

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 173/MP/2011

Coram:

1. Dr. Pramod Deo, Chairperson
2. Shri V.S.Verma, Member
3. Shri M.Deena Dayalan, Member

Date of Hearing: 28.11.2011

Date of order: 5.1.2012

In the matter of

Application for approval under Sections 17(3) and 17 (4) of Electricity Act, 2003 for creating Security in favour of security trustee in connection with the project C of Western Region Strengthening Scheme-II in Gujarat and Madhya Pradesh.

And in the matter of

1. Western Region Transmission (Gujarat) Pvt. Ltd., Mumbai
 2. IDBI Trusteeship Services Limited , Mumbai **Petitioners**
- Vs

1. Maharashtra State Electricity Distribution Company Ltd., Mumbai
2. Gujarat Urja Vikas Nigam Ltd. Vadodara
3. Chattisgarh State Power Distribution Co. Ltd. Raipur
4. Electricity Deptt., Govt. of Goa, Panaji
5. Electricity Deptt. Administration of Daman and Diu, Daman
6. Electricity Deptt., Govt. of UT of Dadra and Nagar Haveli, Silvass
7. Madhya Pradesh Audyogik Kendra Vikas Nigam Ltd., Indore
8. M.P. Power Trading Co. Ltd., Jabalpur
9. Adani Power Limited, Ahmadabad
10. Heavy Water Project, Deptt. of Atomic Energy, Mumbai
11. Power Trading Corporation of India Ltd., New Delhi
12. Jindal Power Limited, Chhatisgah,
13. Sugen Mega Power Project Torrent Power Ltd., Surat
14. Power Grid Corporation of India Ltd., Gurgaon **Respondents**

The following were present:

1. Shri Anupam Verma, Advocate for the petitioner
2. Miss Poonam Verma, Advocate for the petitioner
3. Shri Mayank Bhardwaj, RPTL
3. Shri Daljit Singh, IDBI Trusteeship



ORDER

Western Region Transmission (Gujarat) Pvt. Ltd., the first respondent herein has been granted transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as "the Act"), to transmit electricity as a transmission licensee and for that purpose to construct, maintain and operate the transmission assets pertaining to Western Region System Strengthening Scheme-II, package-C. The first petitioner had approached the Commission in Petition No. 208/2009 for approval under Section 17 (3) and (4) of the Act to create security in favour of the SBICAP Trustee Co. Ltd. by execution of indenture of mortgage. The Commission in its order dated 11.2.2010 had accorded the approval for creating security in favour of SBI CAP Trustee Company Limited.

2. The present petition has been filed by the first petitioner and IDBI Trusteeship Services Limited for approval under Section 17 (3) and 17 (4) of the Act for creation of security in favour of IDBI Trusteeship Services Limited as Security Trustee for the benefit of the ECB Lenders/ECB Lender's Agent/Security Trustee by way of execution and creation of Security Documents.

3. The petitioners have made the following prayers:

- (a) Approve the creation of security in favour of Security Trustee pursuant to Security Trustee to secure the payment, repayment, reimbursement of the obligations pertaining to the ECB Facility;



- (b) Approve the Security documents for creation of security in favour of the Security Trustee for the benefit ECB lender/ECB Lender's Agent/Security Trustee; and
- (c) Pass such other relief as Hon'ble Commission deems fit and appropriate under the circumstances of the case and in the interest of justice.

4. According to the first petitioner, a consortium of financial institutions and banks led by State Bank of India agreed to lend and advance financial assistance by way of rupee term loans aggregating to approximately ₹ 329.70 crore for the purpose of part financing the construction, development and implementation of the project on the terms and conditions set out in the Common Loan Agreement dated 18.5.2009 and other financing and security documents. SBICAP Trustee Co. Ltd. was appointed as security trustee for the rupee lenders. The first petitioner has availed only a part of the Rupee Loans and the said indenture of mortgage is yet to be executed. Thus, no security was created in favour of Rupee Term Lenders based on approval granted vide said order dated 11.2.2010.

5. The first petitioner has also submitted that it approached Credit Agricole Corporate and Investment Bank (hereinafter referred to as the "ECB Lenders"), body corporate existing under the laws of France and having its principal place of business at Credit Agricole Corporate and Investment Bank,



Singapore Branch for part financing of the cost of the project through External Commercial Borrowings, instead and in place of the Rupee Loans. Credit Agricole Corporate and Investment Bank and Mizuho Corporate Bank (ECB Lenders) have agreed to provide financial assistance of 30 Million US\$ each i.e. an aggregate principal amount not exceeding 60 Million US\$ (hereinafter referred to as the "ECB Facility") for the purpose of part financing the construction, development and implementation of the project and on the terms and conditions set put in the Credit Agreement, Sponsor Support Agreement, Security Trustee Agreement, Trust and Retention Account Agreement and other financing documents.

6. The petitioner has further submitted that ECB facility will be in substitution of the Rupee Loans. The debt under the Rupee loans will be satisfied before the availment of ECB facility and creation of security. The security under indenture of mortgage in favour of the Rupees loans approved by the Commission vide order dated 11.2.2010 will not be created. The remaining funds required in the project will be arranged by the sponsor in accordance with the provisions under Financing Agreements including sponsor support agreement. Second petitioner has been appointed by the first petitioner and the ECB lenders as the security trustee for the benefit of ECB lenders and all beneficiaries to the security interest. The second respondent has agreed to act as Security Trustee and to hold the security to be created pursuant to the credit agreement and other Financing agreements in accordance with the

respective terms thereof based on the Security Trustee Agreement dated 29.6.2011.

7. According to the petitioner, the proposed indenture of mortgage and memorandum of entry and Director's declaration have been settled and initialed between the Security Trustee and Petitioner No.1. The petitioner has proposed to notify all the major project parties regarding the assignment of all rights, title benefits, claims and interests in favour of the Security Trustee for the benefit of lenders.

8. The first petitioner has proposed:-

- (i) To create security on assets, rights and entitlements described in the Indenture of Mortgage including immovable properties situated in the State of Gujarat by execution of Indenture of Mortgage;
- (ii) To create security on its immovable assets, present and future, situated in the State of Madhya Pradesh including transmission towers by deposit of title deeds and to execute declaration and undertaking before creation of mortgage through its Director/authorized person. The Security Trustee shall record the said mortgages by deposit of title deeds by Memorandum of Entries in their records; and
- (iii) To create mortgages in favour of the ECB Lenders/Security Trustee in phases as and when immovable assets are



acquired/new contracts in respect of the Transmission Towers are placed and to deposit the possession/completion certificate as and when issued with the Security Trustee by way of additional title deeds.

9. The first petitioner has further stated that in view of the provisions of sub-section (3) and sub-section (4) of Section 17 of the Act, the first petitioner, as a licensee cannot assign the licence or transfer its utility or any part thereof to any person or enter into an agreement relating to any of these transactions without approval of the Commission. Accordingly, the present petition has been filed wherein the petitioners have sought the Commission's prior approval for creating security in favour of Security Trustee and give effect to the aforesaid mortgages, charges and assignments.

10. It is further stated that Implementation agreement signed between the first petitioner and Power Grid Corporation of India Limited and Power Transmission Agreement signed between the first petitioner and beneficiaries of the project provide that the first petitioner is free to create any encumbrance over all or part of the security package or the other assets of the project in favour of the lenders or the representatives of the lenders as security for;

(a) Amount payable under the Financing Agreement; and

(b) Any other amounts agreed by the parties:



Provided that,

- (i) The lenders or the representatives of the lenders shall have entered into the Financing Agreements; and
- (ii) Any encumbrance granted by the petitioners shall contain provisions pursuant to which the lenders or the representatives of the lenders agree unconditionally with the petitioner to release such encumbrances upon payment, to the lenders, of all amounts due under the Financing Agreements.

11. Petition was heard on 20.10.2011 after notice to all the parties. Relevant portion of Record of Proceedings is extracted below:

"2. Replying to the query of the Commission whether clearance has been obtained from the existing Security Trustee (SBICAP Trustee Co. Ltd.), the learned counsel for the petitioner submitted that clearance has not been obtained but the same will be submitted if so directed. He further submitted that the Commission may consider to issue notice to SBICAP Trustee Co. Ltd.

3. The learned counsel for the MP TRADECO submitted that the respondent was concerned about the delayed commissioning of the project, otherwise, he did not have any objection to the petitioner's reply.

4. The Commission directed to admit the petition and issue notice to the respondents and SBICAP Trustee Co. Ltd., Mumbai."

12. None was present on behalf of the respondents. Reply to the petition has been filed by Madhya Pradesh Power Trading Company Limited.

13. The matter was heard on 28.11.2011. The learned counsel for the petitioner submitted an affidavit dated 25.11.2011 accompanying reply on behalf of SBICAP Trustee Company Ltd.

14. The SBI CAP Trustee Ltd. in its reply dated 25.11.2011 has submitted as under:

- (i) The Petitioner No. 1 has fully paid/prepaid all amounts in respect of the Rupee Loans to the respective lenders and the security envisaged to be created to secure the Rupee Loans as approved by the Hon`ble Commission vide order dated 11.2.2010, has not been created;
- (ii) The petitioner No. 1 has fully paid/prepaid the Rupee Loans to the respective lenders;
- (iii) SBICAP Trustee Company Ltd., as Security Trustee, has no objection for creation of security by the Petitioner No. 1 on any or all of its assets as proposed and prayed for in the petition;
- (iv) SBICAP Trustee Company Ltd., as Security Trustee for the lenders in relation to the said Rupee Loans, has no objection for creation of security on its assets by Petitioner No. 1 in favour of ECB Lenders referred to in the Petition or in favour of any Security Trustee appointed by them.

15. Madhya Pradesh Power Trading Company Limited (MPPTCL) in its reply has submitted as under:

(i) The petitioner has failed to put forth the necessity and justification for deviating from Rupee Loan to ECB and bring on record the benefits, if any, in favour of the project and its beneficiaries. The approval of Rupee Loan was granted to the petitioner way back on 11.2.2009 and till now, he has not been able to give effect to it. It therefore, becomes doubtful that whether on a fresh approval being granted to ECB instead of Rupee Loan, the petitioner would be able to reap benefits in interest of the project and its beneficiaries;

(ii) The petitioner be directed to categorically place on record the financial advantages available on shifting on ECB from Rupee Loan, so that it may analyse and comment on it;

(iii) The petitioner is seeking fresh approval and on the other hand is requesting for extension of date of commercial operation, which was initially due on 31.3.2010 and subsequently revised to 31.3.2010 and 20.6.2011;

(iv) The petitioner is not interested in efficient and timely commissioning of the project and is resorting to all sorts of gaming and tactics to delay the project to grave prejudice and hardships to the beneficiaries. The petitioner be directed to place on record the present status of progress and time schedule for completion of the project; and

(v) The project is to be completed and commissioned within the specified time line. The delay in date of commercial operation may lead to cost over-run, which is solely attributable to the petitioner.

16. We have considered the submissions made by the petitioners, MPPTCL and SBICAP Trustee Co. Ltd. The issues raised by the MMPTCL are outside of the scope of this petition. It is clarified that the Commission vide its order dated 11.2.2010 in Petition No. 208/2009 had already accorded approval for creating security in favour of SBICAP Trustee Company Limited, Mumbai and a part of the Rupee Loan has already been availed. SBICAP Trustee Company Ltd., as Security Trustee for the lenders in relation to the said Rupee Loans, has conveyed its no objection on affidavit dated 25.11.2011 for creation of security by Petitioner No. 1 in favour of Security Trustee for the benefits of ECB Lenders. We, therefore, accord in principle approval allowing the applicant to create security in favour of IDBI Trusteeship Services Limited as Security Trustee pursuant to Security Trustee Agreement by way of mortgage on project assets by execution of indenture of mortgage for the project. We,

however, make it clear that the transmission licence granted by the Commission to the first petitioner and the underlying assets cannot be assigned in favour of the nominee of the Security Trustee unless prior approval of the Commission has been obtained at the time of creating rights in favour of such nominee. Before agreeing to transfer of licence and the assets of the first petitioner to the nominee of Security Trustee, the Commission has to evaluate such a nominee's experience in development, design, construction, operation and maintenance of transmission lines, and to be able to execute the project and undertake transmission of electricity. The licensee, lender, security trustee and the nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself of the circumstances necessitating such transfer. This decision of ours accords with Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 which reads as follows:-

"12. Assignment of Licence

In case of default by the licensee in debt repayment, the Commission may, on an application made by the lenders, assign the licence to a nominee of the lenders."

Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lenders, security trustee and the nominee, approve the assignment of the licence to a nominee of the lenders. Therefore, specific prior approval of the Commission for assigning the licence to the nominee of Security Trustee or transfer of any assets to them shall always be needed. Lastly, finance documents and

statements may be filed by the petitioner as and when required by the Commission for any specific purpose.

17. With the above, Petition No. 173/MP/2011 stands disposed of.

Sd/-
(M.DEENA DAYALAN)
MEMBER

sd/-
(V. S.VERMA)
MEMBER

sd/-
(DR.PRAMOD DEO)
CHAIRPERSON

