

**BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

Petition No. 12/99, 13/99, 14/99 and 16/99

**Coram:**

1. Shri S.L. Rao, Chairman
2. Shri D.P. Sinha, Member
3. Shri G.S. Rajamani, Member
4. Shri A.R. Ramanathan, Member

In the matter of

For seeking provisional approval of incentive based on availability of  
Transmission System for the years 1997-98 and 1998-99

In the matter of

M/s Power Grid Corporation of India Ltd.,  
B-9, Outab Institutional Area,  
Katwaria Sarai,  
New Delhi – 110016.

.... Petitioner

Vs

Bihar State Electricity Board and others

... Respondents

The following were present :-

- |   |                         |
|---|-------------------------|
| 1. Shri Parag Tripathi, Sr. Advocate, PGCIL | ... Petitioner          |
| 2. Shri Pramod Dayal, Advocate, PGCIL       | -do-                    |
| 3. Shri Mahendra Kumar, GM, PGCIL           | -do-                    |
| 4. Shri H.S. Bedi, Director PSEB            | ....Respondents (16/99) |
| 5. Shri Shyam Moorjani, Advocate, RSEB      | -do-                    |
| 6. Shri V.K. Gupta, SE, RSEB                | -do-                    |
| 7. Shri Umesh Gupta, Director, RSEB         | -do-                    |
| 8. Shri G.P. Sarkar, Sr. GM, GRIDCO, Orissa | ....Respondents (12/99) |
| 9. Shri S.N. Akhauri, E in C, BSEB          | -do-                    |
| 10. Shri S.S. Rekhi, Retd. CE, BSEB         | -do-                    |

**ORDER  
(Dates of Hearing 27/1, 10/2 & 21/2/2000)**

The Petitioner, Power Grid Corporation of India, has filed these petitions for the Commission's approval to the incentive for the years 1997-98 and 1998-99 for Eastern Region (Petition No. 12/99), Western Region (Petition No. 13/99), Southern Region (Petition No. 14/99) and Northern Region (Petition No. 16/99), based on the availability of the transmission system during these years. Interlocutory applications have been filed by the petitioner for interim order in its favour pending final disposal of the petitions which have been dealt with appropriately. The parties have raised certain questions of law, common to all these petitions and, therefore, these petitions were heard together.

2. The petitioner is a Government of India Undertaking, incorporated under the Companies Act, 1956 as National Power Transmission Corporation Limited, later on re-named as Power Grid Corporation of India (Powergrid) with effect from 23.10.1992 and has been notified as Central Transmission Utility by the Central Government in exercise

of powers under sub-section (1) of section 27A of the Indian Electricity Act, 1910. The main objects of the petitioner company, *inter alia*, include development of power system network and to carry on manufacturing, trading and other business. The petitioner took over the transmission functions from NTPC, NHPC, NLC and NEEPCO w.e.f. 1.4.1992. As the norms for transmission tariff were not decided, tariff for the various transmission systems used to be notified, by the Central Government on system to system basis.

3. The Central Government vide Notification No. 2/3/Powergrid/Tariff/97, dated 16.12.1997, prescribed the norms and factors in accordance with which the tariff leviable for transmission of electricity by Powergrid to the Boards and other persons, called the beneficiary, shall be determined. The notification, *inter alia*, prescribed 95% normative availability of the transmission system. Paras 6 and 7 of the notification lay down the manner of computation of annual transmission charges. According to these provisions, full annual transmission charges shall be recoverable at 95% availability of operation. Para 8 of the notification which relates to payment of incentive, reads as below: -

**"8. Incentives:**

In addition to the transmission charges, 'POWERGRID' shall be paid incentive as under:

For availability of the system beyond 95 percent the rate of incentive shall not exceed 1.0 percent return on equity for each percentage point of increase in availability."

4. Para 11 of the notification dated 16.12.1997, makes certain general provisions and for facility of reference the said para is reproduced below: -

**"11. General:**

11.1 The tariff for transmission of electricity by 'Transmission Utility' to a Board may also be determined in deviation of the norms, other than the norms specified in this notification subject to the condition that: -

(a) The overall tariff of electricity transmitted calculated on the basis of the norms in deviation does not exceed the tariff calculated on the basis of the norms specified in this notification.

(b) The concerned State Government(s) has, after satisfying itself, recommended that the deviations made are justified; and

(c) The Central Government after satisfying itself that the overall per unit tariff is in accordance with condition (a) above, approves the deviation.

11.2 This notification shall be valid for the existing and new transmission systems of POWERGRID and shall be applicable with effect from 1<sup>st</sup> April, 1997. The tariff shall be computed financial year wise starting from the financial year 1997-98 for a period of 5 years, or such longer period as agreed to by POWERGRID and the beneficiaries in its transmission service agreement. For assets commissioned on or after 1.4.97, the annual transmission charges as detailed in para 6 shall be applied for the first financial year on pro-rata basis for completed months of use.

At the time of computing the tariff for a block of five years as above escalation @ 10% per annum on the O&M charges computed at the rates given at para 6 (c) will be considered which shall be subject to year end adjustment after availability of final indices for the relevant year."

5. Based on the terms and conditions laid down by the Central Government for transmission tariff, the tariff applicable to individual transmission systems was notified

by the Central Government. The tariff notifications issued by the Central Government keeping in view the norms prescribed under the notification dated 16.12.1997, and stated to be by virtue of powers conferred by Section 41(1) of the Electricity (Supply) Act, 1948, the Supply Act, are as under and these notifications too make provisions for payment of incentive:

- (i) Notification dated 20.7.1998 for WR Transmission System.
- (ii) Notification dated 16.11.1998 for NR Transmission System.
- (iii) Notification dated 1.12.1998 for SR Transmission System.
- (iv) Notification dated 4.12.1998 for ER Transmission System.

The above region-wise principal tariff notifications were subsequently amended in consideration of commercial operation of additional transmission lines and associated bays. A notification dated 4.2.1999, further prescribed that the availability of the transmission system shall be certified by the Regional Electricity Board.

6. Meanwhile, the Electricity Regulatory Commissions Act 1998 (the Regulatory Commissions Act) was enacted. In exercise of power conferred under sub-section (1) of section 3 of the Regulatory Commissions Act, the Central Electricity Regulatory Commission was constituted vide notification dated 24<sup>th</sup> July, 1998. The Central Commission has, *inter alia*, been assigned the function of regulating the inter-state transmission of energy including tariff of the transmission utilities in terms of section 13 (c) of the Regulatory Commissions Act. By virtue of powers under section 51 of the Regulatory Commissions Act, the Central Government has omitted with effect from 15.5.1999 Section 43 A (2) of the Supply Act, which authorised the Central Government to determine the terms, conditions and tariff for "sale of electricity" by a Generating Company, wholly or partly owned by it.

7. Before coming to the core issues, it may be necessary to take note of certain other related developments. The Parliament enacted the Electricity Laws (Amendment) Act, 1998 (the Amendment Act) which came into force w.e.f. 31.12.1998. In terms of Section 10 of the Amendment Act, Section 41 of the Supply Act was substituted as under:-

"41. Use of transmission lines-

(1) Until the Central Commission is established, the Central Government and thereafter the Central Commission in the case of inter-State transmission system and until the State Commission is established, the State Government and thereafter the State Commission in the case of intra-State transmission system may determine the charges payable to the Central Transmission Utility or State Transmission Utility as the case may be, for the use of transmission system by a Board, its successor entity, generating company, licensee or any other person.

(2) The Central Transmission Utility or State Transmission Utility, as the case may be, may enter into an agreement with any transmission licensee for the exclusive use of the transmission system constructed, maintained and operated by the transmission licensee."

(3) Where the Central Transmission Utility or the State Transmission Utility, as the case may be, considers it necessary to use for any purpose any transmission system or transmission line or main transmission line of a generating company or a licensee, it shall have the power to use such lines to the extent to which the capacity thereof is surplus to the requirements of the generating company or the licensee on payment of charges calculated in accordance with the provisions of the Fifth Schedule.

8. Section 41 of the Supply Act, as it stood prior to amendment is reproduced below:

**41. Use by Board of transmission lines. -**

(1) Where the Board or a Generating Company considers it necessary to use for any of its purposes any transmission lines or main transmission lines of a licensee, the Board or a Generating Company shall have power to use such lines to the extent to which the capacity thereof is or thereafter remains surplus to the requirements of the licensee for the transmission of electricity, on payment of charges calculated in accordance with the provisions of the Fifth Schedule.

(2) The Board or a Generating Company may, by agreement with any licensee or other person, use any transmission line or main transmission line of that licensee or person for such time and upon such terms as may be agreed.

9. The petitions before us relate to incentive relating to 1997-98 and 1998-99. In these petitions, the petitioner has based its claim for incentive on the Central Government notifications adverted to above, which as already noted are founded on the norms laid down in Central Government notification dated 16.12.1997. However, the certification of Availability has been done by the RLDCs and not by REBs as provided in Central Government notification dated 4.2.1999.

10. The respondents in these petitions have opposed the relief prayed for by the petitioner. The main grounds of attack by the respondents are that the tariff notifications issued by the Central Government after establishment of the Central Commission are without legal force; that certification of Availability by RLDCs is not in order; that methodology for working out Availability of transmission system had not been specified by the Central Government and the petitioner while calculating Availability has assigned equal weightage to all the elements of the transmission system, which has caused distortions in calculations; that the outages attributable to other factors also need to be excluded for calculating the system Availability; that incentive should be payable at normative Availability of 98% as recommended by the National Task Force or higher Availability against 95% Availability notified by the Central Government; that rate of incentive is on the higher side; that the petitioner did not consult the beneficiaries as provided in the Bulk Power Transmission Agreement before approaching the Commission, and that the petitioner is not honouring the equity fixed by the Central Government as it has claimed incentive based on higher equity than notified by the Central Government and the claim is over and above the reasonable return on the capital employed.

11. In the pleadings, the respondents have raised certain legal issues. Therefore, before going into the merits of the claim of the petitioner and the contentions raised on behalf of the respondents, the Commission considered it appropriate to address in the first instance these preliminary legal issues. Accordingly, the Commission, through its order dated 20.12.1999, formulated the following preliminary legal issues for consideration and adjudication:-

(a) The validity of the transmission tariff notified by the Central Government after establishment of the Commission.

(b) Whether the notification of incentive is a matter of procedure or that of the substantive law and as such can be taken up by the Commission even for the period prior to vesting of jurisdiction in it under the ERC Act.

(c) Whether the Commission has jurisdiction to exercise the same powers as were exercisable by the Central Government regarding determination of incentives for use of inter-state transmission system, before establishment of the Central Commission.

(d) Whether any vested right accrues in favour of the petitioner to claim incentive for the year 1997-98 and 1998-99 based on the notification issued by the Central government in December, 1997 and subsequent notifications issued from time to time in respect of different regions.

(e) Whether the Commission can exercise jurisdiction for notifying incentive to the petitioner for the period prior to its establishment.

(f) Whether the claim for incentive preferred by the petitioner for the years 1997-98 and 1998-99 based on principles/assumptions notified by the Central Govt. could be extended beyond July 1998, when the Commission was constituted.

(g) Whether the Commission is to follow the criteria laid down by the notifications of the Central Govt. regarding payment of incentive.

(h) Whether the petitioner could file the petitions for incentive over-looking the provisions of the agreement entered into with the beneficiaries.

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