

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

- 1. Shri Ashok Basu, Chairman**
- 2. Shri K.N. Sinha, Member**
- 3. Shri Bhanu Bhushan, Member**

Petition No. 41/2004

In the matter of

Petition under Section 17 of the Electricity Act, 2003 seeking approval of provisions related to Buy-Out of the Tala-Delhi Transmission Project by Petitioner No.2 under the amended and restated Implementation Agreement and amended and restated Transmission Service Agreement.

And in the matter of

1. Powerlinks Transmission Limited, New Delhi
 2. Power grid Corporation of India Limited, Gurgaon
 3. Tata Power Company Ltd., Mumbai
 4. International Finance Corporation, Washington D.C (USA)
 5. Asian Development Bank, Manilla (Philippines)
 6. Infrastructure Development Finance Co. Ltd, Mumbai
 7. State Bank of India, Mumbai
- **Petitioners**

The following were present:

1. Shri Atulya Sharma, Senior Lenders, IFC/IDFC/ADB/SBI
2. Shri Jasmeet Wadhwa, Senior Lenders, IFC/IDFC/ADB/SBI
3. Ms. Aarti Mohanty, Senior Lenders, IFC/IDFC/ADB/SBI
4. Shri R.K. Agrawal, Powerlinks Transmission Ltd.,
5. Shri Sumit Gupta, Powerlinks Transmission Ltd.
6. Shri Karim Rai, Powerlinks Transmission Ltd.
7. Shri Mukesh Agarwal, Powerlinks Transmission Ltd.
8. Shri Utpal Dhar, Powerlinks Transmission Ltd.
9. Shri T.S.P. Rao, PGCIL
10. Shri S. Garg, PGCIL
11. Shri Sanjay Rai, PGCIL
12. Shri Subat Das, Tata Power

**ORDER
(DATE OF HEARING: 8.7.2004)**

The petitioners in this petition seek approval under sub-section (4) of Section 17 of the Electricity Act, 2003 (the Act), for the “buy-out” provisions contained in Section 12 and Schedule 6 of the Implementation Agreement (IA)

and Section 12 and Schedule 4 the Transmission Services Agreement (TSA) entered into between petitioner 1 and petitioner 2 for construction, implementation and operation of Tala Transmission System (hereinafter referred to as “the transmission system”). The IA contains the detailed provisions related to construction phase of the transmission system and the TSA contains the detailed provisions related to operation phase of the transmission system. In this order, the IA and the TSA are collectively referred to as “the agreements”, except where either of them needs to be referred to separately and specifically. A further clarification has been sought whether enforcement of the “buy-out” provisions requires any further approval under Section 17(1) of the Act after compliance with Section 17(2) thereof and if so, the Commission to specify the earliest time when such approval may be applied for and the issues to be addressed in such further application.

2. Based on an application (No.40/2003), petitioner 1 has been granted licence on 13.11.2003 for implementation of the transmission system and is, therefore, a transmission licensee under the Act. Petitioner 2, by virtue of provisions of sub-section (1) of Section 38 read with Section 185 of the Act, is the Central Transmission Utility and accordingly a deemed licensee under the second proviso to Section 14 of the Act. The agreements have been signed between petitioner 1 and petitioner 2. Under the “buy-out” provisions contained in the agreements, petitioner 2 may be required to purchase petitioner 1’s utility upon termination of the agreements on occurrence of the events of default and the events of force majeure specified in Section 12 of the agreements.

3. Petitioner 2 holds 49% equity shares in petitioner 1 and the balance equity shares of 51% are held by petitioner 3. Petitioners 4 to 7, collectively referred to as the lenders, have reportedly agreed to make available loan facilities to petitioner 1 amounting to approximately 70% of the anticipated total cost of the transmission system. It is stated that the lenders have recourse only to petitioner 1's assets including its rights under the agreements and the equity shareholding of petitioners 2 and 3 under a deed of pledge signed by them for repayment of the loans.

4. Earlier, after grant of the transmission licence, petitioner 1 had filed a petition (No. 92/2003) with petitioner 2 and petitioners 4-7 herein as the respondents. The said petition was disposed of by the Commission by its order dated 5.2.2004. In the said petition, the following prayers were made:

- (a) grant its approval under sections 17(3) and 17(4) of the Act and Regulation 20(e) of the Transmission Licence Regulations to the taking of security by the Lenders over the License and the Company's utility/assets;
- (b) grant its approval under Section 17 (3) and 17(4) of the Act to the Lenders' enforcing their security following the occurrence of an event of default under the Financing Documents in accordance with the terms to be set out in the IA and TSA without requiring any further application to be made to this Hon'ble Commission but subject to such directions as the Commission may give to Powergrid as to how it should exercise its rights under the IA and TSA, or its statutory powers as CTU under the Act, in the event of any enforcement by the Lenders of their security rights;
- (c) grant its approval to the sale of the COMPANY's utility/assets pursuant to the buyout provisions contained in the IA and TSA and approved by Powergrid without requiring any further application be made to this Hon'ble Commission;
- (d) clarify whether the Financing Documents are required to be filed with this Hon'ble Commission for its record; and

- (e) pass such orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of this case.

5. In the context of prayers at sub-paras (a) and (b) above, the Commission by its order of 5.2.2004, in principle allowed the petitioner therein to enter into agreements with the lenders to assign the licence or to transfer of the utility or assets to the extent of loan and other dues recoverable. The Commission further directed that the transmission licence granted in favour of the petitioner (petitioner 1 in the present petition) could not be assigned in favour of the nominees of the lenders without the specific prior approval of the Commission. So far as the prayer at sub-para (c) above for sale of the assets to Powergrid (petitioner 2 herein) was concerned, the Commission observed that such an action must conform to sub-section (1) and sub-section (2) of Section 17 of the Act, in view of the fact that respondent No.1 in that petition (petitioner 2 herein) in its capacity as CTU was a deemed transmission licensee. The present petition is filed in pursuance of the observations of the Commission on sub-para (c) of the prayer . We note that in petition No.92/2003, the issue of approval of the Commission for entering into agreement for "buy out" by petitioner 2 of the utility of petitioner 1 was neither raised nor considered by the Commission. In fact, the agreements which were already signed, were not even on record before the Commission in those proceedings. The Commission in its order of 5.2.2004 had considered the issues specifically raised in the petition.

6. Before grant of transmission licence, petitioner 1 and petitioner 2 had signed the agreements. According to the present petition, these agreements were filed before the Commission on 28.7.2003 in Petition No.40/2003 (made for grant

of transmission licence in favour of petitioner 1). The considerations in the application for grant of licence were limited to the assessment of eligibility and suitability of petitioner 1 for grant of licence for transmission of electricity. The petitioners are conscious of this fact as they have stated in the present application that “the buy out provisions have not yet received any express approval under section 17(4) of the Act”. Petitioner 1 and other petitioners, as a result of further discussion, are stated to have amended the “buy-out” provisions in the agreements earlier filed in Petition No.40/2003. Accordingly, the petitioners seek approval of these “buy-out” provisions of the agreements, which have already been signed on 8.4.2004 and take effect from 4.7.2003.

7. In accordance with Section 12 of the agreements, the “buy-out” provisions can be enforced on occurrence of any of the events of default of petitioner 1, petitioner 2 or on occurrence of certain events of force majeure. We are not presently required to go into the details of these events and the same are, therefore, not being adverted to here.

8. The “buy-out” provisions are contained in Schedule 6 attached to the IA and Schedule 4 attached to the TSA. The procedure in regard to enforcing the “buy-out” common to both the agreements (para 6.1.1 of the IA and para 4.1.1 of the TSA) is as under:

- (i) When the Company serves a Termination Notice to POWERGRID due to a Powergrid Event of Default pursuant to Clause 12.1.4, Powergrid shall, at the Company’s option exercised within one hundred and twenty (120) days of such Termination Notice, purchase the Project at a Buy-out Price determined in accordance with this Schedule;

- (ii) When Powergrid serves a Termination Notice to the COMPANY due to the Company Event of Default pursuant to Clause 12.1.3, Powergrid shall, subject to CERC approval, within six (6) months of the date of such Termination Notice, purchase the Project in accordance with this Schedule 6;
- (iii) When Powergrid has served a notice pursuant to Clause 12.1.5 (for a Force Majeure Event) to terminate this Agreement and purchase the Project from the Company, the Company shall, within 120 days of such notice, sell the Project to Powergrid at a Buy-out Price determined in accordance with this Schedule;
- (iv) When the Company has served a notice pursuant to Clause 12.1.5 (for a Force Majeure Event) to terminate this Agreement and sell the Project to Powergrid, Powergrid shall, within 120 days of such notice, purchase the Project from Company at a Buy-out Price determined in accordance with this Schedule.

9. In addition, the following additional provision is made in para 4.1.1 of Schedule 4 of the TSA for determination of “buy out” price:

“(v) Powergrid has served a notice to purchase the Project from the Company, at the Expiry Date, the Company shall sell the Project to Powergrid at a “Buy-out” Price determined in accordance with this Schedule”.

10. The following further provisions in regard to “buy-out” are made in the agreements (para 6.2.8 of the IA and para 4.2.8 of the TSA):

“In case of a Buy-out, subject to the approval of the Lenders, Powergrid shall have the right to require the Company to sell the Project to its nominees provided such nominee pays the due Buy-out Price to the Company and otherwise completes the sale in accordance with this Schedule.”

11. The provisions relating to settlement of disputes are contained in Section 15 of the agreements. The salient features of the provisions for settlement of disputes are that in case of any dispute or difference of any kind whatsoever shall arise between petitioner 1 and petitioner 2 in connection with or arising out of the

agreement including without prejudice to the generality of foregoing any question regarding its existence, validity or termination or execution of the project whether during the progress of the project or its completion or whether before or after the termination, abandonment or breach of the agreement, the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such dispute or difference by mutual consultation within a stipulated period, then the dispute shall be referred in writing by either party to the adjudicator with copy to the other party. The parties shall agree on a panel of individuals from reputed institutes who may be appointed by either party as adjudicators for the purpose of adjudicating upon any dispute. The parties shall finalise the points of such disputes or differences or the terms of reference before referring such disputes or differences to the adjudicator. If either petitioner 1 or petitioner 2 is dissatisfied with the adjudicator's recommendations or if the adjudicator fails to give a recommendation within the stipulated period after dispute or difference being referred to him then dispute can be settled by arbitration. Any dispute submitted by a party to arbitration shall be heard by an arbitration panel comprising of three arbitrators in accordance with the provisions of Arbitration and Conciliation Act, 1996.

12. In principle, we agree that the agreements need to contain the provisions for "buy out" of the utility of the transmission licensee by the Central Transmission Utility, because of the special status accorded to it under the Act, in the event of default by the transmission licensee whether during the construction period or the operation period. Such a provision is considered to be in public interest, as it provides continuity to construction, implementation and operation of any

transmission system. However, the “buy out” provisions must conform to law and their validity has to be tested on the touchstone of statutory provisions. We, therefore, proceed to examine the validity of the agreements and the provisions contained therein.

Question of validity of the Agreements

13. Sub-section (4) of Section 17 of the Act provides that any agreement relating to any transaction specified in sub-section (1) thereof, unless made with the prior approval of the Commission shall be void. For facility of reference, provisions of sub-section (1) are reproduced below:

“(1) No licensee shall, without prior approval of the Appropriate Commission, -

- (a) undertake any transaction to acquire by purchase or takeover or otherwise, the utility of any other licensee; or
- (b) merge his utility with the utility of any other licensee:

PROVIDED that nothing contained in this sub-section shall apply if the utility of the licensee is situate in a State other than the State in which the utility referred to in clause (a) or clause (b) is situate.”

14. Thus, prior approval of the Commission for entering into any agreement for purchase, etc. of utility of a licensee by any other licensee is a condition precedent. Approval of the Commission before entering into the agreements was not obtained and post facto approval has been sought. For the reason of non-compliance of Section 17(4) of the Act, the agreements are void ab initio.

15. The Commission has notified the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission License

and other related matters) Regulations, 2003, under Section 27C of Indian Electricity Act 1910, since repealed. By virtue of Section 185 of the Act, these regulations continue to be in force. Schedule 1 attached to these regulations contains the guiding factors for preparation of the agreements, among certain other provisions. These guidelines envisage that the IA and the TSA shall be “entered into by the Central Transmission Utility”. Under Clause (e) of regulation 19 of these regulations, entire transmission capacity of a transmission licensee is to be made available to the Central Transmission Utility. These provisions would imply that the agreements with the transmission licensee of one part have to be signed by the Central Transmission Utility of the other part. Under the Act, the Central Transmission Utility enjoys a pivotal position inasmuch as it is required to send its recommendations, if any, to the Commission before an application for grant of licence is considered since, under the Act, the Central Transmission Utility has to ensure development of an efficient, co-ordinated and economical system of inter-state transmission lines for smooth flow of electricity from the generating stations to the load centres. These provisions make clear that the agreements are to be signed by the Central Transmission Utility. Under Section 38 of the Act, any government company may be notified by the Central Government as the Central Transmission Utility. Presently, petitioner 2 is notified as the Central Transmission Utility. However, the possibility of any other Government company being notified as the Central Transmission Utility on any future date cannot be ruled out, particularly in the event of re-organisation of petitioner 2. It, therefore, follows that the rights and obligations under the agreements are those of the Central Transmission Utility. The agreements in the present case have not been signed by the Central Transmission Utility but are

signed by petitioner 2. Also, the agreements do not provide that the rights and liabilities under these agreements are that of the Central Transmission Utility. For these reasons also the agreements are not valid, as they do not conform to the provisions of the law and the statutory regulations.

16. For the above reasons, either the fresh IA and TSA need to be signed after complying with the requirements of law. In the alternative, supplementary agreements may be signed providing that the earlier agreements have been signed by the Power Grid Corporation of India Ltd. in its capacity as the Central Transmission Utility and the rights and obligations of the Power Grid Corporation of India Ltd. under these agreements are those of the Central Transmission Utility.

“Buy out” provisions

17. We now consider validity of the provisions made in the agreements in regard to “buy-out”. As we have already noted, sub-section (1) of Section 17 of the Act, prohibits acquisition of the utility of any other licensee or merger of his utility with the utility of any other licensee, without specific prior approval of the Commission.

18. We have reproduced above in paras 8 and 9, the procedure contained in the agreements for invoking the “buy-out” provisions. It has been provided in one of the clauses [Clause (ii)] that where PGCIL (Petitioner 2) serves a termination notice to the Company (Petitioner 1) due to company event of default, PGCIL shall, subject to the Commission’s approval, purchase the transmission system. The provision made is in conformity with sub-section (1) of Section 17 of the Act.

However, in none of the other clauses, i.e. clauses (i), (iii), and (iv) of para 6.1.1 of Schedule 6 of the IA and clauses (i), (iii), and (iv) of para 4.1.1 of Schedule 4 of the TSA provides for the Commission's approval before invoking the "buy-out" provisions. These clauses are contrary to the express provisions of sub-section (1) of Section 17 of the Act, which we have noticed above. Therefore, before we accord our approval to the "buy out" provisions, the relevant provisions have to be brought at par with the provisions of sub-section (1) of Section 17 of the Act. In other words, in every case of "buy out" whether it is on account of company's event of default or PGCIL's event of default or on account of event of force majeure, prior approval of the Commission shall have to be obtained after complying with sub-section (2) of Section 17 of the Act.

19. Further, the provisions are made in the agreements that petitioner 2 shall have the right to require the petitioner 1 to sell the transmission system to its nominee or nominees provided nominee or such nominees pay the due "buy-out" price to petitioner 1 and otherwise complete the sale in accordance with the provisions made in them (para 10 above and Clause 6.2.8 of Schedule of the IA and Clause 4.2.8 of Schedule 4 of the TSA). We cannot at this stage agree to "buy-out" by any other person except the Central Transmission Utility, be such person the nominee of petitioner 2, without looking into the antecedents of such nominee, for the reason that before "buy-out" by any other person is effected, the Commission has to satisfy itself of the person's ability and capacity to execute the transmission system and undertake transmission of electricity. Therefore, para

6.2.8 of Schedule 6 to the IA and para 4.2.8 of Schedule 4 to the TSA shall have to be omitted.

Dispute resolution

20. In regard to dispute resolution, Section 158 of the Act lays down as under:

“158. Arbitration

Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party, but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996). “

21. Clause 10 of the transmission licence granted in favour of petitioner 1 provides as under:

“Notwithstanding anything contained in the Implementation Agreement and Transmission Service Agreement, signed between the licensee and the Central Transmission Utility, all disputes related to the statutory functions of the Commission to regulate inter-state transmission of electricity and determine tariff for inter-state transmission of electricity, interpretation of this license, including the terms and conditions thereof, shall be adjudicated upon or referred for arbitration by the Commission in accordance with the provisions of the Act, the Rules and the Regulations. “

22. Therefore, the provisions made in Section 15 of the agreements in regard to settlement of disputes have also to be modified and brought in conformity with Section 158 read with Clause 10 of the transmission licence, so that the matters covered under Section 158 of the Act and clause 10 of the transmission licence are excluded from the dispute settlement mechanism provided under the agreements.

“Buy out” price

23. Schedule 6 of the IA and Schedule 4 of the TSA also contain the provisions for calculation of components of “buy-out” price. Since we have confined our considerations to the legal aspects of the “buy-out” provisions, we have not gone into the details of the mechanism for computation of “buy-out” price contained in the agreements, particularly for the reason that they relate to the commercial aspects, which need to be left to the parties concerned. Although we have not given any consideration to the calculation of “buy-out” price, we feel concerned about the tariff that may be paid by the consumer for use of the transmission system. Therefore, we make it clear that “buy-out” price shall under no circumstances affect the tariff. In our opinion, “buy out” price should not exceed the capital cost and that during operation phase it shall not exceed the book value based on the admitted capital cost. Further, in case “buy-out” price is less than the admitted capital cost, the tariff will be allowed based on the admitted capital cost or the “buy-out” price, whichever is lower. We reserve the issue of tariff to be considered in detail at the time of actual determination.

Other provisions of IA and TSA

24. We are not concerned with any other provisions made in the agreements since none of them is subject matter of the present petition made to seek approval of the “buy-out” provisions in the agreements. Therefore, this order shall not in any manner be construed as the Commission’s approval to any other provision of the agreements, except those specifically dealt with in this order.

Conclusion

25. In the light of the observations made by us, the revised agreements, or the supplementary agreements, as the case may be, shall be filed before the Commission within three months of this order, for its final seal of approval after rectifying the deficiencies pointed out above. We consider it necessary to adopt this course to obviate any future complications in case of any dispute arising during the stage of construction/implementation or operation of the transmission system. For this purpose, we had also advised the parties to discuss the formulation of the revised provisions with Chief (Law) in the Commission.

**Sd/-
(BHANU BHUSHAN)
MEMBER**

**Sd/-
(K.N. SINHA)
MEMBER**

**Sd/-
(ASHOK BASU)
CHAIRMAN**

New Delhi dated the 23rd July 2004