

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.17/MP/2017

Coram:

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

Date of order: 28th of April, 2017

In the matter of

Petition for approval under Section 17 (3) and (4) of the Electricity Act, 2003 for creation of security interest by way of mortgage, hypothecation, charge or assignment over all the movable and immovable assets of Alipurduar Transmission Limited and assignment of transmission licence in favour of Security Trustee acting on behalf of the lenders and for approval of documents creating security and of other documents in relation to the financing or refinancing of the project of Alipurduar Transmission Limited.

And

In the matter of

1. Alipurduar Transmission Limited
Plott No. 101, Part-III, GIDC Estate,
Sector-28, Gandhinagar-382 02, Gujarat

2. Unit Trust of India Investment Advisory Services Ltd.
Unit No. 2, Block B, 1ST Floor, JVPD Scheme,
Gulmohar Cross Road No. 9,
Andheri (West), Mumbai-400 049

..... **Petitioners**

Vs

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

2. Assam Electricity Grid Corporation Limited
1st Floor, Bijulee Bhawan, Paltan Bazar,
Guwahati-781 001.

3. Manipur State Power Distribution Company Limited
Electricity Complex, Patta No. 1293 under 82 (2),
Khawal Bazar, Keishampat,
District-Imphal West, Manipur-795 001

4. Department of Power, Govt. of Nagaland

New Sectt. Complex,
Kohima-797 001, Nagaland

5. North Bihar Power Distribution Company Limited
2nd Floor, Vidyut Bhawan, Bailey Road,
Patna-800 001.
6. Gridco Limited
Grid Corporation of Orissa Limited, Janpath,
Bhubneshwar-751 011
7. West Bengal State Electricity Distribution Company Limited
Bidyut Bhawan, (A-Block, 3rd Floor) Bidhannagar,
Kolkata-700 091
8. Energy and Power Department, Govt. of Sikkim
House No. 1, Power Secretariat, Sonam Gyatso Marg,
Gangtok, Sikkim-737 101
9. Jharkhand Bijli Vitran Nigam Limited
Engineer`s Building,
Dhurwa, Ranchi-834 004.

....Respondents

The following were present:

Shri Aniket Prasoon, Advocate, ATL

ORDER

The First Petitioner herein, Alipurduar Transmission Limited, 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 "Transmission System strengthening in Indian system for transfer of power from new HEPs in Bhutan (hereinafter referred to as "Transmission System") 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 21.3.2016.

2. Alipurduar Transmission Limited and Unit Trust of India Investment Advisory Services Limited have filed a combined petition for creation of security and assignment of transmission licence in favour of Unit Trust of India Investment Advisory Services Limited as Security Trustee pursuant to the Common Rupee Loan Agreement, Security Trustee Agreement and other relevant financing documents by way of mortgage/hypothecation, charge or assignment over all the movable and immovable on project assets for benefit of the lenders to the project. The Petitioners have made the following prayers:

“(a) Creation and/or perfection of security interest by way of (i) mortgage, hypothecation, charge or assignment over all moveable and other immovable assets of the Petitioner No. 1 (including over the Petitioner No.’s 1 benefits, rights, title and interest under the TSA); (ii) pledge over the pledged shares, in favour of the Security Trustee, acting on behalf of and for the benefit of the lenders;

(b) The security documents (and other documents relating to the financing or refinancing of the Project of the Petitioner No. 1) and execution thereof for creation and/or perfection of the aforesaid security interest in favour of the Security Trustee for the benefit of the Lenders;

(c) Assignment of the transmission licence and creation of security interest over the utility (as defined under the Act) of the Petitioner No.1, by way of security in favour of the Security Trustee, acting for the benefit and on behalf of the lenders;

(d) Condone any inadvertent omissions/errors/shortcomings and permit to add, change, modify, alter this filing and make further submissions as may be required at a future date;

(e) Pass such other order(s), relief or direction as this Commission may deem fit and proper under the facts and circumstances of the present case;”

3. According to the First Petitioner, for the purpose of finance for the project, the First Petitioner requested the lenders for which consortium of lenders comprising of ICICI Bank Limited, HDFC Bank Limited, Corporation Bank, IDBI Bank Limited and India Infrastructure Finance Company Limited (lenders) have agreed to make available financial assistance amounting to Rs. 837 crore as rupee loan for the project (Loan Facility) which includes non-fund based facilities of Rs. 393 crore as sub-limits.

In this regard, ICICI Bank Limited has agreed to act as facility agent for the consortium of lenders. For this purpose, Common Rupee Loan Agreement was entered into between the First Petitioner and the lenders on 14.10.2016. At the request of the First Petitioner and the lenders, Unit Trust of India Investment Advisory Services Limited has agreed to act as Security Trustee in accordance with Security Trustee Agreement and to enter into all relevant financing documents to hold the security interest for and on behalf of the lenders.

4. The First Petitioner has submitted that pursuant to the terms of the Common Rupee Loan Agreement, it has agreed to provide the following security to secure the obligations under Loan Facility,

(a) A first ranking security interest by way of charge/assignment/mortgage/hypothecation/pledge on the following:

(i) all the First Petitioner`s immovable properties (including land) and movable properties including all towers, conductors, insulators, machinery, machine spares, tools and accessories, furnitures, fixtures, vehicles and other movable assets, both present and future;

(ii) all the First Petitioner`s tangible and intangible assets, including but not limited to goodwill, undertaking and uncalled capital, both present and future.

(ii) All insurance policies taken by the First Petitioner.

(iv) All of the First petitioner`s rights and interests under contractor guarantees, performance bonds, letters of credit (including towards payment security mechanism) that may be provided by any party for the

Project, including letter of credit provided by Long Term Transmission Customers (LTTCs) as payment security mechanism under the Transmission Service Agreement dated 22.9.2015 executed by First Petitioner in relation to the Project or any such other security provided by the LTTCs in favour of the First Petitioner in relation to the Project;

(v) All of the First Petitioner`s benefits, rights, title and interest under each of the documents and contracts executed by the First Petitioner in relation to the design, engineering, procurement, construction, operation, maintenance, ownership and implementation of the Project (which *inter alia* includes the TSA and Transmission Licence), duly acknowledged and consented to, where required by the lenders, by the relevant counter-parties to such Project Documents, all the First Petitioner`s rights under each letter of credit/guarantee or performance bond that may be posted by any party to Project Documents for the First Petitioner`s benefits and all the First Petitioner`s rights under the clearances (to the extent assignable under applicable law);

(vi) All the rights, title and interest of the First Petitioner under the Transmission Licence;

(vii) All the book debts, operating cash flows, receivables, all other current assets, commission, revenues of the First Petitioner of whatsoever nature, both present and future;

(viii) All the accounts (including but not limited to the debt service reserve account) and all other bank accounts of the First Petitioner; and

(b) A first ranking pledge over the pledged shares including provision of such powers of attorney in relation to the Pledged Shares as may be required by the Lenders, subject to Section 19 (2) and 19 (3) of the Banking Regulation Act, 1949. For the purpose of this petition, 'Pledged Shares' shall mean, 51% (fifty one per cent) of the paid-up share capital of First Petitioner held by Kalpataru Power Transmission Ltd., the voting rights with respect to which shall not fall below 51% (fifty per cent) of the voting rights with respect to the share capital of the First Petitioner.

(c) The security interest is proposed to be created under the deed of hypothecation coupled with the power of attorney entered into *inter alia* with the Borrower and the Security Trustee.

5. The First Petitioner has 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. The First Petitioner has submitted that in terms of Article 15.2.4 of the TSA, the petitioner is required to take permission from this Commission prior to relinquish or transfer of its rights and obligations in the TSA.

6. The First Petitioner has submitted that assignment of the transmission licence and utility by way of security is exercisable by the lenders only on occurrence of an event of default and would entitle the lenders to appoint their nominee to exercise the rights under the transmission licence and utility or to enforce the assignment of way of

security in such other manner as may be permitted by the Commission. The first petitioner has submitted that such assignment shall be subject to prior approval of the Commission in terms of evaluating such nominee's experience in development, design, construction, operation and maintenance of the relevant project as stipulated in Transmission Licence Regulations as amended from time to time.

7. 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/Lenders 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 mortgage/hypothecation/assignment of mortgaged properties and projects assets through execution of Common Rupee Loan Agreement and other financing documents for the project.

8. The petition was heard after notice to the Petitioners and the Respondents. No reply has been filed by the Respondents.

9. We have considered the submissions made by the Petitioners. 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 consortium of lenders lead by ICICI Bank Limited have appointed the

Second Petitioner, namely Unit Trust of India Advisory Investment Limited as Security Trustee for creation of security over all the movable and immovable assets of the project. Accordingly, Common Rupee Loan Agreement dated 14.10.2016 has been executed for loan of Rs. 837 crore as rupee loan. In accordance with Article 15.2 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 Unit Trust of India Advisory Investment 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 Unit Trust of India Advisory Investment Limited, presently acting as Security Trustee pursuant to Common Rupee Loan Agreement by way of mortgage on project assets by execution

of indenture of mortgage 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. We

direct that the petitioner shall continue to maintain its own books of accounts and balance sheet separately.

12. With the above, Petition No. 17/MP/2017 stands disposed of.

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

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson