



13th February 2019

Mr Sanoj Kumar Jha
Secretary, Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building
36, Janpath
New Delhi- 110001

Sub: Additional Comments/ Suggestions on “Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 for the tariff period from 1.4.2019 to 31.3.2024”

Dear Sir,

This is with reference to the public notice issued by CERC pertaining to ‘Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 for the tariff period from 1.4.2019 to 31.3.2024’ having reference no: No. L-1/236/2018/CERC dated 14th December 2018, inviting comments/ suggestions on the same.

In addition to our comments submitted on 31st January 2019, we are hereby submitting additional set of comments/observations under **Annexure**, enclosed herewith. We also request you to kindly condone the delay in submitting this set of Observations.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Pankaj', with a horizontal line underneath.

Mr. Pankaj Prakash
(Head - Regulatory (ER))

ANNEXURE: ADDITIONAL OBSERVATIONS OF TATA POWER ON DRAFT CENTRAL ELECTRICITY REGULATORY COMMISSION (TERMS AND CONDITIONS OF TARIFF) REGULATIONS, 2019

1. Regulation 33(1)

33(1) Depreciation: (1) Depreciation shall be computed from the date of commercial operation of a generating station or unit thereof or a transmission system including communication system. In case of the tariff of all the units of a generating station or a transmission system including communication system for which a single tariff needs to be determined, the depreciation shall be computed from the effective date of commercial operation of the generating station or the transmission system taking into consideration the depreciation of individual units.;

Our Views and observations

During the development phase of a project, there are devices, equipment, machinery and assets which needs to get capitalised in the books much before the COD of the Project and some minor assets even get depreciated upto the maximum depreciable value before the COD of the Project. Such assets which get depreciated in Books of Accounts from their respective commissioning dates irrespective of the COD of the project. Accordingly, there are situations that such assets may get depreciated in books of accounts much earlier than their respective depreciation for the purpose of determination of Tariff after commercial operation date. On the other hand, this Hon'ble Commission for the purpose of determination of tariff considers the weighted average depreciation rate as per the actual depreciable assets appearing in the book of accounts and then applying the weightages as per respective depreciation rates as per the applicable Depreciation Schedule.

It may be appreciated that in practice, there are circumstances that certain assets which get capitalised in the books of accounts much earlier than the COD of the project but are allowed to depreciate for Tariff determination purpose only from COD of the project, get removed from the depreciable list of assets and thus are not considered by this Hon'ble Commission for tariff determination purpose.

Hence, we humbly submit that the project developer may be allowed to capitalise actual booked depreciation of such assets (which get capitalised even before the COD of the project) into the Project Cost in the same manner IDC is allowed to be capitalised in the project cost during the pre COD phase.

2. Regulation 33(5) and 33(6)

33(5) Depreciation shall be calculated annually based on Straight Line Method and at rates specified in Appendix-I to these regulations for the assets of the generating station and transmission system:

Provided that the remaining depreciable value as on 31st March of the year closing after a period of 12 years from the effective date of commercial operation of the station shall be spread over the balance useful life of the assets.

(6) In case of the existing projects, the balance depreciable value as on 1.4.2019 shall be worked out by deducting the cumulative depreciation as admitted by the Commission upto 31.3.2019 from the gross depreciable value of the assets.

Our Views and observations

In our submission dated 31st Jan'19 to this Hon'ble Commission, while we have stressed upon the matter that the developer should be allowed to recover the complete depreciable value of the asset (including additional capitalisation) over the balance useful life of the project irrespective of the tenure left, we would further supplement our such prayer with a request that while approving the

depreciation value of such additional capitalisation assets, depreciation of such individual Ad-Cap assets shall be approved upto the levels which shall at least be sufficient to meet the obligations of loan repayment schedule of such respective assets.

3. Additional Issues - Transmission Majoration Factor

Our Views and observations

It is to be noted that proposed Draft Tariff Regulations does not stipulate for any specific treatment of Transmission Majoration Factor. However, Hon'ble CERC has recently notified Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2019 dated 30th January 2019, by way of which the following section has been inserted after Regulation 49 of the Principal Regulations.

"49A Transmission Majoration Factor: Transmission Majoration Factor admissible for the transmission projects executed through JV route in terms of Regulation 4.10A of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 shall be available for a period of 25 years from the date of issue of the transmission licence."

Tata Power has already submitted its detailed reasons for adopting the same through Powerlinks letter dated 19th May 2017. Copy of the same is enclosed as Annexure 1 for ready reference. Hence, we humbly submit to this Hon'ble Commission that the same clause may be considered and extended/inserted/included in the Final Tariff Regulations applicable from 01-04-2019.

4. Regulation 72

72. Sharing of Non-Tariff Income: The non-tariff income in case of generating station and transmission system on account of following shall be shared in the ratio of 50:50 with the beneficiaries and the long term customer on annual basis:

- a) Income from rent of land or buildings;*
- b) Income from sale of scrap;*
- c) Income from statutory investments;*
- d) Interest on advances to suppliers or contractors;*
- e) Rental from staff quarters;*
- f) Rental from contractors;*
- g) Income from advertisements;*
- h) Interest on investments and bank balances;*

Provided that the interest or dividend earned from investments made out of Return on Equity corresponding to the regulated business of the Generating Company shall not be included in Non-Tariff Income.

Our Views and observations

In this matter, we would like to draw attention of this Hon'ble Commission to a judgement by Hon'ble Supreme Court in CIVIL APPEAL NOS. 3510 - 3511 OF 2008 dated 6th May 2009, by which Hon'ble Supreme Court has adjudicated in the matter pertaining to Functions of Commissions and has concluded as below:

"CONCLUSION

1) Activities of a generating company are beyond the purview of the licensing provisions.

2) The Parliament therefor did not think it necessary to provide for any regulation or issuance of directions except that which have expressly been stated in the Act.

3) Section 21 occurs in the chapter of "licensing" under which the generating companies would not be governed."

In light of the above judgement, we wish to further supplement our view/observation submitted to this Hon'ble Commission on 31st Jan'19 that no Non- Tariff Income should be considered for sharing by the Generating Companies as it is not a licensed activity unlike that of Transmission Licensees and Distribution Licensees.

5. Para 14.5.2 (f) and 14.6.2 of the Explanatory Memorandum

14.5.2 (f) For NTPC stations, it was generally observed that the employee expenses for FY 2016-17 and FY 2017-18 were on the higher side due to impact of wage revision. During the FY 2016-17, the pay revision impact is provided for 3 months (i.e. January 2017-March 2017), while during FY 2017-18, the same is provided for the entire financial year. This pay revision impact has been separated from employee expense during the respective financial year, which works out to INR 1.60 Lakh/MW for coal based generating stations and INR 1.38 Lakhs/MW for gas based generating stations. The same has been considered while deriving the norms for O&M expenses.

14.6.2 The Escalation rate computed based on the five -year average of WPI for FY 2013-14 to FY 2017-18 works out to 1.49%, while that of CPI for the same period works out to 5.76%. Considering the 60:40 weightage for WPI and CPI respectively, the escalation rate works out to 3.20%. The Commission observes that actual O&M expenses after normalisation during the period from FY 2013-14 to FY 2017-18 have increased at a rate of approx. 3.31% for coal based generating stations...

Our Views and observations

It is evident from the above excerpts from the Explanatory Memorandum that the wage revision has been considered for arriving at the norms of the O & M expenses, however, it would be appreciated that WPI/CPI combination considered for arriving at the escalation rate does not factor such revision. Also, it is to be noted that while, such wage revisions happen in blocks of 5 years in CPSUs, such escalation is spread and is considered in the Wage revision process of the Private Organisations every year instead of such escalation in block of 5 years. Hence, we humbly submit to this Hon'ble Commission that escalation rate been proposed in Draft Tariff Regulations for the purpose of O & M expenses may be considered for revision and the impact of such Wage revision of CPSUs (which has not been factored in the process of working out the annual escalation rates) shall be considered for working out revised escalation rates. Hence, for this purpose, we propose to this Hon'ble Commission that the Pay Revision escalation may be spread over a period of 5 years by averaging and then adding such annual escalation rate to worked out escalation rate of 3.31% as arrived at by this Hon'ble Commission and stipulated also in Para 14.6.2 of the Explanatory Memorandum. We have also attempted to demonstrate the impact of such wage revision on escalation rate based on random assumptions.

Parameters	Annual Escalation in Wages
Worked out Escalation Rate by Hon'ble CERC	3.31%
Assumed Wage escalation during Wage revision after 5 years	10%
Average Annual spread on Wage Escalation Impact	2.00%
Total Escalation Rate to be approved by Hon'ble CERC	5.31%

In addition to above, in the matter of CPI/WPI weightage, while in our earlier submission dated 31st Jan'19 to this Hon'ble Commission, we have requested to increase the weightage of CPI to 60%, Through this submission, we would also request this Hon'ble Commission to further increase the weightage of CPI to 75% in the mix for arriving at the Annual O & M escalation rate.

6. Regulation 20.1

20. Interest During Construction (IDC) and Incidental Expenditure during Construction (IEDC)

(1) Interest during construction (IDC) shall be computed corresponding to the loan from the date of infusion of debt fund, and after taking into account the prudent phasing of funds upto SCOD.

Our Views and observations

We are aware that any project involves certain gestation period before commissioning and thus certain amount of justifiable IDC is always involved in any project cost and is also acknowledged by this Hon'ble Commission in its Tariff Regulations from time to time. It has been noticed that while the relevant clauses of Tariff Regulations (from time to time) always stipulate for computation of IDC after taking prudent phasing of funds, the clause does not stipulate for factors which are considered by Hon'ble CERC for working out the IDC to be approved as a part of approved Capital Cost.

Such clarified set of factors are required for the entities to closely estimate and monitor the gap of their actual IDC viz - a -viz. the likely IDC which may be considered by this Hon'ble Commission for approval in Capital Cost. Such factors are also required to bring clarity to the treatment of delay by this Hon'ble Commission for various factors like:

- Delay due to Controllable factors
- Delay due to Un-Controllable factors
- Impact of duration of such delay
- Impact of the phase of delay whether the delay is in initial phase, intermediary phase or advanced phase of the project.

Hence, we humbly submit to this Hon'ble Commission to kindly include an elaborated methodology and the factors which are considered by Hon'ble CERC for approval of IDC and determination of Tariff.

7. Regulation 30(2) (i)

(2) Return on equity shall be computed at the base rate of 15.50% for thermal generating station, transmission system including communication system and run of the river hydro generating station, and at the base rate of 16.50% for the storage type hydro generating stations including pumped storage hydro generating stations and run of river generating station with pondage:

Provided that:

- i. Return on equity in respect of additional capitalization after cut off date within or beyond the original scope shall be computed at the weighted average rate of interest on actual loan portfolio of the generating station or the transmission system;

Our Views and observations

In addition to our earlier submission dated 31st Jan'19 to this Hon'ble Commission through which we have insisted for allowing full Return on Equity at 15.5% for all approved additional capitalisation after cut-off date instead of allowing it at weighted average rate of interest on actual loan portfolio, we would like to further strengthen our view by drawing attention of this Hon'ble Commission to the described below element.

Proposal of allowing Return on additional capitalisation at weighted average rate of interest on actual loan portfolio implies that it is being assumed that the developer would be able to secure long term debt financing upto 100% for all such additional capitalisation projects. While, in our earlier submission we have reserved our stand that such assumption is completely unrealistic and the fact that it will push up the cost of debt to such an extent that may lead to overall cost increase for consumers, without prejudice to our such submission we would like to further submit that while loan capital is repaid back, equity is never repaid and hence attracts higher returns, in case Hon'ble Commission still considers RoE on additional capitalisation at weighted average rate of interest on actual loan portfolio treating equity as loan, then Hon'ble Commission should also adopt a balancing approach for allowing additional depreciation for equity part of such additional capitalisation as depreciation is considered as deemed repayment for such long term loans over and above the allowable depreciation. Hence, we submit that under such assumption it would be appropriate to allow the developer to recover the depreciation for such additional capitalisation amount at stipulated rates as per Appendix I plus additional depreciation of $25\%/12 = 2.08\%$ on equity portion (for a period of 12 years) or the amount arrived at by spreading the balance depreciable value over the balance useful life of the project, whichever is higher. Also, there would be requirement of a clarity that what should be the RoE for situations where the generating company does not obtain or is left with any actual loans.

In view of such above complexities, we again humbly submit to this Hon'ble Commission that all equity (upto normative level of 30%) infused in all approved Capital Investments should be allowed to recover post tax RoE in tune of 15.5% or the rate (post tax RoE) which Hon'ble Commission may decide for the Original Project Cost, whichever is higher.

8. Regulation 35

Our Views and observations

In the matter of normative O & M expenses, in addition to our earlier submission dated 31st Jan'19 to this Hon'ble Commission, we would like to further submit that it is known that currently many generating stations do not have a separate Sewage Treatment Plant and accordingly the current norms of O & M expenses does not provide for such additional costs required for operating such Sewage Treatment Plants. Hence, for any such future instance of Enforcement of any law/statute in the matter compelling the generating companies to make such additional investments, we humbly submit that Generating Companies should be allowed to approach this Hon'ble Commission for approval of additional Fixed Cost and additional Variable Cost (if any) in lieu of such additional capitalisation required for complying to such statutes.

9. Regulation 10(7) & 13(4)

10 (7) The difference between the tariff determined in accordance with clauses (3) and (5) above and clauses (4) and (5) above, shall be recovered from or refunded to, the beneficiaries or the long term customers, as the case may be, with simple interest at the rate equal to the bank rate prevailing as on 1st April of the respective year of the tariff period, in six equal monthly instalments.

13 (4) After truing up, if the tariff already recovered exceeds or falls short of the tariff approved by the Commission under these regulations, the generating company or the transmission licensee, shall refund to or recover from, the beneficiaries or the long term customers, as the case may be, the excess or the shortfall amount along with simple interest at the rate equal to the bank rate as on 1st April of the respective years of the tariff period in six equal monthly instalments.

Our Views and observations

Regulation 10(7) and 13(4) of proposed Tariff Regulations stipulate for a mechanism of settlement of tariff subsequent to issuance of Final Tariff Order and True Up Order for a Tariff Period. While, such Regulations specify for recovery or refund of the settlement amount among the beneficiaries in six equal monthly instalments, it does not clearly specify the timeline for which such carrying cost shall be calculated in the event of such six monthly instalments. The number of instalments may be limited to 6 but not fixed at 6, i.e. party obliged to pay may choose to pay back in upto six instalments starting not beyond 3 months from the date of Order.

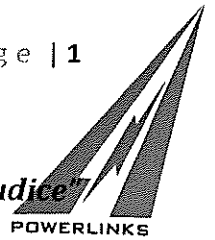
We understand that carrying cost on such differential amount i.e the difference between the earlier billed amount and the revised Bill amount as per the Final Order/True-up Order shall be computed from the date of earlier original bill at previously approved tariff till the date of first instalment arrears bill at revised tariff. For the subsequent Instalments, the carrying cost shall be computed on the balance differential amount (i.e Initial differential amount less the partial differential amounts already paid through subsequent instalments) from the date of last Instalment Invoice till the date of subsequent Instalment Invoice. We have attempted to demonstrate such understanding with the help of following Illustration.

Parameters	Assumptions
Applicable Interest Rate p.a	9%
Differential Bill Amount till Issuance of Tariff Order Date (incl. Carrying Cost till Date of Order)	120
Date of Order	26-12-2018

Parameters	UoM	Instalment Amount Computation					
		05-03-2019	04-04-2019	04-05-2019	03-06-2019	03-07-2019	02-08-2019
Date of Instalment Invoice	dd-mm-yyyy						
Amount on which Carrying Cost is to be Paid	Rs Crs	120	100	80	60	40	20
Days for which Carrying Cost is to be computed	No. of Days	69	30	30	30	30	30
Carrying Cost computed till Date of Instalment Invoice Date	Rs Crs	2.042	0.740	0.592	0.444	0.296	0.148
Instalment Amount to be adjusted	Rs Crs	20	20	20	20	20	20
Balance Differential Amount to be adjusted	Rs Crs	100	80	60	40	20	0
Net Amount to be Billed in the current Instalment Invoice	Rs Crs	22.042	20.740	20.592	20.444	20.296	20.148

Hence, based on the above, we humbly request to this Hon'ble Commission to kindly include appropriate clarification to Regulation 10(7) and 13(4) of proposed Tariff Regulations along with an illustration working demonstrating such principle.

**ANNEXURE 1: RESPONSE OF POWERLINKS IN THE MATTER OF
TRANSMISSION MAJORATION FACTOR DATED 19TH MAY 2017**



To,
The Secretary,
Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi- 110001

Date: 19.05.2017

Sub: Representation regarding draft CERC (Terms & Conditions of Tariff) (Second Amendment) Regulations, 2017

- Ref: (a) Public notice dated 28.04.2017 inviting comments / suggestions / objections from the stakeholders and interested person on draft CERC (Terms & Conditions of Tariff) (Second Amendment) Regulations, 2017**
- (b) Draft CERC (Terms & Conditions of Tariff) (Second Amendment) Regulations, 2017**
- (c) Explanatory Memorandum for the "Draft Central Electricity Regulatory Commission (Terms and Conditions for Tariff) (Second Amendment) Regulations, 2017"**

Respected Sir,

1.1 Vide Public Notice dated 28.04.2017, the Hon'ble Central Electricity Regulatory Commission ("**Hon'ble Commission**") invited comments/suggestions/objections from the stakeholders and interested persons on the Draft CERC (Terms & Conditions of Tariff) (Second Amendment) Regulations, 2017 ("**Draft Amendment**").

1.2 The Draft Amendment proposes to insert Regulation 49A to the CERC (Terms & Conditions of Tariff) Regulations, 2014 ("**Principal Regulation**"). The said proposed Regulation 49A reads as under:

"49A. Transmission Majoration Factor

Transmission Majoration Factor allowed to transmission project executed through JV route in terms of Regulation 4.10A of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 shall stand withdrawn with immediate effect."

1.3 Accompanying the above-mentioned Draft Amendment is an Explanatory Memorandum which seeks to set out the reasons which instigated the issuance of Draft Amendment along with a brief description of the genesis of Transmission Majoration

Tainily

Registered & Corporate office :

10th Floor, DLF Tower A, District Centre Jasola, New Delhi 110025 Tel. : 91 11 45159500
Fax : 91 11 45159555 Email : powerlinks@powerlinks.co.in Website : www.powerlinks.co.in
CIN : U40105DL2001PLC110714



Factor ("TMF"). The reasons rendered by the Hon'ble Commission under the Explanatory Memorandum have been summarized herein below:

- (a) During the period 2004-09, a number of transmission licences were issued for execution of the transmission projects through JV routes.
- (b) Availability of tariff at competitive rates through competitive bidding process.
- (c) Powerlinks Transmission Limited ("**Powerlinks**") is the only company qualifying for TMF while the rest of the 46 projects (which are implemented either exclusively by private companies or with participation of private companies) are not getting any promotional incentive such as Transmission Majoration Factor.
- (d) In Petition no. 18/TT/2014 and 20/TT/2014, certain entities like BRPL and UPPCL have raised objections against grant of TMF over and above the transmission charges and continuation of TMF in case of Powerlinks.
- (e) During the past 11 years (since 2006-07 till 2013-14), Powerlinks has been sufficiently incentivised.
- (f) This will balance the interest of both the project developer availing TMF and that of the consumers.

1.4 It is submitted that abovementioned Draft Amendment are grossly prejudicial to the vested rights of Powerlinks. Please find below the comments and objections of Powerlink on the Draft Amendment.

2. COMMENTS:

2.1 Adherence with Principles of Transparency Mandatory:

2.1.1 The Hon'ble Commission vide its order dated 06.05.2016 in Petition no. 18/TT/2014¹ made following observations:

"78. The petitioner has been availing promotional scheme of Transmission Majoration Factor (TMF) since COD, in accordance with Regulation 4.10A introduced vide Central Electricity Regulatory Commission (Terms & Conditions of Tariff) (First Amendment) Regulations, 2001, dated 21.9.2001 which were to remain in force for the entire life of the

¹ Similar observations were also made by the Ld. Commission in order dated 16.05.2016 in Petition no. 19/TT/2014 and in order dated 23.05.2016 in Petition No. 20/TT/2014



transmission project unless² reviewed earlier or extended by the Commission. It is pertinent to mention that TMF was introduced to encourage private sector participation in transmission sector, however, subsequently a number of private players/JVs have entered into the area of transmission on or after 1st April 2004. The Commission is of the view that there is a need to review the impact of the promotional scheme of TMF and its continuation. Accordingly, Commission directs the staff to examine the issue and submit to the Commission."

2.1.2 In pursuance to above, the staff examined the issue and submitted a report. The same is evident from the following paragraph of the Explanatory Memorandum:

"6. Accordingly, the staff of the Commission examined the matter on file and submitted a report to the Commission."

2.1.3 It is submitted that though the Draft Amendment is premised on the report submitted by the staff of the Commission. However, the same has not been made available to Powerlinks. It is noteworthy that Section 79(3) of the Electricity Act mandate that Hon'ble Commission should ensure transparency while exercising its powers and discharging its functions. In order to ensure transparency, it is prayed that this Report may also be made available and to afford an opportunity to Powerlinks to comment upon the same.

2.1.4 Further the letter and notification dated 28.04.2017 seeking response of Powerlinks by 19.05.2017 was received only on 05.05.2017 leaving only 14 days to respond to the proposal which affects only Powerlinks. The said time period is not sufficient to effectively analyse the Explanatory Memorandum for preparing an effective response as the same would require collecting and analysing all relevant information.

2.1.5 In this regard it is most respectfully prayed that this Hon'ble Commission may kindly grant one month's time (from the date the staff report is provided to Powerlinks) to enable Powerlinks to give detailed comments on the proposed amendment. It is further prayed that the present comments may kindly be treated as preliminary submissions and Powerlinks may be allowed to add/amend/modify the submissions made hereunder, if need be.

2.2 Hon'ble Commission's role under Electricity Act, 2003:

2.2.1 The Hon'ble Commission is mandated to inter alia ensure that the interests of all stakeholders within the sector are adequately balanced and protected and that the

² It is pertinent to note that this order incorrectly records that the right of Powerlink to avail TMF for the entire life of the transmission project was subject to review or extension. A perusal of Regulation 4.10A clearly evidences that such right was absolute, unconditional and not subject to review.



sector as a whole grows in a healthy manner. This is clearly discernible from the Electricity Act, 2003 ("Act of 2003") itself, the long title of which provides as follows:

"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

2.2.2 Further, it is noteworthy that Section 61 of Act of 2003 provides as follows:

"61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*

..."

2.2.3 This Hon'ble Commission is accordingly mandated under the Act of 2003 to ensure that the objectives are fulfilled in letter and spirit. As is amply clear from the Preamble r/w Section 61 of Act of 2003, the Hon'ble Commission, being the sectoral regulator and in its role as the guardian of the sector, is obligated to preserve and protect the interests of all the players and stakeholders in the sector. The Hon'ble Commission has to take a wholesome, holistic and pragmatic view on all the issues before it so as encourage investments and to balance the competing interests of all the stakeholders and not be solely concerned with consumer interest.

2.2.4 Further, the Hon'ble Supreme Court has also recognized that primary intent of the Act of 2003 was to encourage private sector participation. The Hon'ble Apex court



in ***Transmission Corporation of Andhra Pradesh vs. Sai Renewable Power Private Limited***, reported as **(2011) 11 SCC 34** has held that:

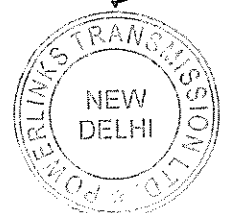
"108. The basic policy of both the Central as well as the State Government was to encourage private sector participation in generation, transmission and distribution of electricity on the one hand and to further the objective of distancing the regulatory responsibilities of the Regulatory Commission from the Government and of harmonising and rationalising the provisions of the existing laws relating to electricity in India, on the other hand. The Objects and Reasons of the Electricity Act, 2003 as well as the Reform Act, 1998 are definite indicators of such legislative intent. The basic objects of these enactments were that the said Regulatory Commission may permit open access in distribution of energy as well as to decentralise management of power distribution through different bodies.

109. The Reform Act, 1998 stated in its Objects and Reasons that the set-up of power sector in force, at that time, was virtually integrated and functional priorities were getting distorted due to resource crunch. This has resulted in inadequate investment in transmission and distribution which has adversely affected the quality and reliability of supply. The two corporations proposed thereunder were to be constituted to perform various functions and to ensure efficiency and social object of ensuring a fair deal to the customer. These Objects and Reasons clearly postulated the need for introduction of private sector into the field of generation and distribution of energy in the State. Efficiency in performance and economic utilisation of resources to ensure satisfactory supply to the public at large is the paramount concern of the State as well as the Regulatory Commission. The policy decisions of these constituents are to be in conformity with the object of the Act. Thus, it is necessary that the Regulatory Commission, in view of this object, take practical decisions which would help in ensuring existence of these units rather than their extinguishment as alleged."

2.2.5 The Hon'ble Supreme Court in the case of ***State of Karnataka and Anr. vs. H. Ganesh Kamath and Ors.*** reported as **(1983)2 SCC 402** has held:

"7. It is well settled principle of interpretation of statutes that the conferment of rule-making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of enabling Act or which is inconsistent therewith or repugnant thereto"

2.2.6 In light of the preceding paragraphs, it is submitted that the Draft Amendment is contrary to the legislative intent and would discourage private investment in sector as a whole. It is also a well settled principle that rule must accord to parent statute. Further, the long title of Act of 2003 (as quoted above) clearly provides for the objectives and sets up the regulatory commissions to fulfil the aspirations of Act of



2003. The Draft Amendment is clearly in violation of the Act of 2003 as it goes against the intent and objective of the Act of 2003.

2.3 Promissory Estoppel and Legitimate Expectation:

2.3.1 It is also pertinent to note that the Draft Amendment is not sustainable when tested on the anvil of principles of Promissory Estoppel and Legitimate Expectation.

2.3.2 The concept of TMF emanates from the order dated 29.05.2001 issued by this Hon'ble Commission in Petition No. 23/2001 wherein this Hon'ble Commission devised an incentive scheme to attract private investors in the field of transmission. Such scheme was conceptualised by this Hon'ble Commission in order to address the need to expedite the investment of private players in the transmission business. Relevant excerpts from the above Order in this respect is re-produced below:

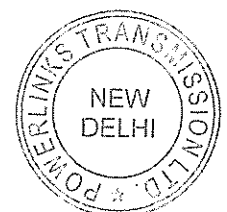
"Transmission Majoration Factor (TMF)

*22. In discussing the elements of "Insurance" and "Target Availability/incentive" for transmission lines, the Commission has mentioned a concept designated as "Transmission Majoration Factor". Introduction of this factor is in due consideration of the fact that the Commission **recognizes the need for expediting new investments** in the transmission sector. It has **also recognized the fact that the private investors, in transmission, have to incur additional liabilities in their pioneering efforts** compared to long standing central transmission utility like PGCIL. Accordingly, in respect of such lines executed by private investors, the Commission proposes to allow 10% mark up (pre-tax) on transmission charges as Transmission Majoration Factor. This would be available only to the new private investors who would like to enter the field. Accordingly, there would be no need to provide for TMF in respect of projects executed by PGCIL. This will not also apply to the HVDC projects to be executed by private investors involving heavy capital investments and do not, hence, justify a special treatment by way of Transmission Majoration Factor. In respect of PGCIL, the development surcharge of 10% provided to it takes care of requirements of TMF allowed for private investors in respect of new investments."*

(Emphasis supplied)

2.3.3 The Hon'ble Commission had while proposing the above Scheme examined all the aspects of the transmission business including the adequacy of return on the investment and the interest of the consumers over the entire life of the Project. The Hon'ble Commission had envisaged an additional IRR of at least 4.5% which was considered adequate to attract necessary private investments in the Sector. This is evident from the relevant excerpts as follows:

Toussaint



*"23. The directions contained in the Commission's order shall yield an additional IRR of about 4.5% in US Dollar terms over and above 8.84% indicated by the petitioner. This additional IRR includes the effect of monthly payment of return on equity vis-a-vis the annual return on equity of 16%. By taking into account the effect of payment of depreciation and interest payment on monthly basis as compared to the quarterly or half yearly repayment of loan, the IRR would improve further. **The returns that may be earned by the petitioner and other private investors in the light of above directions is considered to be reasonable and adequate to attract necessary investment in the private sector, on the one hand and protect the consumers' interest on the other hand.**"*

(Emphasis supplied)

2.3.4 The Hon'ble Commission had, while proposing the above Scheme, examined all the aspects of the transmission business including the adequacy of return on the investment and the interest of the consumers over the entire life of the Project. The Hon'ble Commission had envisaged an additional IRR of at least 4.5% which was considered adequate to attract necessary private investments in the Sector. This is evident from the relevant excerpts as follows:

*"23. The directions contained in the Commission's order shall yield an additional IRR of about 4.5% in US Dollar terms over and above 8.84% indicated by the petitioner. This additional IRR includes the effect of monthly payment of return on equity vis-a-vis the annual return on equity of 16%. By taking into account the effect of payment of depreciation and interest payment on monthly basis as compared to the quarterly or half yearly repayment of loan, the IRR would improve further. **The returns that may be earned by the petitioner and other private investors in the light of above directions is considered to be reasonable and adequate to attract necessary investment in the private sector, on the one hand and protect the consumers' interest on the other hand.**"*

(Emphasis supplied)

2.3.5 Therefore, it is clear from the above excerpts that this Hon'ble Commission had proposed the scheme of Transmission Majoration Factor after due scrutiny of the investment requirement in the transmission sector and the interest of the consumers as well considering its impact over entire life of the Project. It is also pertinent that this Hon'ble Commission had explicitly mentioned in the above Order and other subsequent Orders that such scheme would be available to new entrepreneurs who enter the sector upto a pre-determined period ending 31.03.2004 and as such would be eligible to avail such Transmission Majoration Factor till the entire life of the Project. This was an unconditional assurance specifically provided not only to attract immediate investments in the Sector but also to assure the availability of such



incentive scheme throughout the entire life of the Project which would ensure an additional IRR of at least 4.5% as mentioned above to the investors. The relevant excerpts from the above Order is re-produced below:

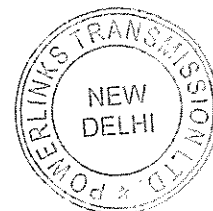
*"24. Commission would like to make it clear that the **TMF is a one-time measure to encourage private entrepreneurs to promote investments in transmission sector.** We expect that the serious entrepreneurs would seize this opportunity and we also expect that the PGCIL would also expedite urgent action to cover all the critical lines within a limited period in meaningful and constructive cooperation with private investors. **Accordingly, the TMF would be available to new entrepreneurs only for the period up to 31st March 2004.** This would, thus, be coterminous with the Commission's order dated 21-12-2000 on terms and conditions of tariff. **However, the benefit of TMF would continue to be available during the entire life of the project in respect of the investors who enter the transmission sector up to the period ending 31-3-2004.**"*

(Emphasis supplied)

2.3.6 Powerlinks, a joint venture company of Tata Power Company Limited and Power Grid corporation of India Limited ("**PGCIL**") was granted transmission licence on 13.11.2003 for a period of 25 years. Powerlinks was the only company in JV route which applied for and was granted transmission licence during the 2001-04 tariff period and, therefore, became eligible to avail the proposed scheme on Transmission Majoration Factor.

2.3.7 The Hon'ble Commission thereafter promulgated the Tariff Regulations 2004 which did not contain such provisions on Transmission Majoration Factor. Hence, Powerlinks specifically moved a Petition before this Hon'ble Commission seeking clarification on the availability of the TMF for the life of the Project as envisaged earlier. This Hon'ble Commission had, while clarifying the availability of such TMF for the entire life of the project, also noted the settled legal position that the expiry of a temporary statute does not obliterate the rights or obligations under that statute. In view of the above, the necessary clarification as provided by this Hon'ble Commission through the Order dated 01.07.2004 is reproduced below:

*"6. The notification dated 26.3.2001 which provided for payment of Transmission Majoration Factor was valid up to 31.3.2004. Under these circumstances, the question arises as to whether with the expiry of the notification dated 26.3.2001, the provisions regarding the Transmission Majoration Factor as contained in Regulation 4.10A can still be enforced. **The settled legal position is that the expiry of a temporary statute does not obliterate the rights or obligations under that statute. The nature of the right and obligations resulting from the provisions of the temporary statute and their character may have to be***



regarded in determining whether the said right or obligations endures beyond the life of the statute. The Hon'ble Supreme Court in State of Orissa Vs Bhupendra Kumar (AIR 1962 SC 945) has held that:

".....in considering the effect of the expiration of a temporary statute, it would be unsafe to lay down any inflexible rule. If the right created by the statute is of enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired....."

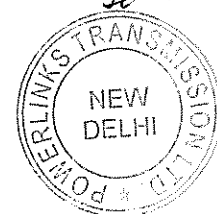
7. For an answer to the question raised, we consider the background leading to incorporation of Regulation 4.10A in the notification dated 26.3.2001. The Regulation 4.10A notified on 21.9.2001 was preceded by the Commission's order dated 29.5.2001 in Petition No.23/2001. The Commission recognised the fact that private investors in transmission had to incur additional liabilities in their efforts compared to long standing transmission utilities like Power Grid Corporation of India Limited. Accordingly, in respect of the projects executed by private investors, the Commission allowed 10% mark up (pre-tax) on transmission charges as Transmission Majoration Factor. The Commission directed that the Transmission Majoration Factor would be available to new entrepreneurs only for the period up to 31.3.2004, which implied that the benefit of Transmission Majoration Factor would continue to be available during the entire life of the project in respect of investors who entered the transmission sector up to the period 31.3.2004.

....

*8. When seen in the light of above background, in our considered opinion, Regulation 4.10A **ibid** has conferred a substantive right on the petitioner to claim Transmission Majoration Factor. Therefore, despite the fact that no provision for payment of Transmission Majoration Factor is made in the 2004 Regulations, the petitioner shall be entitled to claim the Transmission Majoration Factor throughout the period of licence, which is 25 years from the date of issue."*

(Emphasis supplied)

2.3.8 The Hon'ble Commission has, therefore, made it clear to Powerlinks that even if there is no provision in the Tariff Regulations 2004, it is eligible to claim TMF through the 25 years from the date of issue of the license. It is pertinent to observe that the Hon'ble Commission had explicitly mentioned about the availability of the TMF for Powerlinks throughout the entire life of the Project without any condition for interim review or abolishment of the same. It is submitted that investment in Generation and Transmission Projects are conceived only after evaluation of the risks and return



based on projections and available statutory assurances/clearances/consents. This would define the projected IRR which helps the investor to make his decision on the investment. The assurance of availability of the TMF for the entire life of the Project was one such key factor which attracted Powerlinks to invest into a Project extending for a life of 25 years. The IRR of the Project as envisaged initially considered the TMF for the entire lifetime of the Project and decision to invest laid entirely on expected returns based on such assurance.

2.3.9 It is pertinent to note that the objection with respect to allowance and continuation of TMF has been taken by beneficiaries right from the first Tariff Order of Powerlinks. In its Order dated 28.04.2008 in Petition No. 144 of 2007, this Hon'ble Commission has not only rejected the objection but has also elaborately dealt with the objection tracing out the above history to conclude that TMF is a substantive right conferred to Powerlinks for entire life of the license and, hence, it has to be allowed. Relevant extract of the said Order is as follows:

"8. When seen in the light of above background, in our considered opinion, Regulation 4.10A ibid has conferred a substantive right on the petitioner to claim Transmission Majoration Factor. Therefore, despite the fact that no provision for payment of Transmission Majoration Factor is made in the 2004 Regulations, the petitioner shall be entitled to claim the Transmission Majoration Factor throughout the period of licence, which is 25 years from the date of issue."

"58. Therefore, 10% mark up (pre-tax) on the transmission charges given under para 52 above shall be allowed as the Transmission Majoration Factor in the present petition since petitioner had entered the transmission sector before 31.3.2004 and was even granted licence before this date."

2.3.10 As evident from above, right from 2001, assurances were extended to Powerlinks that it can avail TMF for a period of 25 years. It is noteworthy that Powerlinks has made a substantial investment of around Rs. 1550 crores to create the transmission assets required to evacuate the power from Tala HEP. Such investments have been made on the basis of Regulation 4.10A of the Tariff Regulations, 2001 r/w orders dated 29.05.2001 in Petition no. 23/2001 and 01.07.2004 in Petition no. 51/2004 which have been further ratified by this Hon'ble Commission in the subsequent tariff orders³. Having acted on the promises made by this Hon'ble Commission under its Regulation and subsequent orders and having altered their position which is manifested by the creation of necessary transmission assets, it is

³ Order dated 28.04.2008 in Petition no. 147/2007, order dated 30.04.2008 in Petition no. 148/2007, order dated 30.04.2008 in Petition no. 149/2007, order dated 27.11.2008 in Petition no. 92/2008, order dated 30.07.2009 in Petition no. 64/2009, order dated 18.08.2010 in Petition no. 286/2009, order dated 17.03.2011 in Petition no. 287/2009, and order dated 17.03.2011 in Petition no. 288/2009,



undisputable that the Doctrine of Promissory Estoppel and Legitimate Expectation come into play.

2.4 Amendment should not abrogate vested rights:

2.4.1 In the present case, it is pertinent to note that Powerlinks has a vested right of getting the benefit of TMF by virtue of Regulation 4.10A of the CERC (Terms and Conditions of Tariff) Regulations, 2001 ("**Tariff Regulations, 2001**"). Further, this Hon'ble Commission has confirmed the right of Powerlinks to claim TMF by virtue of orders dated 29.05.2001 in Petition no. 23/2001 and 01.07.2004 in Petition no. 51/2004 and tariff orders issued from time to time. The said Regulation 4.10A reads as follows:

"4.10A Transmission Majoration factor

In respect of the transmission projects executed through IPTC/JV routes, 10% (Ten percent) markup (pre-tax) on transmission charges shall be allowed as Transmission Majoration Factor.

Provided that Transmission Majoration Factor shall be allowed on HVDC projects executed through IPTC/JV routes.

Provided further that the Transmission Majoration Factor shall be allowed during the entire life of the transmission project to the new investor entering the transmission sector through IPTC/JV routes and who has been granted a transmission licence under Section 27 of the Indian Electricity Act, 1910, upto 31-3-2004."

2.4.2 As evident from above, by way of Regulation 4.10A, the Hon'ble CERC assured that new investments will be encouraged by way of TMF and that the same will be applicable during the entire life of the transmission project. The criteria for qualifying for TMF was also specified by this Hon'ble Commission, namely-

- (a) It should be a new transmission project;
- (b) The new transmission project should be executed through IPTC/JV route; and
- (c) The transmission licence (under Section 27C of the Indian Electricity Act, 1910) should be obtained upto 31.03.2004.

Once the above eligibility criteria are fulfilled, the right of enjoyment of TMF becomes absolute, vested and is unconditional and not subject to any further embargoes or conditions or to any review.

2.4.3 The term "vested right" is defined in Black's Law Dictionary (7th Edition) at page1324 as:



"A right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent."

Further, the term "vested" (adj.) is defined in Black's Law Dictionary (7th Edition) at page 1557 as:

"That has become a completed, consummated right for the present or future enjoyment; not contingent; unconditional; absolute."

A co-joint reading of the above reveals that a vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned.

2.4.4 In this context, it is noteworthy that based on such representation by this Hon'ble Commission, Powerlink (a JV between Tata Power company holding 51% equity and PGCIL holding 49% equity) was formed for laying down a new transmission project for evacuation of power from Tala HEP. Further, Powerlinks was granted transmission licence on 13.11.2003 i.e. within the stipulated timeline of up to 31.03.2004. As such, having qualified all the criteria prescribed by Regulation 4.10A of the Tariff Regulations, 2001, Powerlinks has a vested right to enjoy the benefit of TMF throughout the entire life of the Project i.e. for 25 years.

2.4.5 The settled law is that rights cannot be taken away by new legislation or amendment. This settled law is based on the legal maxim *nova constitution futuris formam imponere debet non prateritis* which means "a new law ought to regulate what is to follow, not the past".

2.4.6 The Hon'ble Supreme Court in the case of ***Mahabir Vegable Oils (P) Ltd. & Anr. v. State of Haryana & Ors.*** reported as **(2006)3 SCC 620** has held as follows:

"22. It is not in dispute that when the appellants herein started making investments, Rule 28-A was operative. Representation indisputably was made in terms of the said Rules. The State, as noticed hereinabove, made a long-term industrial policy. From time to time it makes change in the policy keeping in view the situational change.

23. The State intended inter alia to grant incentive to include industrial units by way of waiver and/or deferment of payment of sales tax wherefor Rule 28-A was made. The sales tax laws enacted by the State, as noticed hereinbefore, contain a provision empowering the State to grant such exemption.

24. The relevant provisions of the Act and the Rules framed thereunder indisputably were made keeping in view the industrial policy of the State. Such industrial policies by way of legislation or otherwise, subject, of course, to the provisions of the statute have been framed by several other States.

Tamir



25. *It is beyond any cavil that the doctrine of promissory estoppel operates even in the legislative field. Whereas in England the development and growth of promissory estoppel can be traced from Central London Property Trust Ltd. V. High Trees House Ltd. in India the same can be traced from the decision of this Court in Collector of Bombay v. Municipal Corpn. of the City of Bombay. In that case the Government made a grant of land (which did not fulfil requisite statutory formalities) rent free. It, however, claimed rent after 70 years. The Government, it was opined, could not do so as they were estopped...*"

"44. *By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996 as also the subsequent amendments carried out in 1996 as also the subsequent amendments prior to 2001, could not, thus, have taken away the rights of the appellant with retrospective effect.*"

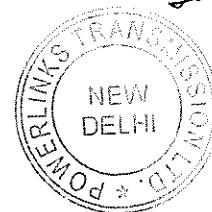
2.5 Regulatory uncertainty:

2.5.1 It is submitted that the regulatory uncertainty triggered by the Draft Amendment has the potential of irreparably effecting the investments in the transmission sector. Predictability and ability to create trust of the stakeholders are some of the attributes of a good regulatory system. Predictability of regulatory decisions is to be seen with regard to consistency of regulatory decisions over time so that stakeholders are able to anticipate them with reasonable certainty. Predictability is necessary to give confidence to investors to take investment decisions. The increasing risks associated with assurances rendered to attract investments, may cause serious concerns amongst the market players.

2.6 Draft Amendment does not satisfy the test of Article 14 of the Constitution of India:

2.6.1 The Draft Amendment does not satisfy the test laid down by Article 14 of the Constitution of India. The right to equality incorporated under Article 14 of the Constitution of India has been explained by the Hon'ble Supreme Court in the case of **Prem Chand Somchand Shah & Anr. v. UoI & Anr.** reported as (1991)2 SCC 48 in the following words:

"8. *As regards the right to equality guaranteed under Article 14 the position is well settled that the said right ensures equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment. It means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Conversely discrimination may result if persons dissimilarly situate are treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In*



that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question."

Therefore, what follows from above is that not only equals are to be treated as equals but it is also imperative that unequals should not be treated as equals.

2.6.2 In this light, one must trace the genesis of TMF. For the first time, the concept of TMF was introduced by this Hon'ble Commission in its order dated 29.05.2001 in Petition No.23/2001. Having duly considered the rival contentions of the party, this Hon'ble Commission in the said order noted that:

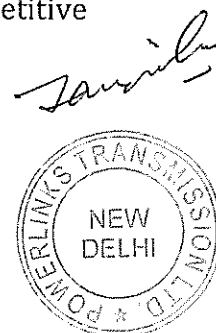
*"24. Commission would like to make it clear that the **TMF is a one-time measure to encourage private entrepreneurs to promote investments in transmission sector. We expect that the serious entrepreneurs would seize this opportunity** and we also expect that the PGCIL would also expedite urgent action to cover all the critical lines within a limited period in meaningful and constructive cooperation with private investors. **Accordingly, this TMF would be available to new entrepreneurs only for a period up to 31st March 2004.** This would, thus, be co-terminus with the Commission's order dated 21-12-2000 on terms and conditions of tariff. **However, the benefit of TMF would continue to be available during the entire life of the project in respect of the investors who enter the transmission sector up to the period ending 31-3-2004.**"*

(Emphasis supplied)

As evident from above, this Hon'ble Commission came to a duly considered conclusion that the benefit of TMF would continue to be available during the entire life of the project. On this basis of this promise, this Hon'ble Commission invited private entrepreneurs to invest and enter in the transmission sector and further highlighted unequivocally that TMF is a one-time measure which can be availed by an investor who enters the transmission sector up to the period ending 31.03.2004. Similar stipulations are also present in Regulation 4.10A of the Tariff Regulations, 2001 which was notified on 21.09.2001⁴.

2.6.3 In this regard, it is respectfully submitted that at the time when TMF was approved for private investors entering the sector through JV route, the projects allotted through bidding were required to build the TMF in their bids. This would be evident from the following extract of Hon'ble Commission's Order dated 09.05.2002 in Case No. 54 of 2001, approving the bidding process for transmission competitive bidding regulations:

⁴ Reproduced at para 2.1.2.



"81. Having said that, it is important to summarize the guiding principles for regulating ISTS projects procured through the process of competitive bidding:

....

As per the Commission's notification dated 21.9.2001, a Transmission Majoration Factor (TMF) of 10 percent is provided to the IPTC/JV projects to encourage private investment in the transmission sector. The bidders shall factor the TMF @ 10 percent (pre-tax) on transmission service charges in their bids in accordance with the said notification. The TMF shall not be allowed on HVDC projects executed through IPTC/JV routes."

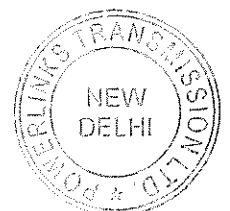
Thus, at this point in time, an equal opportunity was given to all bidders to participate by submitting their bids (which would include the TMF component).

2.6.4 It is noteworthy that, during the period 29.05.2001 to 31.03.2004, all investors stood on a similar footing as all of them had an equal opportunity to come forth and invest in the sector. However, by obtaining a transmission licence on 13.11.2003, Powerlinks distinguished its case from the rest. Since there was no other entrepreneur who participated in this scheme, as on 31.03.2004, Powerlinks stood as a separate class distinct from all other transmission licensees in the country who did not participate under the scheme. As such, any attempt as on date to equate Powerlinks to the rest of the transmission licensee, including by way of notification of the extant Draft Amendment as final, would be completely unjust and arbitrary. This would also be violative of Article 14 of the Constitution of India which prescribes that unequals cannot be treated as equals.

2.6.5 In light of the above, it is evident that the Draft Amendments ignores the march of events and the rights vested and accrued in the course of years by reverting to a situation that existed on 31.03.2004 when every future and existing market player was at an equal footing. In furtherance of the above, it can be concluded that reasons enumerated under the Explanatory Memorandum, such as, 46 other projects are not getting TMF benefit and that entities like BRPL and UPPCL are objecting to it, are unsustainable and violative of Article 14.

2.6.6 Another facet of Article 14 has been explained by the Hon'ble Supreme Court in the case of *State Bank's Staff Union (Madras Circle) v. UoI & Ors.* reported as *(2005)7 SCC 584* wherein it was observed as follows;

"31. ...Whenever any amendment is brought in force retrospectively or any provision of the Act is deleted retrospectively, in this process rights of some are bound to be affected one way or the other. In every case the exercise by the legislature by introducing a new provision or deleting an existing provision with retrospective effect per se does not amount to violation of Article 14 of the Constitution. The legislature can change, as observed by this Court in



Cauvery Water Disputes Tribunal, Re the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of legislature amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of powers."

(Emphasis supplied)

2.6.7 Viewing from this angle, it is evident that the Draft Amendment is not a class action but is targeting only one entity i.e. Powerlinks. Hence, the Draft Amendment is violative of Article 14 of the Constitution.

2.7 Impact on tariff at consumer end:

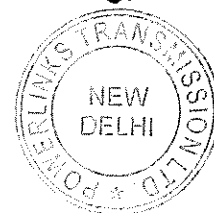
2.7.1 It is reiterated that the concept of TMF was introduced by this Hon'ble Commission in its order dated 29.05.2001 in Petition no. 23/2001. Having duly considered the rival contentions of the parties, this Hon'ble Commission in the said order noted that the returns that may be earned by a private investor is reasonable and adequate to attract necessary investment in the private sector on one hand and protect the consumers' interest on the other hand. The relevant portion of the order is extracted herein below:

*"23. The directions contained in the Commission's order shall yield an additional IRR of about 4.5% in US Dollar terms over and above 8.84% indicated by the petitioner. This additional IRR includes the effect of monthly payment of return on equity vis-à-vis the annual return on equity at 16%. By taking into account the effect of payment on monthly basis as compared to quarterly and half yearly repayment of loan, the IRR would improve further. **The returns that may be earned by the petitioner and other private investors in the light of above directions is considered to be reasonable and adequate to attract investment in the private sector, on the one hand and protect the consumers' interest on the other hand.**"*

(Emphasis supplied)

A perusal of the above reveals that before extending the assurance of TMF benefit, the Hon'ble Commission has duly studied the impact of TMF on consumers and ensured that the interest of investor and consumers are balanced. Hence at such belated stage, resorting to the reasoning of balancing of interests in the Explanatory Memorandum, is completely baseless and devoid of merit.

2.7.2 Without prejudice to the above, it is submitted that in any case the impact on tariff at consumers end as a result of TMF is miniscule. The total annual transmission



charge of Inter State Transmission System for the FY 2016-17 is of the order of Rs 25000 Crores for about 600 BUs handled, which is about 41.66 paisa/kWh. The total charge on account TMF allowed in terms of the 2001 Tariff Regulations is about Rs 22 Crores for FY 2016-17. Thus, the impact of TMF is only 0.088%. This may translate to less than 0.04 paisa/kWh (1/25th of one paisa/kWh) on beneficiaries or practically no impact on the consumers. On the other hand the impact of withdrawal of TMF on Powerlinks is 10% of the annual transmission charges. Thus, balance of convenience lies in favor of Powerlinks.

2.8 Summary

2.8.1 As highlighted above, that reasons provided by the Hon'ble Commission in the Explanatory Memorandum is untenable in law and equity. It is pertinent to note that Powerlinks by virtue of Regulation 4.10A of the Tariff Regulations, 2001 r/w orders dated 29.05.2001 in Petition no. 23/2001 and 01.07.2004 in Petition no. 51/2004 has a vested right to claim TMF for entire life of the project. It is submitted that Powerlinks should not be equated with other transmission licensees who has established business after 2004 as the same does not satisfy the test laid down by Article 14 of the Constitution of India. The Hon'ble Commission should ensure that the interests of all stakeholders within the sector are adequately balanced and protected and that the sector as a whole grows in a healthy manner. The Hon'ble Commission should take a wholesome, holistic and pragmatic view on all the issues before it so as encourage investments and to balance the competing interests of all the stakeholders and not be solely concerned with consumer interest.

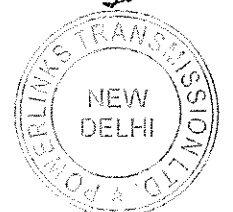
2.8.2 The Hon'ble Commission in the Explanatory Memorandum has justified withdrawal of TMF on following counts -:

(a) During the period 2004-09, a number of transmission licences were issued for execution of the transmission projects through JV routes. (Para.3 of Explanatory Memorandum)

(b) Availability of tariff at competitive rates through competitive bidding process. (Para.4 of Explanatory Memorandum)

(c) Powerlinks is the only company qualifying for TMF while the rest of the 46 projects (which are implemented either exclusively by private companies or with participation of private companies) are not getting any promotional incentive such as TMF. (Para.4 of Explanatory Memorandum)

d) In Petition no. 18/TT/2014 and 20/TT/2014, certain entities like BRPL and UPPCL have raised objections against grant of TMF over and above the transmission charges and continuation of TMF in case of Powerlinks. (Para.4 of Explanatory Memorandum)



e) During the past 11 years (since 2006-07 till 2013-14), Powerlinks has been sufficiently incentivised. (Para.7 of Explanatory Memorandum)

f) This will balance the interest of both the project developer availing TMF and that of the consumers. (para.7 of Explanatory Memorandum)

2.8.3. It submitted that reasons adduced by the Hon'ble Commission for withdrawal of TMF as highlighted in (a), (b)(c) and (d) are not justified in law because other projects are not entitled to claim the benefit of TMF. The other transmission licensees who are raising an objection as on date have commissioned their projects after 31.03.2004 i.e the last date up to which one time benefit of TMF was available under the first amendment of 2001 Tariff Regulations. Powerlinks distinguished its case from the rest by participating in the scheme. Since there was no other entrepreneur who participated in this scheme, as on 01.04.2004, Powerlinks stood as a separate class distinct from all other transmission licensees in the country. As such, any attempt as on date to equate Powerlinks to the rest of the transmission licensee, including by way of notification of the extant Draft Amendment as final, would be completely unjust and arbitrary. This does not satisfy test laid down under Article 14 of the Constitution of India which prescribes that unequals cannot be treated as equals.

2.8.4 It is submitted that reasons provided by the Hon'ble Commission for withdrawal of TMF as highlighted in (e) are not tenable in eyes of law and equity. It is pertinent to note that the order dated 06.05.2016 passed in Petition No. 18/TT/2014 incorrectly records that the right of Powerlink to avail TMF for the entire life of the transmission project was subject to review or extension. A perusal of Regulation 4.10A clearly evidences that such right was absolute, unconditional and not subject to review. Further, it is pertinent to note that the objection with respect to allowance and continuation of TMF has been taken by beneficiaries' right from the first Tariff Order of Powerlinks. However, this Hon'ble Commission has not only rejected such objections but has also elaborately dealt with the objection tracing out the history to conclude that TMF is a substantive right conferred to Powerlinks for entire life of the license and, hence, it has to be allowed.

2.8.5 It is submitted that reason as highlighted in (f) that the Draft Amendment will balance the interest of both the project developer availing TMF and that of the consumers is incorrect and unjust. As highlighted earlier (at para 2.8.2 above), the impact on tariff at consumers end as a result of TMF is only 0.088 % which translate to less than 0.04 paisa/kWh which is very miniscule, practically having no impact on the consumers. On the other hand, the impact of withdrawal of TMF on Powerlinks is 10 % of the annual transmission charges. Therefore, balance of convenience lies in favor of Powerlinks. Further, it is reiterated that the concept of TMF was introduced by this Hon'ble Commission in its order dated 29.05.2001 in Petition no. 23/2001.

Sarvika



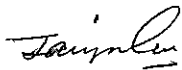
Having duly considered the rival contentions of the party, this Hon'ble Commission in the said order noted that the returns that may be earned by a private investor is reasonable and adequate to attract necessary investment in the private sector on one hand and protect the consumers' interest on the other hand.

2.8.6 The letter and notification dated 28.04.2017 seeking response of Powerlinks by 19.05.2017 was received only on 05.05.2017 leaving only 14 days to respond to the proposal which affects only Powerlinks. The said time period is not sufficient to effectively analyse the Explanatory Memorandum for preparing an effective response as the same would require collecting and analysing all relevant information.

In light of above, it is most respectfully prayed that this Hon'ble Commission may kindly grant one month's time (from the date the staff report is provided to Powerlinks) to enable Powerlinks to give detailed comments on the proposed amendment and thereafter grant it an opportunity of being heard.

Thanking you,

For Powerlinks Transmission Limited



Jayant Tiku
CEO & Executive Director