

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 392/MP/2018

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S. Jha, Member**

Date of Order: 2nd of April, 2019

In the matter of

Approval under Section 17 (3) and (4) of the Electricity Act, 2003 by way of creation of security interest in favour of Security Trustee/Lenders and other security creating documents/financing agreements by way of mortgage/hypothecation/assignment of mortgage properties and project assets of Fatehgarh-Bhadla Transmission Limited.

And

In the matter of

Fatehgarh-Bhadla Transmission Limited
Adani House, Near Mithakhali Six Roads,
Navrangapura, Hyderabad-380 009

...Petitioner

Versus

Adani Renewable Energy Park Rajasthan Limited
Achalraj Building, Opposite Mayor Bungalow,
Law Garden, Ahmedabad-380 006

2. HDFC Bank Limited
3rd Floor, HDRF Bank House,
Opp Jain Dersar,
Navrangapura, Ahmedabad-380 009

3. Catalyst Trusteeship Limited
213, 2nd Floor, Naurang House, 21,
Kasturba Gandhi Marg,
New Delhi-110 001

...Respondents

The following was present:

Shri Sameer Ganju, FBTL

ORDER

The Petitioner, Fatehgarh Bhadla Transmission Limited, has been granted transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to

as "the Act") to establish transmission system for "Ultra Mega Solar Park in Fatehgarh District Jaisalmer, Rajasthan" 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 27.8.2018 in Petition No. 94/TL/2018.

2. The Petitioner, Fatehgarh Bhadla Transmission Limited, has filed the present Petition for creation of security interest over all the movable and immovable assets of the Petitioner in relation to the project comprising of, amongst others, in favour of Catalyst Trusteeship Limited as Security Trustee pursuant to the Security Trustee Agreement and Common Loan Agreement, on project assets for the benefit of the lender to the project. The Petitioner has made the following prayers:

"(a) Approve the assignment of the transmission licence and Utility (as defined in the Electricity Act, 2003) of the Petitioner by way of security in favour of the Catalyst Trusteeship Limited as Security Trustee, acting for the benefit and on behalf of the Lenders;

(b) Approve the creation and/or perfection of security interest in favour of the Catalyst Trusteeship Limited as Security Trustee, acting on behalf of and for the benefit of the Lenders as provided under the Common Loan Agreement.

(c) Approve the Security documents (as defined in the Common Loan Agreement), and execution thereof, for creation and/or perfection of aforesaid security interest in relation to the aforesaid security in favour of Catalyst Trusteeship Limited as Security Trustee acting on behalf of and for the benefit of the Lenders;

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

3. According to the Petitioner, for the purpose of financing for the project, the Petitioner requested HDFC Bank Limited (hereinafter referred to as 'lender') for which lender has agreed to make available financial assistance amounting to Rs. 268 crore, out of which Rs. 200 crore would be utilized by the Petitioner in the form of Letter of Credit (LC) as sub-limit of the Rupee Facility on the terms and conditions set out in the Common Loan Agreement and Security Trustee Agreement (hereinafter referred

to as the Financing Agreements). The Petitioner has submitted that in addition to rupee term loan of Rs. 268 crore, on its request, the lender has agreed to provide guarantee facility, working capital facility and hedge facility of Rs. 14.85 crore, Rs. 12 crore and Rs. 25 crore respectively to the Petitioner on the terms and conditions specified in the Financing Agreements.

4. The Petitioner has appointed the Respondent, namely, Catalyst Trusteeship Limited as Security Trustee (hereinafter referred to as 'Security Trustee') who has agreed to act as Security Trustee and has entered into Common Loan Agreement and Security Trustee Agreement on 2.11.2018.

5. The Petitioner has submitted that pursuant to the Common Loan Agreement, the Petitioner has agreed to provide the following security to secure the obligations under the loan facility in favour of the Security Trustee:

(a) A first mortgage and charge on all the Applicant/Petitioner's immovable properties, both the present and future, together with all structures and appurtenances thereon and thereunder;

(b) A first charge by way of hypothecation over all the movable assets, including movable plant and machinery, machinery spares, tools and accessories, furniture, fixtures, vehicle, all other movable assets, both present and future;

(c) A first charge on the current assets including operating cash flows, receivables, commissions, revenues of whatsoever nature and wherever arising, both present and future;

(d) A first charge over all bank accounts of the Applicant/Petitioner including without limitation, Escrow Account and the sub-accounts thereunder (including but not limited to the DSRA, other reserves and any bank guarantee/letter of credit in lieu thereof) of any account in substitution thereof, opened pursuant to

the provisions of the Escrow Agreement or any of the other Project Documents, wherein all revenues, disbursement, receivables and all funds of the Applicant/Petitioner shall, from time to time, be deposited and all permitted investments or other securities representing all amount credited thereto:

Provided that in the event the DSR is maintained in a non-fund based for, all and singular rights, title, interest, benefits, claims and demands whatsoever of the Applicant/Petitioner in, to under and in respect of the non-fund based DSR, wherever maintained, shall be charged/assigned by way of continuing security in favour of the Security Trustee.

(e) A first charge on all intangibles assets in relation to the Project including but not limited to goodwill of the Project, intellectual property rights, uncalled capital of the Applicant/Petitioner, and undertaking, both present and future;

(f) A first charge by way of hypothecation over:

(i) all the rights, title, interest, benefits, claims and demands whatsoever of the Applicant/Petitioner in, to and under the Project Documents (including Transmission Service Agreement/transmission licence). Duly acknowledged and consented to by the relevant counter-parties to such Project documents, all as amended, varied or supplemented from time to time;

(ii) all the rights, title, interest, benefits, claims and demands whatsoever of the Applicant/Petitioner in, to and under the clearances in respect of the Project, and

(iii) all the rights, title, interest, benefits, claims and demands whatsoever of the Applicant/Petitioner in any letter of credit, guarantee including contractor guarantee and liquidated project documents and all insurance contracts and insurance proceeds in respect of the Project.

(g) A security interest by way of assignment of all rights, title, interest and obligations of the Applicant/Petitioner in, to and under the Project to or in favour of the Lenders/Security Trustee in case of right of substitution is being exercised under the Transmission Service Agreement.

(h) First ranking pledge of 10% fully paid and voting equity shares of the Applicant/Petitioner, together with all accretions thereon, such that the lenders have effective pledge on 100% fully paid up and voting equity shares of the Applicant/Petitioner held by the Promoter, at all times until COD, and thereafter first ranking pledge over 51% of the fully paid-up and voting equity shares of the Applicant/Petitioner at all times until final settlement date; and

(i) First ranking pledge and equitable assignment of 100% CCPs/CCDs/NCDs/any other similar instruments issued by Applicant/Petitioner, together with all accretions thereon, such that the lenders have effective pledge and equitable assignment on 100% CCPs/CCDs/NCDs/any other similar instruments issued by Applicant/Petitioner at all times until COD, and thereafter first ranking pledge and equitable assignment over 51% CCPs/CCDs/NCDs/any other similar instruments issued by Applicant/Petitioner at all times until final settlement date:

Provided further the security interest stipulated above shall in all respect rank pari-passu among the Rupee Lenders, the Guarantee, the Hedge Facility Provider to the maximum extent of Hedge Facility and working facility without any preference or priority to one over the other or others till the final Settlement date.

6. The Petitioner has submitted that under the financial agreements and on enforcements of the security interest, it shall be lawful for the Security Trustee, acting on behalf of and for the benefit of the lender, to enter into and to take possession of the assets/ properties, mortgaged/charged/assigned for their benefits and substitute themselves or any of the them or its nominees for the Petitioner under any or all the

project document(s).

7. The Petitioner has stated that Article 15.2.2 of the Transmission Service Agreement entered into between the Petitioner and the beneficiaries of the Project provide that the 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 Petitioner shall contain provisions pursuant to which the lenders or the representative of the lenders on their behalf agrees unconditionally with the Petitioner to release such encumbrances upon payment by the Petitioner to the lenders, of all amounts due under the Financing Agreements.

8. The 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 relinquishment or transfer of its rights and obligations in the TSA. The Petitioner has stated that in view of the provisions of sub-sections (3) and (4) of Section 17 of the Electricity Act, 2003, the Petitioner, as a licensee cannot create security interest over all the movable and immovable assets of the Petitioner in favour of Security Trustee acting on behalf of and for the benefit of the lenders pursuant to Common Loan Agreement

and Security Trustee Agreement without approval of the Commission. Accordingly, the Petitioner has filed the present Petition seeking prior approval of the Commission for creation of security interest, over all assets including the movable and immovable assets for the project in favour of Security Trustee pursuant to Security Trustee Agreement and Common Loan Agreement.

9. The Petitioner, vide letter dated 5.3.2019, was directed to submit information in respect of the Project as per the format prescribed by the Commission. The Petitioner vide its affidavit dated 8.3.2019 has submitted the required information.

10. The Petition was heard on 6.3.2019 after notice to the Respondents. No reply has been filed by the Respondents. None was present on behalf of the Respondents despite notice.

11. We have considered the submissions made by the Petitioner. The Petitioner approached the lender, namely HDFC Bank Limited and for a rupee term loan of Rs. 268 crore which includes LC facility of Rs. 200 crore for the purpose of financing the Project on the terms and conditions contained in the Common Loan Agreement dated 2.11.2018 entered into between the Petitioner and the lender.

12. The lender has agreed to grant rupee term loan of Rs. 268 crore to the Petitioner subject to the terms and conditions set out in the financing documents. As per the Common Loan Agreement dated 2.11.2018, estimated project cost is Rs. 370 crore which will be sourced by the Promoter's contribution of Rs. 76.05 crore and equity share capital of Rs. 25.05 crore.

13. The Petitioner has submitted that in addition to rupee term loan of Rs. 268 crore,

the lender has also agreed to provide guarantee facility, working capital facility and hedge facility of Rs. 14.85 crore, Rs. 12 crore and Rs. 25 crore respectively to the Petitioner, subject to the terms and conditions set out in the financing documents. Since, the Petitioner cannot avail loan facility more than the loan component of its Project cost, its request in this regard is not being considered.

14. The transmission projects are capital intensive projects requiring huge capital investment. These projects are financed through loans. It is a normal practice followed by financial institutions/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 lender, namely HDFC Bank Limited has agreed to provide loan of Rs. 268 crore to the Petitioner. In accordance with Article 15.2 of the TSA, the Transmission Service Provider has been allowed to create encumbrance over all or part of the receivables, Letter of Credit or other assets of the project in favour of the lenders or the lender's representatives, as security for amounts payable under the Financing Agreements and any other amounts agreed by the parties.

15. 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.”

16. 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.

17. The Petitioner and the lender have appointed the Catalyst Trusteeship Limited as Security Trustee for creation of security over all the movable and immovable assets of the project. Accordingly, Security Trustee Agreement and Common Loan Agreement dated 2.11.2018 have been executed for a loan of Rs. 268 crore. As per the Security Trustee Agreement dated 2.11.2018, at the request of the Petitioner, the lender has agreed to provide a rupee facility of Rs. 268 crore which includes sub-limit by way of letter of credit of Rs. 200 crore for the project on the terms and conditions contained in the Common Loan Agreement and Security Trustee Agreement. In our view, Catalyst Trusteeship Limited needs to be given comfort for creation of security for the benefit of lender as security for the financial assistance provided by the lender. We, therefore, accord approval allowing the Petitioner to create security interest in favour of Catalyst Trusteeship Limited, by way of mortgage on project assets by execution of indenture of Mortgage and financing documents of the Project. The Petitioner is directed to submit signed copy of Indenture of Mortgage for the Project immediately after its execution.

18. It is, however, made clear that the transmission licence granted by the Commission to the 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 assignment of licence and the assets of the petitioner to the nominee of lenders, the Commission shall evaluate such a nominee's experience in development, design, construction, operation and maintenance of transmission lines, and ability 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, lender, Security Trustee and the nominee, approve the assignment of the licence to a nominee of the lender 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 Petitioner as and when required by the Commission for any specific purpose.

19. With the above, Petition No. 392/MP/2018 stands disposed of.

Sd/
(I.S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson