CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:

Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member

Date: 30.01.2019

In the matter of:

Central Electricity Regulatory Commission (Terms and Conditions for Tariff) (Second Amendment) Regulations, 2017

STATEMENT OF REASONS

In exercise of power conferred under Section 178 of the Electricity Act, 2003 ("the Act"), the Central Electricity Regulatory Commission issued the Draft Central Electricity Regulatory Commission (Terms and Conditions for Tariff) (Second Amendment) Regulations, 2017 ("2017 Tariff Regulation") on 28.4.2017 vide public notice no. L-1/144/2013-CERC alongwith Explanatory Memorandum inviting comments/suggestions/objections from the stakeholders and members of public on the draft regulations by 19.5.2017. In response to the Public Notice, comments have been received from Powerlinks Transmission Limited, BSES Rajdhani Power Limited (BRPL), Grid Corporation of Odisha (GRDICO) and Rural Electrification Corporation Limited (REC).

2. The public hearing was held on 8.8.2017. The following stakeholders participated in the public hearing:

a) Powerlinks Transmission Limited
b) Shri N.K. Jain (Engineer)

3. **Amendment of Regulation 4.10A of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff) Regulations, 2001:**

3.1 The Transmission Majoration Factor (TMF) was introduced by insertion of Regulation 4.10A by way of amendment dated 21.9.2001 to the Central Electricity Regulatory Commission (Terms and Conditions for Tariff) Regulations, 2001 ("2001 Tariff Regulations") in order to encourage private investment in transmission sector. This provision assured a TMF of 10% of the transmission charges to the transmission projects executed through IPTC/JV routes which were granted transmission licence upto 31.3.2004 under Section 27C of the Indian Electricity Act, 1910. The said Regulation is extracted hereunder:-

> "4.10A Transmission Majoration Factor
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> 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 license under Section 27C of the Indian Electricity Act, 1910, upto 31.3.2004."

3.2 Powerlinks Transmission Limited ("Powerlinks"), a joint venture company of Tata Power Limited and PGCIL which executed the transmission system for evacuation of power from Tala HEP. Powerlinks applied for transmission licence under Section 27C of the Indian Electricity Act, 1910. Powerlinks was granted transmission licence on 13.11.2003 for a period of 25 years. This was the only company in JV route which applied for and was granted transmission licence during the 2001-04 tariff period. Though the transmission project was actually executed during 2004-09 period, it was granted TMF as it fulfilled the condition of Regulation 4.10A of 2001 Tariff Regulations. The Commission vide its orders dated 24.6.2004 and 28.4.2008 in Petition Nos. 51/2004 and 147/2007 had clarified that the TMF would be available for the entire life of the project.

3.3 In Petition Nos. 18/TT/2014 and 20/TT/2014 filed by Powerlinks, the respondents, namely, BRPL and UPPCL objected to the grant of TMF in addition to the transmission charges and continuation of TMF in case of Powerlinks. The Commission in its order dated 6.5.2016 in Petition No. 18/TT/2014 directed the staff as under:-

> "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 transmission project unless 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."

3.4 In the light of the above directions of the Commission, the process of amendment was initiated which culminated in the issue of the draft second amendment to the 2014 Tariff Regulations seeking to withdraw the Transmission Majoration Factor allowed to transmission project executed through JV route in terms of Regulation 4.10A of 2001 Tariff Regulations. A new provision withdrawing the TMF with immediate effect was proposed to be introduced in the 2014 Tariff Regulations. The proposed amendment to the 2014 Tariff Regulations was as follows:-

> "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."

3.5 The main reasons given in the Explanatory Memorandum of the proposed amendment were as under:

(a) 47 transmission licences (as on the date of issue of the draft amendment) have been issued by the Commission. Out of them, 7 are through JV route, 3 are through Independent Power Transmission Companies (IPTC route), 33 are through competitive bidding route and 4 are through conversion of dedicated transmission licence into ISTS. Except for Powerlinks, none 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.

(b) Powerlinks has recovered ₹187.25 crore as TMF since the commercial operation of its assets in 2006-07 till 2013-14.

(c) Transmission tariff is available at competitive rates through competitive bidding process and till the date of the proposed amendment, Powerlinks has been sufficiently incentivised.

4. Stakeholders' Comments:

4.1 **Comments of Powerlinks**

a. **Unconditional assurance at the time of grant and subsequently**: The 2001 Tariff Regulations assures TMF throughout the life of the project. TMF was offered as an incentive unconditionally to attract private investments in the transmission sector. Accordingly, Powerlinks made an investment of about ₹1550 crore. Powerlinks was the only JV company which was granted licence during the 2001-04 tariff period and became eligible for TMF. Though there was no provision in the 2014 Tariff Regulations, the Commission had confirmed in order dated 1.7.2004 in Petition No.51/2004 that Powerlinks is eligible to claim TMF for the entire life. The assurance was given to Powerlinks without any condition for interim review or abolishment of TMF, which was reaffirmed in the subsequent tariff orders. Abrogation of the vested right is neither desirable nor permissible in law or equity.

b. **Vested substantive right to claim TMF**: By confirming the continuation of TMF for the entire life of the project, vide order dated 1.7.2001 in Petition No.51/2004, the

Commission has created a substantive right in favour of Powerlinks to claim TMF throughout the life of the project. A vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned. A right cannot be taken away by legislation or amendment and “a new law ought to regulate what is to follow, not the past”.

c. **Promissory Estoppel and Legitimate Expectation**: Based on the assurance that TMF can be availed for the entire life of the project, Powerlinks made a substantial investment to create the transmission assets. The investments were made on the basis of Regulation 4.10A of the 2001 Tariff Regulations, orders dated 29.5.2001 and 1.7.2004 in Petition Nos. 23/2001 and 51/2004 respectively. Powerlinks had acted on the promises made by the Commission in the 2001 Tariff Regulations and subsequent orders and Powerlinks altered its position by making investments, thus the Doctrine of Promissory Estoppel and “legitimate expectation” come into play.

d. **Entities dissimilarly situated cannot be treated equally**: TMF was introduced to invite private entrepreneurs to invest and enter the transmission sector and it highlighted unequivocally highlighted that it is a one-time offer for investors who enter transmission sector from the date of notification of the amendment on 29.5.2001 to 31.3.2004. All the investors during the said period stood on similar footing and all of them had equal opportunity to invest in the transmission. However, Powerlinks was the only investor who was issued licence on 13.11.2003 and no other entrepreneur participated in the scheme. Thus, Powerlinks stood as a separate class distinct from other transmission licensees in the country who did not participate in the scheme. Any attempt to equate Powerlinks with other transmission licensees by way of the present amendment is unjust and arbitrary and violative of Article 14 of the Constitution.

f. **Need to preserve the objective of TMF and regulatory certainty**: TMF was introduced to lure the private investors into transmission sector by way of amendment to the 2001 Tariff Regulations. The Commission has to take a wholesome, holistic and pragmatic view on all the issues to encourage investments and to balance the competing interests of all the stakeholders and not be concerned solely with the consumer interest. The proposed amendment has the potential of affecting the investments in the transmission sector.

g. **Need to balance the interest of all stakeholders**: The Commission having considered the rival submissions it observed in order dated 29.5.2001 in Petition No.23/2001 that 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 and reiterated the continuation of TMF. The Commission having studied the impact of TMF on consumers and ensured the interest of investor and consumers are balanced.

h. Miniscule impact on consumers: The impact on tariff on the consumers as a result of TMF is miniscule as Powerlinks received transmission charge of ₹25000 crore during 2016-17 and the amount received towards TMF scheme is about ₹25 crore (0.098%) which comes to less than 0.04 paisa/kwh and it has no impact on the consumers.

4.2 Comments of REC

TME was introduced to attract private investments into the transmission sector and withdrawl of TMF would lead to regulatory uncertainty. The Commission should explore other options which would benefit Powerlinks and the beneficiaries of the transmissions assets owned by Powerlinks.

4.3 Comments of BPRL

BRPL had suggested withdrawal of TMF in its reply to Petition Nos. 18/TT/2014 and 20/TT/2014 and raised objections against the grant and continuation of TMF over and above the transmission charges. BRPL has stated that Powerlinks is the only beneficiary of TMF in the last 11 years. BRPL supported the Commission's proposal to withdraw the TMF.

4.4 <u>Comments of GRIDCO</u>

Substantial amount has already been recovered through TMF and in the present age of competition when the Transmission Service Providers are selected through competitive bidding there is no further need to enhance the benefit to Powerlinks at the cost of consumers. Taking into consideration the consumers' interest and emerging scenario in transmission sector, the Commission may withdraw the benefits of TMF granted to Powerlinks.

4.6 <u>Comments of Mr. N.K. Jain (Engineer)</u>

Mr. N.K. Jain, an Engineer by profession, in his individual capacity has put forward the following reasons in support of withdrawal of the TMF:-

a. Only Powerlinks is benefited by the provisions of TMF. Privy Purses was granted to all the rulers of the kingdoms which merged with the Union of India at the time of Independence and was to be given for all the time. However, the Government which espoused the concept of Privy Purses withdrew it in 1969 as it was considered burden on the society. The same principle and reasoning must be applied in the present case as the TMF has become a burden on the beneficiaries and it may be withdrawn.

b. Interest rates were high at the time when TMF was decided. Now, the interest rates have come down to half of the rates which were prevailing at the time of introduction of TMF. Hence, TMF should be withdrawn.

c. In case of other JVs which have been granted transmission licence, interest on return on investment @ 15.5% is allowed by the Commission. Once the POC mechanism came into being on 1st July, 2011 there should not be any case for granting any additional benefit to any individual entity. The POC charges are at par for all, hence no special treatment should be given to any entity and as such TMF should be withdrawn with effect from 1st April, 2014 as the tariff is for 2014-19 block. After withdrawl of TMF, the excess amount recovered from the beneficiaries should be returned to the beneficiaries in the interest of public.

Analysis & Commission's decision

5.0 We have considered the submissions of Powerlinks, REC, BRPL, GRIDCO and Shri N.K. Jain. Powerlinks sought to implement the transmission project through JV route and applied for and was granted transmission licence on 13.11.2003 i.e. within the specified period of 31.3.2004. There was a possibility that other JVs and IPTCs might have expressed interest and applied for and might have been granted transmission licence before 31.3.2004. In all these cases, the transmission projects would have been implemented during 2004-09 and all of them would have been eligible for TMF. Simply because other JVs and IPTCs did not come forward to implement the transmission projects in terms of Regulation 4.10A of 2001 Tariff Regulations, this cannot be held against the lone JV, namely, Powerlinks who took the risk and came forward to implement the task. Even if there is only one beneficiary of the promotional scheme under the regulations, the benefits of the regulations should be fully extended to the said lone beneficiary. Otherwise the sanctity of the regulations and the solemn promise made by the Commission through the regulations will be lost. This will create regulatory uncertainty in the mind of the investors. There is a legitimate expectation on the part of Powerlinks when it applied for and was granted transmission licence under the said provision. Even the legitimate expectation was further strengthened when the Commission unambiguously reiterated its commitment vide orders dated 24.6.2004 and 28.4.2008 in Petition Nos. 51/2004 and 147/2007 respectively that TMF would be available to Powerlinks throughout its useful life. The objections of the beneficiaries and Shri N K Jain cannot be sustained for the reason that TMF is the result of the policy decision of the Commission to extend promotional benefits for JVs and IPTCs to enter the transmission sector when the selection of Transmission Service Providers through competitive bidding was not even envisaged in the Act and the said policy decision cannot be sacrificed because subsequently, transmission tariff is being determined at competitive price through competitive bidding without any promotional scheme. When TMF was conceived, it was conceived in public interest in order to draw capital and expertise from the private sector in transmission. Therefore, we are of the view that the implementation of said policy decision should be continued till its logical end and should not be terminated midway. The Commission has therefore decided not to go ahead with the amendment as proposed in the draft regulations.

6.0. Regulation 4.10A in the 2001 Tariff Regulations specifies that the TMF will be available for the entire life of the transmission project. The life of a transmission line was specified as 25 years in the 2001 Tariff Regulations and accordingly, transmission licence was granted vide order dated 22.10.2003 in Petition No. 40/2013 to Powerlinks for a period 25 years. However, the useful life of the transmission line has been specified as 35 years in 2009 and 2014 Tariff Regulations. In our view, the promotional scheme of TMF should be confined to the useful life specified in the 2001 Tariff Regulations and the transmission licence granted to Powerlinks. Accordingly, the incentive of TMF granted to Powerlinks shall be available only for a period of 25 years from the date of issue of licence. This aspect needs to be clarified as the useful life of the transmission assets has been subsequently enhanced from 25 years to 35 years. The Commission has decided to issue second amendment to the 2014 Tariff Regulations clarifying the period for which TMF would be available.

7.0 Accordingly, the following provision is inserted by way of second amendment to the 2014 Tariff 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."

sd/-	**sd/-**
(Dr. M.K. Iyer)	**(P.K. Pujari)**
Member	**Chairperson**