

To,  
The Secretary,  
Central Electricity Regulatory Commission,  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath,  
New Delhi- 110 001

Date: 28.01.2019

**Sub: Representation regarding draft CERC (Terms and Conditions of Tariff) Regulations, 2019**

**Ref:** (1) Explanatory Memorandum to draft CERC (Terms and Conditions of Tariff) Regulations, 2019  
(2) Consultation Paper on draft CERC (Terms and Conditions of Tariff) Regulations, 2019

Respected Sir,

1. This Hon'ble Central Electricity Regulatory Commission ("**CERC**") vide Public Notice dated 14.12.2018 invited comments/ suggestions/ objections from the stakeholders and interested persons on the draft CERC (Terms and Conditions of Tariff) Regulations, 2019 (hereinafter referred to as "Draft Tariff Regulations, 2019"). The present comments are with respect to the proposed regulations relating to the transmission of electricity.
2. The Objector herein, is Mrs. Gurmeet Kaur, and is a resident of VB-133, 2<sup>nd</sup> Floor, Street No. 5, Virender Nagar, Janakpuri - 110058, New Delhi. The Objector is a consumer of BSES, Rajdhani, Delhi, having the Consumer No. 150832996. The Objector is giving his comments/ objections to the draft CERC (Term and Conditions of Tariff) Regulations, 2019, as the transmission tariff is a component of the electricity charges paid by the Objector to the distribution licensee. As such, the Objector is materially affected by any negative or adverse impact of the draft regulations on the transmission tariffs,



once the said Regulations are finalized. In view of the above, the Objector humbly requests that the present comments/ objections may be taken on record and considered before finalizing the regulations.

3. The present comments/ objections are being provided under the following major heads:
  - a. Brief background;
  - b. Comments/ objections on the proposed regulations; and
  - c. Achieving the objective of the Electricity Act, 2003

**Re: Brief background**

4. The Draft Tariff Regulations, 2019 to be notified for the Control Period 2019-24, proposes to introduce certain parameters for the purpose of determination of tariff of the transmission licensees under Section 62 of the Electricity Act, 2003. Some of the said proposed parameters will result in reduction of uncertainties by reducing the risk exposure for the transmission licensees while constructing, operating and maintaining a project under Section 62 of the Act. This will render the parameters proposed in the draft regulations as incentives/ benefits being extended to transmission licensees who execute projects under Section 62, when the same are seen in the context of transmission Projects developed on the basis of Tariff Based Competitive Bidding (TBCB) under Section 63 of the Act. This has to be seen from the consumer's perspective in terms of the fact that when the Act and the Tariff Policy envisage that the electricity services, which includes generation, transmission and distribution, have to be provided at competitive rates/ tariffs, then where does the draft regulations fit in with respect to the same. Whether the draft regulations further the intent of the Act in promoting competition, or whether the same is





only incentivising delays in implementing power projects, including transmission, without the focus on how to keep the Section 62 route competitive and aligned to the market.

5. Accompanying the above-mentioned Draft Tariff Regulations, 2019 is an Explanatory Memorandum and a consultation paper which seek to set out the reasons which prompted the issuance of Draft Regulations. The undersigned, vide the present submissions, takes an opportunity to submit his comments/ suggestions/ objections to the Draft Tariff regulations, 2019.
6. It is submitted that the Electricity Act, 2003 (hereinafter referred to as the "Act") was promulgated with the objective to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity. The Act envisages measures conducive to development of electricity industry by promoting efficiency and competition in the industry. The Act is an outcome of 3rd generation reform of the electricity regime in the Country, which was necessitated due to failure of the state mechanism in the form of erstwhile State Electricity Boards which were involved in rendering the functions of generation, distribution and transmission of electricity. Therefore, the conscious mandate of the legislature is reflected in the provisions of the Act which delicensed generation and made provision for private parties to opt for distribution and transmission of electricity as a licensed activity, in order to ensure efficiency, competition and cost effectiveness in the power sector at large.
7. Apart from the above, the Act under Section 3 empowers the Central Government to lay down policy in the form of National Electricity Policy and Tariff Policy in consultation with the stakeholders of the sector, for the development of power system by optimum utilization of resources of the country. It is a settled principle now that National



Electricity Policy and Tariff Policy, are policy measures having statutory flavour and such policies provide the road map to be followed by the regulators/ CERC and other stakeholders for achieving the objectives enshrined under the Act.

8. Electricity is a critical infrastructure on which the socio-economic development of the country depends. Reliable and quality power at competitive rates is essential for the industry in order to be globally competitive, and further the same will also result in employment generation. When the Act was being framed, there was a severe shortfall in the supply of electricity on account of both, inadequate generation capacities as well as on account of inadequate transmission and distribution network. It is recorded in the National Electricity Policy, 2005 that as per Census 2001, about 44% of the households did not have access to electricity, and the same required robust expansion of, inter alia, the transmission network. As such, a need was felt to attract private investment in the generation, transmission and distribution of electricity.

The Ministry of Power, Government of India, in compliance with Section 3 of the Act, notified the Tariff Policy on 06.01.2006 and revised Tariff Policy on 28.01.2016. The Tariff Policies provide that introduction of competition in different segments of the electricity industry i.e. generation, distribution or transmission, is one of the key features of the Electricity Act, 2003. The competition will lead to significant benefits to consumers through reduction in capital costs while improving efficiency of operations. It will also facilitate the tariff to be determined competitively.

The National Electricity Policy and the Tariff Policy were enacted in order to not only spell out the intent of the Electricity Act, 2003 but also spelt out the methodologies and protocol to be followed for the





growth of the electricity sector in a sustainable and cost-effective/ competitive manner.

9. Under Section 62 of the Act, a Commission is empowered to determine tariff, including for transmission of electricity. Such tariff determination is carried out as per Section 61 of the Act which provides broad principles for regulation of tariff for generation, transmission and distribution of electricity. Section 61 provides that while determining tariff, a Commission has to consider that the same encourages competition, efficiency, economical use of the resources good performance and optimum investments. In accordance with Section 61 of the Act, the Appropriate Commission has to strike a balance between the consumers' interest and the investors' (generating company, transmission licensee and distribution licensee) interest, with emphasis on the need for applying commercial principles while determining the tariff. The evolution of regulatory approach has been gradually shifting towards normative approach for inducing efficiency so that tariff becomes affordable and competitive. The approach for determination of tariff needs to be evolved continuously so that objectives of Section 61 of the Act are met.

The Tariff Regulations which are framed by regulatory commissions are for the purpose of implementing the principles contained under Section 61.

10. While Section 62 is for the purpose of cost plus determination of tariff qua transmission, distribution and generation of electricity, on the other hand Section 63 provides for adoption of tariff discovered through competitive bidding conducted in accordance with the guidelines issued by the Central Government.

When the Act was enacted, the primary focus was to reform the electricity sector, and one of the ways to reform the said sector was



through attracting private investment into transmission, distribution and generation of electricity. The private participation could only be encouraged when there is transparency towards award of projects, as well as reasonable returns. For this very purpose, Section 63 was introduced so that there can be robust private participation in order to augment the power system in the country, which included transmission of electricity. When infrastructure projects are thrown open to public participation, one of the key objectives is to reduce unwanted costs associated when such projects are implemented through Government Companies under non-competitive route.

11. Certain amendments which are being proposed in the draft regulations are running contrary to the intent of the Act as well as the aforementioned policies, in terms of the fact that the same is greatly reducing the element of risk involved in implementing a transmission project, and is further increasing the returns for a developer constructing, operating and maintaining a transmission network.

***Re: Comments/ objections on the proposed amendments***

12. Keeping in view the above brief outline, the undersigned provides its comments on certain aspects of the draft Tariff Regulations with respect to transmission of electricity.

***I. Definition of Expansion Project***

13. As per Regulation 3(23) of the Draft Regulations, 'Expansion project' shall include any addition of new capacity to the existing generating station or the transmission system, as the case may be.
14. In this context, it is submitted that the term 'augmentation' ought to be defined, as in transmission projects, instead of expansion, the





term which is used is augmentation. In this context, reference be made to regulation 9 of the CERC Connectivity Regulations, 2009.

15. Further, in the case of transmission projects awarded under the competitive bidding route, there is no provision which guarantees that any augmentation work would be awarded to the same project developer on a cost-plus basis. This aspect ought to be considered by this Hon'ble Commission by providing a similar dispensation to the developers under the TBCB route. This will introduce competition in the augmentation sphere, and would help in reducing the overall costs. The same will also further the intent of the Electricity Act, 2003 and the Tariff Policy, which aims at providing transmission services in a cost effective and competitive manner.
16. The Hon'ble Commission under the draft proposed regulations ought to question and evaluate the implementation of the transmission project under Section 62 vis-à-vis Section 63, with the objective of achieving better tariffs for the consumers.

## **II. Force Majeure:**

17. A developer of a transmission project, starting from the implementation to operationalization, has to encounter certain difficulties/ risks which are normally associated with infrastructure projects. Such difficulties, at times result in stalling the implementation and/ or operation of the transmission infrastructure, which has a cost impact. In order to address such situations, the tariff regulations contain provisions relating to force majeure and uncontrollable parameters/ factors. The draft regulations provide the definition of Force Majeure under Regulation 3(26), which is being reproduced here under:

"3(26) 'Force Majeure' for the purpose of these regulations means the event or circumstance or



combination of events or circumstances including those stated below which partly or fully prevents the generating company or transmission licensee to complete the project within the time specified in the Investment Approval, and only if such events or circumstances are not within the control the generating company or transmission licensee and could not have been avoided, had the generating company or transmission licensee taken reasonable care or complied with prudent utility practices:

(a) Act of God including lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, geological surprises, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years; or

(b) Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(c) Industry wide strikes and labour disturbances having a nationwide impact in India;

(d) Delay in obtaining statutory approval for the project except where the delay is attributable to project developer;

[underline supplied]

18. The above underlined provision [3(26)(d)] is being introduced, which is not present in the existing regulations for control period 2014-19. A bare perusal of the aforesaid provision suggests that it has been specifically provided that any delays in obtaining statutory approvals, would be covered under the definition of force majeure. However, there is a caveat that such delay should not be attributable to the developer of the transmission project.
19. In the existing regulations (2014-19), if an event did not fall under 3(26)(a) to (c), then a transmission licensee had to rely upon the





general definition of force majeure provided under Regulation 3(26) in order to demonstrate that such an event is beyond the reasonable control.

The above has to be seen in the context of the force majeure clause appearing in TSAs executed under Section 63 of the Act pursuant to a TBCB process. An analysis of the same is provided in the subsequent paragraphs.

20. By inserting Regulation 3(26)(d), the burden of proof for including delay in getting a statutory approval, has been greatly reduced. In this regard, it is stated that while implementing transmission projects under the Act, the issue of land acquisition, ROW, forest and other statutory clearances are recurrent issues faced by the developers. If these contingencies are expressly included under force majeure clause, then it will result in reducing the exposure of risk to the licensee implementing project under Section 62 of the Act. Mere submission of a certificate/ document depicting delay in granting statutory approval would accrue a right in favour of transmission licensee to claim benefits under the Regulations.
21. On the other hand, Article 11 of model Transmission Service Agreement (TSA) executed by the transmission licensee for the projects implemented under TBCB or Section 63 of the Act, does not follow such a liberal approach towards interpretation of force majeure clause. Reference could be made to Article 11 of model TSA here under:  
(quote)



### 11.3 Force Majeure

A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

(a) **Natural Force Majeure Events:**

act of God, including, but not limited to drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,





(b) **Non-Natural Force Majeure Events:**

i. **Direct Non Natural Force Majeure Events**

- Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the TSP; or
- the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the TSP to perform their obligations under the RFP Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other Consents, Clearances and Permits required for the development/operation of the Project, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down; or
- any other unlawful, unreasonable or discriminatory action on the part of an Indian Governmental Instrumentality which is directed against the Project, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

ii. **Indirect Non - Natural Force Majeure Events**

- act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or
- radio-active contamination or ionizing radiation originating from a source in India or resulting from any other Indirect Non Natural Force Majeure Event mentioned above, excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Site by the Affected Party or those employed or engaged by the Affected Party; or
- industry wide strikes and labour disturbances, having a nationwide impact in India.

...



**11.7 Available Relief for a Force Majeure Event**

Subject to this Article 11

- (a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;
- (b) every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.
- (c) For the avoidance of doubt, it is clarified that the computation of Availability of the Element(s) under outage due to Force Majeure Event, as per Article 11.3 affecting the TSP shall be as per Appendix III to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2014, as on seven (7) days prior to the Bid Deadline. For the event(s) for which the Element(s) is/are deemed to be available as per Appendix III to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2014, then only the Non Escalable Transmission Charges, as applicable to such Element(s) in the relevant Contract Year, shall be paid by the Long Term Transmission Customers as per Schedule 5, for the duration of such event(s).

(unquote)

A careful perusal of the Article 11 provides as follows:

- a. delay in statutory approval has not been specifically made part of force majeure events;
- b. the licensee under TBCB route cannot claim relief for delay in getting statutory approval as a matter of right arising out of the



- d. further reference be made to the 'Natural Force Majeure Events' and 'Non-natural Force Majeure Events' provided in a Section 63 TSA. As per 'Non-natural Force Majeure Events', the transmission licensee will not be automatically entitled to get the relief of force majeure on account of denial or revocation of a statutory clearance, unless such denial or revocation is held by a court of law as unlawful. The same demonstrates that in Section 63 projects claiming relief under force majeure is much more difficult as compared to Section 62 project.
- e. further, in case of Draft Tariff Regulations, 2019, occurrence of force majeure event causing loss to the transmission licensee may be compensated in terms of extension of time as well as monetary relief under capital cost (as IDC and IEDC) however, under TSA, licensee is given temporary amnesty in the form of extension of time, and no monetary relief in terms of cost incurred, is granted.

The above demonstrates that there is a huge difference between the onus of proof required to claim benefit under force majeure, by a transmission licensee operating under Section 62 route and a transmission licensee operating under Section 63 route. Under Regulation 3(26)(d) of the draft regulations, no declaration from a court of law is required for declaring delay or revocation of a statutory approval as unlawful, for claiming benefit under force majeure. The relatively easier and smooth dispensation to claim benefit under force majeure in a Section 62 transmission project automatically pushes up the transmission tariff as more and more difficulties/ risks associated with infrastructure project. This is contrary not only to consumer interests but also falls foul of the object and intent with which the Act was enacted.

- 22. It needs to be understood that Sections 62 and 63 are two modes of tariff determination. However, the difference between the said



provisions ends there. Under Section 62, tariff is determined through tariff regulations which are based upon the principles contained in Section 61. Under Section 63, the bidding is conducted as per the bidding guidelines, which are also meant for implementing the principles of Section 61. This has been held by the Hon'ble APTEL in ***judgment dated 16.12.2011*** passed in ***Appeal No. 82 of 2011*** (please see para 48). The relevant extract of the said judgement is reproduced herein below:

"48. In the light of the above submissions made by the Appellant, it is appropriate to refer to the bid process under Section 63 of the Act which has been invoked by the Noida Power. The Bid process under Section 63 of the Act is different from normal procurement of goods. Unlike the stated objectives of Section 63 of the Electricity Act 2003 and the objectives of the Government of India guidelines, all the other non statutory procurement process are driven to a sole objective of:

(a) In cases of public sector or state procuring supply of goods or services from the private sector, securing lowest possible price from a credible party;

(b) In case of auction of public assets in most of the cases securing maximum price for such sale. In some cases, some social objectives like coverage and roll out obligations may be the objective.

(c) The Government of India has framed guidelines under Section 63 of the Act to comply with the principles specified in Section 61 of the Act. The Government of India guidelines contain the mandate to safeguard consumer interest as well as to encourage competition, efficiency, economical use of the resources. The stated objectives of the Government of India guidelines to strike a balance between transparency, fairness, consumer interest and viability."

(underline supplied)





A copy of the **judgment dated 16.12.2011** passed in **Appeal No. 82 of 2011** by Hon'ble APTCL, is enclosed herewith and marked as **Annexure A.**

Therefore, apart from the process of tariff determination, other aspects of a project developed under Section 62 or Section 63 ought to be similar. As such, the principle of force majeure has to largely remain same as the risks in developing a project under Section 62 or under Section 63 are same. By inserting a new provision under Section 3(26)(d), the draft regulations seek to offset any amount of delay which may be caused in obtaining a statutory approval.

23. It is submitted that for obtaining statutory approvals, there is no universal time frame as to within what time an approval should be granted by the relevant government authorities. Hence, the delay in obtaining any such approvals, is extremely subjective and there is a need that the burden of proof required for establishing such delay which would fall under the category of force majeure, ought to be similar to the one provided under TSAs executed pursuant to Section 63.

By inserting the above provision in the draft regulations, the burden of proof is being greatly reduced, and that a developer under Section 62 will be required to only place on record its request for getting an approval and date on which final approval is granted. As the regulation would itself provide for such delay as a force majeure, then there would be no need or requirement to analyse as to whether proper steps and follow ups have been undertaken by the project developer in order to get an approval.

### **III. Regulation 21**



24. The Draft Tariff Regulations, 2019 under Regulation 21 has expanded the scope of "uncontrollable factors". The same is reproduced herein below:

**"21. Controllable and Uncontrollable factors:**

The following shall be considered as controllable and uncontrollable factors leading to cost escalation, IDC and IEDC of the project:

(1) The "controllable factors" shall include but shall not be limited to the following:

a. Efficiency in the implementation of the project not involving approved change in scope of such project, change in statutory levies or change in law or force majeure events; and

b. Delay in execution of the project on account of contractor, supplier or agency of the generating company or transmission licensee.

(2) The "uncontrollable factors" shall include but shall not be limited to the following:

a. Force Majeure events;

b. Change in law; and

c. Time and cost over-runs on account of land acquisition except where the delay is attributable to the generating company or the transmission licensee;"

(underline supplied)

25. It is stated that the above insertion of Clause (c) in Regulation 21(2) is peculiar. This is for the reason that in the existing regulations, under Regulation 12(2) of the 2014-19 tariff regulations, the "uncontrollable factors" already included force majeure and change in law events.

The above already enabled a transmission licensee to claim monetary compensation for events falling under force majeure and change in law.





26. Under Regulation 3(26)(d), the draft regulations provide that the delay in obtaining statutory approvals is a force majeure event. The same means that any cost impact on account of delay in obtaining a statutory approval, would be compensated to the transmission licensee. The same would have included any delays in obtaining right of way in terms of the Guidelines for payment of compensation towards damages in regard to Right of Way (ROW) for transmission lines. As such, there is no such need to specifically include Regulation 21(2)(c) pertaining to time and cost overrun on account of any delays in land acquisition.

The only inference which can be drawn is that any delays on account of negotiations with private land owners would be treated as an uncontrollable event.

27. While in a Section 62 project, the cost towards acquisition of land is a pass through in tariff, however, Regulation 21(2)(c) in the draft regulations is an extra provision, or a surplusage, which otherwise is not required when the definition of force majeure is already covering the same. Such extra cushioning of any conceivable risks involved in developing a transmission project under Section 62, would only result in pushing up transmission tariffs to the detriment of the end consumers.

Through draft regulations, if all possible risks associated with an infrastructure project are offset with monetary reimbursements, then the same will only increase the inefficiency amongst the developers under Section 62. This would be in the teeth of the intent with which electricity infrastructure was sought to be opened to private developers under the Act read with the National Electricity Policy and the Tariff Policy.



28. By virtue of Regulation 21, the licensee may claim extension of time as well as cost for the period during which land acquisition process was delayed for the reasons not attributable to the licensee under cost-plus route. However, under the force majeure clause of TSA, in case of delay caused in land acquisition process which is beyond the control of affected party, the mandatory requirement is first to establish force majeure within the meaning of Article 11, and thereafter, the remedy available is only in the form of extension of time and no other monetary claim is granted.

#### **IV. *Return on Equity***

29. As per Regulation 30 of the Draft Tariff Regulations, 2019, Return on Equity (ROE) is being computed at the base rate of 15.50% for transmission system implemented under Section 62 of the Act. The principle behind providing Return on Equity is to provide for efficiency, economical use of the resources, good performance and optimum investments. The ROE has a direct impact upon the transmission tariff, and that there is a need to maintain a fine balance between sustainable returns on one hand and the burden of transmission tariff on the other.
30. On the one hand, while most of the risk factors involved in laying down of an infrastructure project, such as a transmission line, have been taken care of in terms of providing time and cost relief, there is a need to rationalise ROE allowed to transmission licensee.
31. In view of the reduction and minimisation of risks qua time and cost impacts in a Section 62 transmission project, the ROE 15.5% is on a higher side. Once all the expenses, in terms of the costs incurred in construction and operation of the transmission project, are allowed under Section 62, then there is a need to rationalise ROE. After





considering the above, an ROE of 15.5% will further increase the transmission tariffs.

32. In addition to the above, a ROE of 15.5% will generate huge surplus revenues. Considering the fact that electricity is a necessary resources/ ingredient without which there cannot at all be any growth and development of the society and the country. As such, transmission of electricity is in the nature of a public function, which cannot be looked from the angle of real revenue generation or profiteering. It is for this purpose that the Act under section 61 (c) provides for economical use of the resources as well as encouraging competition. Such objectives can only be achieved if the ROE is reduced for transmission licensees operating under Section 62.
33. It is submitted that as compared to a generation project, a transmission project implemented under cost-plus faces fewer risks and the risks faced are related to ROW and statutory clearances. Operational risks are very minimal for a transmission project. As stated above, the Draft Tariff Regulations, 2019 has reduced significant risks faced by a developer by including delay in statutory approval under force majeure and time and cost over runs due to land acquisition under uncontrollable factors.

By this, the developmental risks are further lowered for the transmission licensee under cost-plus method. In this context, when the risk has been lowered under draft regulations, it is not prudent for the Commission to provide a higher ROE of 15.5%.

**V. *No timelines provided in the Draft Regulations for implementation of the transmission projects***

34. It is submitted that the Draft Regulations removes the benefit of additional RoE of 0.5% for completing the project within the timelines



specified. This is a welcome provision as incentives ought to be designed and provided for exceeding set targets, and not for meeting normative targets.

However, while removing the benefit of above additional RoE, what has been additionally done in the Draft Regulations is that the timelines provided for implementation of a transmission project has been removed/ taken away. There is no Appendix I in the Draft Regulations providing timelines for implementation of transmission projects.

35. In this context, it may be appreciated that the timelines defined for calculation of additional RoE under Appendix-I of Tariff Regulations, 2014 was also acting as guidelines for setting targets for completion of transmission assets within a specified period. On account of the non-inclusion of the timelines in the Draft Regulations, the developers of Section 62 transmission projects may take unreasonable time to execute the project and this may lead to increase in cost due to operational inefficiencies, which would be ultimately borne by the end consumers.

In a Section 63, a developer has to adhere to strict timelines for implementing the transmission project. Similar approach ought to be considered for Section 62 Projects, as the difference between Sections 62 and 63 is limited to the process for determination of tariff, and not for inclusion of non-competitiveness or inefficiencies while implementing transmission projects.

## **VI. Debt: Equity Ratio**

36. As per Regulation 17 of the Draft Tariff Regulations, 2019, the capital cost for generation and transmission projects commissioned after





01.04.2019 is considered to be financed through a debt equity ratio of 70:30.

37. The Consultation Paper provides that the debt equity ratio can be considered as 80:20. In this context, it is further mentioned in the Consultation Paper that when demand for capacity addition is low, maintaining debt: equity of 70:30 may need review.
38. The above is on account of the fact that India has seen a robust increase in the development of the transmission network. Further, this Hon'ble Commission is also aware of the huge number of relinquishment of long-term access requests made by various LTA customers. In the Consultation Paper it is further recorded that the banking/financial institutions are willing to extend debt to the extent of 80%, and in a situation where the demand of capacity addition is low, there is need to revise the debt equity norms for a transmission licensee, in line with the Consultation Paper.
39. It is stated that the purpose of coming out with tariff regulations for different control periods is to improve and rationalise the earlier norms, so that the generation, transmission and distribution becomes more and more economical, competitive and efficient. When the Consultation Paper itself provides for revision of debt equity norms, then this Hon'ble Commission ought to consider the same for the purpose of achieving the ultimate objectives provided under Section 61 of the Act.
40. Once the debt equity ratio is revised, then this Hon'ble Commission can simultaneously also revise as to how ROE is allowed for transmission projects Such reforms are the need of the hour in order to make the transmission system sustainable and cost-effective for the end consumers of electricity.



## **VII. Operation and Maintenance (O&M)**

41. The Draft Regulations under Regulation 35 (3) provides for operation and maintenance expenses (O&M). From a perusal of the said regulation, it is evident that O&M expenses that the same are applicable to all transmission licensees which are operating under Section 62 route.
42. The Powergrid Corporation of India Limited (PGCIL) owns the majority of interstate transmission lines in the country. PGCIL owns and operates about 1,49,309 ckt kms of transmission lines at 800/765kV, 400kV, 220kV & 132kV EHVAC & +500kV HVDC levels and 237 sub-stations. Also, the transformation capacity is about 3,44,791 MVA as on 30.09.2018. In an economy of scale, the larger the business, the lower is its per-unit costs. Keeping the said principle in mind, the operation and maintenance expenses, after providing for major risk parameters, are on a much higher side in the draft regulations.
43. For O&M expenses, the concept of economies of scale has to be considered. On account of the same, the allowance of a fixed amount of O&M expenses to the transmission licensees, irrespective of their size, would defeat the objective sought to be achieved under section 61 of the Act.

The cost of operation and maintenance of transmission network by PGCIL, would be much less as compared to a smaller licensee who maintains and operates much lesser number of transmission assets.

44. The O&M expenses for a transmission licensee who owns and runs a much smaller network can be a bit higher, while there has to be a gradual reduction in the allowable O&M expenses for the larger transmission licensees such as PGCIL under Section 62 route. If such





rationalisation is not considered, then the objective of the Act for making the power system more and more cost efficient and competitive, would be rendered otiose.

45. The O&M expenses for transmission system can be rationalized by introducing multiplication factor for larger transmission licensees with respect to the allowable O&M expenses. Another methodology could be to provide similar O&M expenses as are factored in Section 63 projects by PGCIL. There cannot be any rationale behind the philosophy that O&M expenses for PGCIL, qua a similar asset, being different under Section 62 project vis-à-vis Section 63 project. Such comparison and rationalisation of the draft regulations is necessary for meeting the objectives contained in Section 61 of the Act.

**Re: *Achieving the objective of the Electricity Act, 2003***

46. As already submitted herein before, the primary objective of the Act was to rationalise the cost of electricity, and at the same time provide for sustainable growth in the energy sector. The said purpose, the National Electricity Policy as well as the Tariff Policy were framed by the central government under Section 3 of the Act. Further, for the purpose of determination of tariff, the Act provides the broad principles contained under Section 61.
47. A combination of the above provides that the primary objective of the Act is as follows:
- a. generation, transmission, distribution and supply of electricity are conducted on commercial principles;
  - b. introduction of competition in various electricity sectors, such as transmission of electricity;



- c. encouraging private investment so that the transmission network can be built on the basis of latest technologies and in a cost-effective competitive environment;
  - d. ensuring that the services in the energy sector, such as transmission, are available at competitive rates;
  - e. the developers of electricity projects, including transmission networks, should get reasonable returns, however, the same should not result in revenue surplusness or profiteering; and
  - f. safeguarding of consumer interest.
48. The Act provides determination of tariff by two methods; Section 62 i.e. Cost-Plus Method and Section 63 i.e. Bidding Method. Section 62 of the Act confers power on the Commissions to determine tariff in accordance with Tariff Regulations enacted by the Commission itself from time to time.

On the other hand, Section 63 starts with a non-obstante clause qua Section 62, and provides for a competitive bidding process to be followed for the purpose of discovering market aligned and competitive tariff. Such bidding is mandated to be conducted in accordance with the bidding guidelines issued by the Central Government.

49. The objective behind introduction of competitive bidding under Section 63 was to attract private investment into generation, transmission and distribution of electricity. When the Act was enacted, the country was suffering from severe electricity shortages. There was a requirement to greatly enhance the generation, transmission and distribution capacities in the country, which could not be achieved by only sovereign funds.





Therefore, there was a need to open up energy sector to private players. The same could only have been achieved by introduction of competitive bidding so that powers of discretion and nomination by the relevant authorities, qua development of energy projects, is reduced.

50. Private participation in a closed sector can only be achieved when transparency is produced. For the said purpose, in the year 1998, the electricity regulatory commissions were constituted under the Electricity Regulatory Commissions Act, 1998. The entire agenda was to alienate the government from the decision-making with respect to tariffs applicable for generation, transmission and distribution of electricity.

Subsequently, the Act of 2003 was enacted whereby radical new concepts such as open access and competitive bidding were introduced.

51. Accordingly, the Act provided for two modes of tariff determination, one being cost plus under Section 62, and the other being competitive bidding under Section 63. The decision to choose any one of the above routes for electricity project, including the transmission project, is the cost effectiveness of such a route. The Hon'ble Commission, as a sector regulator, has to come out with a protocol which should be followed by CTU before considering as to which route (Section 62 or Section 63) would be more competitive, before sanctioning a transmission project. The said intent should also be incorporated under the scope of the draft regulations so as to mean that a project under Section 62 is not a matter of right but has to be guided by keeping in mind the consumer interest and competitive pricing.



52. The Draft Regulations provides for monetary reimbursements transmission licensees who develop projects under Section 62, against all possible risks and expenses. Over and above the same, Draft Regulations for the provide a return on equity. During the time of the enactment of the Act, there were large number of electricity projects in the field of generation and transmission of electricity which were under execution or had been already planned. In order to take care of such projects, the Act retained the Section 62 route.

In this context, reference be made to the tariff policy issued on 06/01/2006. Clause 5.1 of the said policy provided that after a period of 5 years of the date of the said policy, electricity projects have to be developed as per competitive bidding. The tariff policy under Clause 7.1 (6) further provides that transmission projects ought to be awarded through competitive bidding. The aforesaid provisions of the tariff policy are reproduced herein below:

## **"5.0 GENERAL APPROACH TO TARIFF**

5.1 Introducing competition in different segments of the electricity industry is one of the key features of the Electricity Act, 2003. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations. It will also facilitate the price to be determined competitively. The Central Government has already issued detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensees for medium or long-term period vide gazette notification dated 19<sup>th</sup> January, 2005.

.....

### **7.1 Transmission pricing**

.....

(6) Investment by transmission developer other than CTU/STU would be invited through competitive bids. The Central Government will issue guidelines in three months





for bidding process for developing transmission capacities. The tariff of the projects to be developed by CTU/STU after the period of five years or when the Regulatory Commission is satisfied that the situation is right to introduce such competition (as referred to in para 5.1) would also be determined on the basis of competitive bidding."

Subsequently, the tariff policy was revised on 28/01/2016. As per the revised tariff policy, Clauses 7.1(6) and (7) specifically provide that transmission projects should only be awarded under the competitive bidding route, except in certain exigencies. The provisions of the revised tariff policy also reproduced herein below for ready reference:

"5.1 Introducing competition in different segments of the electricity industry is one of the key features of the Electricity Act, 2003. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations. It will also facilitate the price to be determined competitively. The Central Government has already issued detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensees.

.....

### **7.1 Transmission pricing**

.....

(6) Investment by transmission developer including CTU/STUs would be invited through competitive bids in accordance with the guidelines issued by the Central Government from time to time.

(7) While all future inter-state transmission projects shall, ordinarily, be developed through competitive bidding process, the Central Government may give exemption from competitive bidding for (a) specific category of projects of strategic importance, technical



upgradation etc. or (b) works required to be done to cater to an urgent situation on a case to case basis."

53. Hence, from the above it is evident that the entire focus is towards making generation and transmission electricity more and more competitive. It is, therefore, necessary to consider the Draft Regulations with the prism of the above objective sought to be achieved by the Act. In this context, reference be made to the following judgments of the Hon'ble Supreme Court where statutory policies have been held to be binding:

- a. ***Energy Watchdog v. CERC***, reported in (2017) 14 SCC 80 (please see para 28);
- b. ***Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Limited and Others***, reported in (2003) 7 SCC 1 (please see para 4.1);
- c. ***Clariant International Limited & Anr. v. Securities and Exchange Board of India***, reported in (2004) 8 SCC 524 (please see para 63);

It needs to be considered as to whether the Draft Regulations would result in rationalising/ lowering of transmission tariffs and encouraging more and more competition.

A copy of the judgment of the Hon'ble Supreme Court in ***Energy Watchdog v. CERC***, reported in (2017) 14 SCC 80, is enclosed herewith and marked as **Annexure B**.

A copy of the judgment of the Hon'ble Supreme Court in ***Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Limited and Others***, reported in (2003) 7 SCC 1, is enclosed herewith and marked as **Annexure C**.





A copy of the judgment of the Hon'ble Supreme Court in ***Clariant International Limited & Anr. v. Securities and Exchange Board of India***, reported in (2004) 8 SCC 524, is enclosed herewith and marked as **Annexure D**.

54. When the Draft Regulations are analysed with respect to the above aspect, the following emerges:

- a. the Draft Regulations will result in surplus revenue generation for transmission licensees operating under the Section 62 route. This is for the reason that monetary reimbursements are allowed for all the expenses and/ or risks involved in developing transmission network;
- b. while Section 62 route is substantially different from Section 63 route, however at the same time simply because the former is cost plus, the same should not be utilised to reduce and minimise almost all the risks involved in laying down of infrastructure/ transmission projects;
- c. if utilities such as PGCIL (which is also the Central Transmission Utility/CTU), and the State Transmission Companies (which is also the State Transmission Utilities/STUs), are allowed tariffs on the basis of parameters or norms provided in the Draft Regulations, including the ROE, then the balance sheets of the said utilities would be surplus revenues.

The above would provide an undue advantage for such transmission licensees when the same bid for transmission projects under Section 63 of the Act, as compared to various private developers who do not have any such advantage of Section 62 projects in their project portfolio so as to match the ability of CTU/ STUs to bid aggressively;



- d. The above would result in most of the competitively bid projects landing in the hands of such state owned transmission companies, who also own a substantial portion of transmission projects under Section 62. This defeats the entire objective which was sought to be achieved when the Act was enacted.
55. In view of the above, there is an urgent need to review the Draft Tariff Regulations 2019 provisions. This can be achieved by undertaking the following:
- a. the norms provided under the draft regulations, such as ROE, O&M, debt equity, etc. to be rationalised in terms of the suggestions given herein before. This will result in making the Section 62 route more and more competitive, which would be in line with the objectives sought to be achieved by Section 61 of the Act read with the provisions of the tariff policy;
  - b. introduction of competition under Section 62. This can be achieved by introducing competition even for award of projects under cost plus mechanism. The Hon'ble Supreme Court in the judgement rendered in **Energy Watchdog v. CERC** (Supra) has already held that bidding can be conducted even in the absence of bidding guidelines. This further means that some kind of competition or bidding can be introduced even for awarding cost plus transmission projects under Section 62.

In this context, reference be made to an order dated 13/11/2017 passed by the Ld. Haryana Electricity Regulatory Commission (HERC) in Case No. HERC/PRO-24 of 2017. In the said proceedings, for procurement of power from hydropower projects, it was recorded that as per Ministry of Power (MoP) letter dated 15/09/2017 hydropower plants are exempted from





long-term bidding till the year 2022. However, after the passage of the said order, an Expression of Interest (EOI) dated 09/07/2018 was issued by the Haryana Power purchase Centre for long-term procurement of hydro-power under cost plus route. The relevant extract of the said EOI is reproduced herein below for ready reference:

"1. ....

Keeping in view the above, the state has planned to procure power from hydro power stations preferably with storage/pondage as defined as per CERC norms, (hereinafter referred to as "Hydro Plant", "Generator "or "Plant"), to cater the peak demand of the state. It has been decided to procure power from hydro plants by entering into long term power purchase agreements ("PPA") for a capacity of 500 MW for a period of 35 years or life time of the plant, whichever is later, at a tariff to be determined by the State Commission as per its Tariff Regulations but subject to the levelised ceiling tariff (Rs/ kWh) to be indicated by the Applicant.

2. This invitation for EoI has been designed for inviting responses from interested Generation Companies owning hydro plants, preferably with storage/pondage, to participate in the procurement of 500 MW of hydro power by the state of Haryana at a tariff to be determined by the State Commission as per its Tariff Regulations subject to levelized ceiling tariff (Rs/ kWh) to be indicated by the Applicant."

As per the above, it is evident that expressions of interest from various players can be called even in a cost-plus awarding of electricity project. Similar approach can also be considered by



this Hon'ble Commission while framing the draft tariff regulations for control period 2019-24.

A copy of the order passed by the Ld. HERC in Case No. HERC/PRO-24 of 2017, is enclosed herewith and marked as **Annexure E.**

A copy of the Expression of Interest (EOI) dated 09/07/2018 issued by the Haryana Power purchase Centre, is enclosed herewith and marked as **Annexure F.**

56. It is submitted that since the enactment of the Electricity Act, 2003, there has been a lot of development which has taken place respect to the said infrastructure. The situation at present is not at all the same which existed in the year 2003. This Hon'ble Commission has been at the forefront of various reforms in the energy sector, including creation of energy exchanges and the creation of renewable energy certificates. Such evolving of the system and development of market is at the core of the above Act.
57. Hence, the control period 2019-24 is an opportunity for carrying out reforms under cost plus determination of tariff. The operating parameters have to be restricted in order to make Section 62 route more competitive and efficient. This can be achieved by not only linking the tariff norms with economies of scale, such as the transmission networks owned and controlled by CTU, but also by introduction of competition through opening up of cost-plus route to private players. This can be achieved by issuing expressions of interest, in line with those issued by the Ld. HERC with respect to hydro power projects.
58. The concept of Tariff Based Competitive Bidding (TBCB) for procurement of power by distribution licensees, and for laying down





transmission infrastructure, was introduced vide Section 63 of the Act. The basis of the same is reflected from the preamble of the Act, which upholds competition, rationalization of electricity tariff and consumer interest. It needs to be appreciated that transmission tariff is one of the most important components of the final tariff paid by the end consumers of electricity. Competition in establishing the transmission infrastructure through TBCB route visualised under Section 63 of the Act, would greatly reduce the transmission tariff, thereby reducing the landed cost of electricity for end consumers. The entire competitive bidding process is not only to discover the tariff but also to discover the supplier who would be able and efficient to supply the required quantum of power to the procurer in timely manner.

However, in the event the Draft Regulations in their present form are notified, then the same would only lead to more and more concentration of transmission projects in the hands of government owned transmission licensees. As already submitted herein before, there has to be a mechanism or a protocol which should be created whereby, before sanctioning transmission project, CTU ought to consider if the Section 62 project would be in the interest of consumers and would encourage competition. Otherwise, the government owned transmission licensees would become extremely revenue surplus, thereby ending the competition even under Section 63 route by cross subsidising any perceived losses due to aggressive bidding on account of surplus revenues generated under section 62.

59. In 2011, for awarding transmission projects to CTU i.e. Power Grid Corporation of India Ltd. (PGCIL) on 'nomination' basis, i.e., without requiring TBCB route, a restriction was created such as need for compressed timelines, technical upgradation and strategic reasons.



In terms of the above, the revised Tariff Policy, 2016 vide Clause 7.1(7) provided that while all future inter-state transmission projects shall, ordinarily, be developed through competitive bidding process, the Central Government may give exemption from competitive bidding for only (a) specific category of projects of strategic importance, technical upgradation etc. or (b) works required to be done to cater to an urgent situation on a case to case basis.

However, contrary to the above mandate, the Draft Regulations are incentivising the development of transmission projects under section 62, and the same substantially excludes private players.

60. Despite the Tariff Policy mandating tariff determination of transmission project through bidding route, there has been regular tendency to avoid competitive bidding process in awarding transmission projects both, at the centre in respect of inter-state project and at state level as regards intra-state project. The implementing authorities consistently infringe the government policies including the Tariff Policy that provides for competitive bidding process in award of transmission projects and hide behind the veneer of one pretext or other such as 'urgent situations', or 'compressed time schedules' to prefer nomination route, which causes serious loss of confidence amongst private investors.

Further, this behaviour has resulted in a setback to the government efforts to encourage private participation and to bring in competition to enhance overall efficiency in terms of time and cost and to modernize and improve overall grid infrastructure.

61. In addition to the above, the current regime, so far as the process of selection of developer is concerned, is utterly monopolistic, non-transparent and mechanical and almost over 2/3rd of the projects are assigned to CTU/STU as a matter of practice without evaluating the





merit and considerations that need to be considered as per the tariff policy.

62. It is pertinent to note herein that the Draft Regulations has deleted/ removed the timeline defined for calculation of additional RoE under Appendix-I of Tariff Regulations, 2014 which act as guidelines for setting targets for completion of transmission assets within that period. The said timeline under 2014 Tariff Regulations in respect of transmission project is on higher side in comparison to the projects implemented under Section 63 route. In case of no timeline being defined under Draft Regulations, no project requiring urgent implementation could be allotted under Section 62 of the Act. In view of such an eventuality, the exception of 'urgent situations', or 'compressed time schedules' to prefer nomination route other than mandatory competitive bidding route as provided under Clause 7.1 of the Tariff Policy will be redundant. The developer of Section 62 project or CTU as explained above, may take unreasonable time to execute the project and this may lead to increase in cost due to operational inefficiencies. Further, the developer of Section 63 project will be discriminated against developer under Section 62 project as Section 63 project has to strictly comply with the timeline and the consequent liabilities provided under concerned documents executed between parties. By way of liberal parameters, the Draft Regulations are incentivising the development of transmission projects under section 62, and the same substantially excludes private players, except in cases where dedicated transmission systems have been developed under either ISTS or InSTS networks. As such, the draft regulations should introduce provisions for introduction of competition even under cost plus mechanism.
63. It is pertinent to mention that in the transmission sector, the private participants are not allotted projects, rather the projects are allocated



to the public sector undertakings on nomination basis under Section 62 of the Act which does not result in discovery of price competitively. This deliberate exclusion of private sector results in elimination of competition for the projects allotted under Section 62 of the Act. Consequently, the licensees in private sector are forced to participate through TBCB route under Section 63 of the Act. It may not be out of the place to refer the observations of 29<sup>th</sup> Empowered Committee for Transmission, responsible for approving ISTS projects which stated that tariff of the projects discovered through competitive bidding under Section 63 is about 33.7% lower than the tariff computed by CERC as per Tariff Regulations under Section 62 of the Act. The relevant extract is reproduced herein below:

**3. Review of the progress of transmission projects under bidding process**

**3.1 Transmission system associated with IPPs of Vemagiri area-Package A**

3.1.1 RECTPCL informed that, at RFQ stage, total 28 bidders had submitted response to RFQ and 22 bidders were short listed for next stage of bidding i.e. RFP stage. It was further informed that, out of 22 short listed bidders, 18 bidders had purchased the RFP document. The Non-Financial & Financial bids have been submitted by following 7 bidders on due date and time i.e. 15.02.2012:

- (i) M/s Power Grid Corporation of India Limited
- (ii) M/s L&T Infrastructure & Development Limited
- (iii) M/s Sterlite Grid Limited
- (iv) M/s IVRCL Limited
- (v) Consortium of Elecnor, S.A.- KEC International Ltd.
- (vi) Consortium of Ind Bharath Power Gencom Ltd.- Megha Engineering & infrastructures Ltd.
- (vii) Consortium of NCC Infrastructure Holdings Limited – BS Transcomm limited

Financial bid were received from above seven bidders and the same were opened on 07.03.2012. The lowest levelised transmission tariff as quoted by M/s Power Grid Corporation Of India Limited of Rs. 1197.4035 million per annum was lowest. The Letter of Intent was issued on 20.03.2012 and the SPV (M/s Vemagiri Transmission System Limited) was transferred to M/s Powergrid on 18.04.2012. It was further informed that, based on the estimated cost of Rs. 1300 crore, the levelised transmission tariff based on CERC norms was worked out by the BPC as Rs. 1805.9663 million per annum. The lowest levelised transmission tariff as quoted by M/s Power Grid Corporation Of India Limited of Rs. 1197.4035 million per annum is 33.70% lower as compare to tariff computed based on CERC norms.

*Jk*

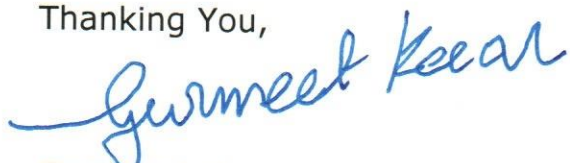


64. The legislative mandate provided in section 61 which regulates tariff under section 62 and 63, also ensures that there has to be a level playing field amongst the players/ stakeholders of the sector, be it private or public, so that the ultimate objective of benefit to the consumer can be achieved. The advent of the Act is not only a reform in the electricity sector but also a step towards evolving phenomenon of regulatory jurisprudence in the Country. Therefore, sector regulators in the form of Appropriate Commissions were created in order to ensure a level playing field which shall bring fair competition between the players including both private and public, for promoting efficiency and cost-effective modes of generation, transmission, distribution and trading of electricity.
65. In view of the brief background, the Draft Tariff Regulations, 2019 (control period 2019-2024) applicable on the cases where tariff is determined by the Commission under Section 62 of the Act, may be analysed. The said Draft Tariff Regulations, 2019 proposes several benefits/ incentives to the generating companies and transmission licensees implementing the project under cost-plus method. Such incentives have resulted in reducing the uncertainties or exposure to the risk for the licensees and generating companies while executing the project under Section 62 as compared to TBCB projects under Section 63 of the Act. Transmission Licensee participating in competitive bidding under section 63, is exposed to several risk factors, as such the bidder has to submit the tariff after contemplating all risk factors in its bid.
66. As mentioned herein above, the regular and deliberate practice of allotting most of the transmission projects under Section 62 on nomination basis to CTU has resulted in elimination of private sector participants and hence the competitive discovery of tariff in consumer interest. Therefore, the incentives introduced vide the Draft Tariff



Regulations, 2019 are likely to benefit the CTU as compared to private transmission licensees, which will have an adverse financial impact upon the end consumer of electricity on account of increase in transmission tariffs.

Thanking You,



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