause 4 of Section-V stipulates that if the conditions precedent as specified in TSA are not duly satisfied or waived within 8 months after the date of TSA, either party may

terminate the agreement by giving a written notice to other party. The petitioner has submitted that one of the conditions precedent in TSA is the date of commercial operation, which is scheduled approximately after three years from the date of signing of TSA. Therefore, the condition as stipulated by the Commission cannot be complied with. The period needs to be 8 months from the actual date of commercial operation.

47. In view of the submission made by the petitioner, the relevant provision shall be amended suitably.

48. 6th bullet of Clause 5, Section-V, provides that licensee may use or allow use of the transmission assets for the purpose other than transmission, subject to the conditions that such use shall not adversely affect the transmission capability and the benefits of such use shall be shared with the beneficiaries of the transmission assets as per the decision of the Commission. The petitioner has requested for amendment of this condition as POWEGRID may invest or cause to invest risk capital to make any other use of the assets of the projects along with associated business and commercial risks. According to the petitioner, any benefit or loss accrued for such usage shall be to its own account alone.

49. 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, the

petitioner 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/the petitioner, the risks taken by various parties shall be taken into account. We do not find any merit in the arguments of PGCIL that loss or benefit should accrue to the petitioner only.

50. 7th Bullet point of Clause 5, Section V provides that CTU shall consult the licensee and take up the issue of finalisation of the outage schedule in REB Forum. The petitioner has submitted that as per the Indian Electricity Grid Code, transmission licensee, shall be the member of the REB Forum. Therefore, the licensee itself can take up the matter in the REB Forum.

51. We have noted that there is no such provision in IEGC that licensee will automatically become member of REB. Membership of the REB forum is decided by the Central Government. Therefore, stipulation contained in the guidelines is in order.

52. Last bullet point of Clause 5, Section-V stipulates that any modification in the scope of the project shall be carried out with the consent of CTU and after the approval of the Commission. The petitioner has prayed for amendment to this stipulation as any change in scope shall be carried out with the approval of CEA and the prior approval of the Commission may not be necessary. RVPNL has expressed its agreement with the views of the petitioner.

CERS has stated that modifications should be carried out with the approval of CEA and under intimation to the Commission.

53. We are of the opinion that since the licensee is to operate and maintain the project as per statutory requirements, approval of the CEA, if required shall be obtained. Approval of the Commission is essential as the license is granted for specific transmission assets and any change in scope must be with the approval of the Commission.

54. 5th bullet point of Clause 7, Section-V, provides that incentives for achieving availability shall be linked to non-indexed rupee component. The petitioner has stated that non-indexed rupee component will be a small part for foreign bidders, which may discourage them to participate. The petitioner has suggested that incentive payment should be linked with the normative equity participation in the IPTC, considering debt - equity ratio of 70:30, in line with the Commission's stipulations vide Notification dated 26.3.2001. CERS has also expressed similar views.

55. We have carefully considered the suggestion made by the petitioner. This stipulation was introduced as a signal to the bidder to reduce foreign currency component and indexed rupee component in the tariff thereby reducing the risk of foreign exchange variation and domestic inflation respectively for the beneficiaries. The understanding of the petitioner that the rupee component in case of foreign bidders would be less is not correct as the bidder can quote higher rupee component irrespective of actual capital employed in rupee terms by taking the risk of exchange variation. The problem in accepting suggestion of the petitioner (that incentive should be payable based on the normative equity) is that since bid evaluation

will be done based on the TSC quoted, it may not be possible to verify the capital cost of the project. We are, therefore convinced that the existing stipulation is in order.

56. 2nd Bullet point of Clause 12, Section-V stipulates that on cessation of POWERGRID's status, as CTU shall not constitute CTU's event of default. The argument of the petitioner against this provision and our directions are identical to similar provision in case of IA as discussed at paragraphs 39 and 40 supra. The directions contained in paragraph 40 shall be ipso facto applicable here.

57. 3rd Bullet point of Clause 12, Section-V, stipulates that agreement shall not be terminated without prior approval of the Commission. The argument of the petitioner against this provision and our directions are identical to similar provision in case of IA as discussed at paragraphs 27 and 28 supra.

58. Clause 13 of Section-V provides that only in the events 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 ERC Act, 1998. The argument of the petitioner against this provision and our directions are identical to similar provision in case of IA as discussed in paragraph 43 above.

59. The petitioner has submitted that the document issued by the Commission is quite exhaustive. In its understanding any other provisions, as required, may be introduced by POWERGRID in the RfQ and RfP documents so as to make them comprehensive. Apart from other details, sections like force majeure, liability and indemnification and assignment and

Charges, etc., also need to form a part of the documents to be issued to the bidders. According to the petitioner such, and any other details, though not forming a part of the guiding factors, may be inserted in the final document to be prepared for issuance to the bidders.

60. We are aware that the RfQ and RfP documents contain a number of provisions other than those covered in the guiding factors. We, therefore, grant petitioner the liberty to insert or redraft the provisions as long as they are in conformity with the guiding factors or do not amend, modify or alter the spirit of the guiding factors stipulated by the Commission.

61. With the above directions, the review petition No. 85/2002 stands disposed of.

62. The Commission's office shall take immediate steps for notification of the decisions contained in this order as also the order of 27.3.2002, where necessary.

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(G.S. RAJAMANI)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRMAN

New Delhi dated the 28th May, 2003