

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.123/MP/2016

Coram:
Shri Gireesh B.Pradhan, Chairperson
Shri A.K.Singhal, Member
Shri A.S.Bakshi, Member
Dr. M.K.Iyer, Member

Date of order: 20th of September 2016

In the matter of

Petition for approval under Section 17 (3) and (4) of the Electricity Act, 2003 for creation of security in favour of Security Trustee pursuant to Unattested Deed of Hypothecation on Project Assets for benefit of the Lenders/Security Trustee to the Project and also for any future security creation in favour of security trustee/Lenders, for the transmission lines, i.e. (i) Jharsuguda (Sundargar)-Raipur Pool 765 kV D/C line (Hexa Zebra Conductor) and (ii) OPGC-Jharsuguda (Sundergarh) 400 kV D/C (Triple Snowbird Conductor)

And

In the matter of

1. Odisha Generation Phase-II Transmission Limited
F-1, The Mira Corporate Suites, 1 & 2 Ishwar nagar,
Okhla Crossing, Mathura Road,
New Delhi-110 065

2. SBICAP Trustee Company Limited
202, Maker Tower 'E', Cuffe Parade,
Mumbai – 400021

..... **Petitioner**

Vs

1. West Bengal State Electricity Distribution Company Limited
Bidyut Bhawan, A-Block, 3rd Floor,
Bidhannagar, Kolkata-700 091

2. North Bihar Power Distribution Company Limited
2nd Floor, Vidyut Bhawan, Bailey Road,
Patna-800 001

3. South Bihar Power Distribution Company Limited
2nd Floor, Vidyut Bhawan, Bailey Road,
Patna-800 001

4. Jharkhand Bijili Vitran Nigam Limited
Engineer's Building, Dhurwa,

Ranchi-834 004

5. Damodar Valley Corporation
DVC Head Quarters, DVC Towers,
VIP Road, Kolkata-700 054

6. Gridco Limited
Grid Corporation of Orissa Limited, Janpath,
Bhubneshwar-751 011

7. Energy and Power Department, Govt. of Sikkim
Power Secretariat, Sonam Gyatso Marg,
Gangtok, Sikkim-737 101

..... Respondents

The following were present:

1. Shri Pulkit Sharma, NRSS
2. Shri T N Reddy, NRSS

ORDER

The first petitioner herein, Odisha Generation Phase-II Transmission Limited (OGPTL), 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 undertake the business of establishing transmission system for "Common Transmission System for Phase-II Generation Projects in Odisha and immediate evacuation system for OPGC (1320 MW) project in Odisha" on 'Build, Own, Operate and Maintain' (BOOM) basis, the details of which are specified in the schedule attached to the licence issued vide order dated 30.6.2016.

2. Odisha Generation Phase-II Transmission Limited and SBICAP Trustee Company Limited have filed a combined petition for creation of security in favour of SBICAP Trustee Company Limited as Security Trustee pursuant to the Security Trustee Agreement and other relevant financing documents by way of hypothecation

for benefit of the lenders to the project. The petitioners have made the following prayers:

“(a) Approve the creation of security in favour of Security Trustee pursuant to Security Trustee Agreement, by way of hypothecation on Project Assets through execution of unattested deed of hypothecation for the Project.

(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.”

3. According to the first petitioner, for the purpose of part finance for the project, the first petitioner requested the L & T Infrastructure Finance Company Limited, L & T Finance Limited and L & T Fincorp Limited (hereinafter referred to as ‘lenders’) for which lenders have agreed to make available financial assistance amounting to Rs. 954.00 crore as rupee term loan for construction, development and implementation of the project on the terms and conditions set out in the Common Loan Agreement, Security Trustee Agreement, Lenders Agent Agreement, Trust and Retention Account Agreement and Unattested Deed of Pledge of Shares (Financing Agreements). For this purpose, the first petitioner and lenders have appointed the second petitioner, namely SBICAP Trustee Company Limited as Security Trustee (hereinafter referred to as ‘Security Trustee’) who has agreed to act as Security Trustee for the lenders and has entered into Security Trustee Agreement on 28.6.2016. The first petitioner has submitted that the proposed unattested deed of hypothecation has been settled and initialled between the Security Trustee and the first petitioner in which the commitment of the lenders has been set out.

4. The first petitioner has submitted that it proposes to agree under unattested deed of hypothecation that it shall be lawful for the Security Trustee or the lenders to enter into and take possession of the hypothecated premises along with all intangibles and any future assets under the project comprised in unattested deed of hypothecation

and OGPTL shall take no action inconsistent with or prejudicial to the right of Security Trustee action for the lenders quietly to possess, use and enjoy the same and to receive the income, profits and benefits thereof without interruption or hindrance by OGPTL or by any person or persons whatsoever.

5. The first petitioner has submitted that as per Section 17 (3) (4) of the Electricity Act, 2003 prior approval of the Commission is necessary for the agreement under the unattested deed of hypothecation to take effect. Accordingly, unattested deed of hypothecation shall be executed after approval of the Commission.

6. The first petitioner has further stated that Article 15.2.2 of the Transmission Service Agreement entered into between the first petitioner and the beneficiaries of the project provide that the first petitioner is free to create any encumbrance over all or part of the receivables, Letter of Credit or other assets of the project in favour of the lenders or the representative of the lenders as security for amount payable under the Financing Agreements and any other amounts agreed by the parties. Provided that:

- (i) The lenders or the representatives of the lenders on their behalf shall have entered into the Financing Agreements and agreed in writing to the provisions of this Agreement; and
- (ii) Any encumbrance granted by the first petitioner shall contain provisions pursuant to which the lenders or the representative of the lenders on their behalf agrees unconditionally with the first petitioner to release such encumbrances upon payment by the first petitioner to the lenders, of all amounts due under the Financing Agreements.

7. The first petitioner has submitted that in terms of Article 15.2.4 of the TSA, the first petitioner and LTTCs are required to take permission from this Commission prior to relinquish or transfer of its rights and obligations in the TSA. The first petitioner has stated that in view of the provisions of sub-sections (3) and (4) of Section 17 of the Electricity Act, 2003, the first petitioner, as a licensee cannot create security interest over all the movable and immovable assets of the first petitioner in favour of Security Trustee and for any subsequent transferees, assignees, novatees thereof and any refinancing lenders to the project, acting on behalf of and for the benefit of the lenders pursuant to Financing Agreements, by way of hypothecation on project assets without approval of the Commission. Accordingly, the petitioners have filed the present petition seeking prior approval of the Commission for creation of security in favour of Security Trustee/lenders by way of hypothecation on projects assets through execution of Security Trustee Agreement and other financing documents for the project.

8. The petition was heard after notice to the petitioner and the respondents. No reply has been filed by the respondents. None was present on behalf of the respondents despite notice. During the course of hearing, the representative of the petitioner submitted that the petitioner is a separate legal entity and has its own books of accounts and balance sheet.

9. We have considered the submissions made by the petitioner. The transmission projects are capital intensive projects requiring huge capital investment. These projects are financed through loans. It is normal practice followed by financial institution/banking industry to ask for sufficient security from the borrower to back the

loan in order to mitigate the credit risk of the lenders. In the instant case, the first petitioner and lenders have appointed the second petitioner, namely SBICAP Trustee Company Limited as Security Trustee for creation of security over all the movable and immovable assets of the project. Accordingly, Security Trustee Agreement, Lenders Agent Agreement, Trust and Retention Account Agreement dated 28.6.2016 have been executed for loan of Rs. 954.00 crore. In accordance with Article 15.2.2 of the TSA, the Transmission Service Provider has been allowed to create any encumbrance over all or part of the receivables, Letter of Credit or the other assets of the project in favour of the lenders or the representative of the lenders, as security for amounts payable under the Financing Agreements and other amounts agreed by the parties.

10. Section 17 (3) and (4) of the Electricity Act, 2003 provides as under:

“17.(3) No licensee shall be any time assign his licence or transfer his utility, or any part thereof, by sale, lease, exchange or otherwise without the prior approval of the Appropriate Commission.

(4) Any agreement relating to any transaction specified in sub-section (1) or sub-section (3), unless made with the prior approval of the Appropriate Commission, shall be void.”

11. As per the above provision, a licensee is required to obtain approval of the Commission for assigning his licence or transfer its utility or any part thereof by way of sale, lease, exchange or otherwise and to enter into an agreement relating to any of these transactions. We are satisfied that SBICAP Trustee Company Limited as Security Trustee needs to be given comfort for creation of security for the benefit of banks/financial institutions/non-banking financial companies as security for the financial assistance provided by the lenders. We, therefore, accord in principle approval allowing the first petitioner to create security in favour of SBICAP Trustee Company Limited, presently acting as Security Trustee pursuant to Security Trustee

Agreement by way of hypothecation on project assets by execution of unattested deed of hypothecation for the project. It is, however, made 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 is obtained at the time of creating rights in favour of such nominee. Before agreeing to transfer of the licence and the assets of the first petitioner to the nominee of Security Trustee, the Commission shall 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, lenders, 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 is in accordance 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 under:

“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 subject to proper due diligence of the process. 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 first petitioner as and when required by the Commission for any specific purpose. The representative of the petitioner during the hearing submitted that it is separate legal entity and has its own books of account and balance sheet. We direct that the petitioner shall continue to maintain its own books of accounts and balance sheet.

12. With the above, Petition No. 123/MP/2016 stands disposed of.

Sd/-
(Dr. M.K.Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson