

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 106/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: 13<sup>th</sup> of July, 2017**

**In the matter of**

Petition for approval under Section 17 (3) and (4) of the Electricity Act, 2003 for creation of 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 and for any subsequent transferees, assign, novatees thereof and any refinancing lenders to the project, by way of hypothecation and equitable mortgage on project assets, pursuant to unattested deed of Hypothecation, Declaration and Undertaking and other Financing Agreements, for the transmission lines i.e. /assignment of Mortgaged Properties and Project Assets, for the transmission lines, i.e. (i) LILO of one ckt of Khandwa-Rajgarh 400 kV D/C line at Khargone TPP, (ii) Khargone TPP Switchyard-Khandwa pool 400 kV D/C (Quad) line, (iii) Khandwa Pool-Indore 765 kV D/C line, (iv) Khandwa Pool-Dhule 765 kV D/C line, (v) Establishment of 765/400 kV, 2x1500 MVA pooling station at Khandwa and (vi) 2 nos. of 765 kV line bays and 7 X 80 MVAR Switchable line reactors (1 unit as spare) along with 800 Ω NGR and its auxiliaries for Khandwa Pool-Dhule 765 kV D/C at Dhule 765/400 kV sub-station of M/s Bhopal Dhule Transmission Company Limited

**And**

**In the matter of**

1. Khargone 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-400 005

..... **Petitioners**

**Vs**

1. Madhya Pradesh Power Management Company Ltd.  
M-13, Green Park Main,  
New Delhi-110016

2. Chhattisgarh State Power Distribution Company Ltd.  
4<sup>th</sup> Floor, Vidyut Seva Bhawan,  
Daganiya, Raipur,  
Chhattisgarh-492013

3. Gujarat Urja Vikas Nigam Ltd.  
Vidyut Bhawan, Race Course,  
Vadodara-390007

4. Maharashtra State Electricity Distribution Company  
Prakashgad, 5th Floor, Bandra (East),  
Mumbai-400051

5. Electricity Department, Govt. of Goa  
66 kV Road, Amla,  
Near Secretariat, Silvassa-396230

6. DNH Power Distribution Corporation Ltd.  
66 kV, Amla Road,  
Silvassa-396230

7. Electricity Department, Daman and Diu  
Vidyut Bhavan, Kachigam Road,  
Daman-396215

.....Respondents

**The following were present:**

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

**ORDER**

The first petitioner herein, Khargone 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 WR associated with Khargone TPP (1320 MW)" 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 17.11.2016.

2. Khargone 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 mortgage and hypothecation on project assets for benefit of the lenders to the project. The petitioners have made the following prayers:

“(a) Approve the creation of security Interest, over all the movable and immovable assets of Petitioner No. 1 and to the extent as mentioned in paras 6 and 9 above and also for any future security creation, in favour of Security Trustee acting on behalf of and for the benefit of the Lenders and for subsequent transferees, assigns, novatees thereof and any refinancing lenders to the project by way of hypothecation and equitable mortgage on Project assets, pursuant to Unattested Deed of Hypothecation, Declaration and undertaking and other Financing Agreements.

(c) Pass such other order/orders, as may be deemed fit and proper in the facts and circumstances of the case;”

3. According to the first petitioner, for the purpose of part finance for the project through long term debt, the first petitioner requested L&T Infrastructure Finance Company Ltd. and L&T Finance Ltd. (hereinafter referred to as Lenders) for which lenders have agreed to make available financial assistance for amounting to Rs. 1070 crore as rupee term loan for the purpose of part financing the construction, development and implementation of the project and on the terms and conditions set out in the Common Loan Agreement, Security Trustee Agreement, Lender`s Agent Agreement, Trust and Retention Account Agreement, SPTL Undertaking and Sponsor and Promoter Undertaking ( herein after referred to as the 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 including their assigns, transferees and novatees and has entered into Security

Trustee Agreement, Common Loan Agreement, Trust and Retention Account Agreement and Sponsor and Promoter Undertaking on 28.2.2017.

4. The first petitioner has submitted that pursuant to the Common Loan Agreement, the secured obligations are secured by:

- (a) A first charge on all the Borrower's tangible moveable assets including movable plant and machinery, machinery spares, tools and accessories, furniture, fixtures, vehicles and all other movable assets and current and non-current assets pertaining to the Project, both present and future;
- (b) A first charge over all accounts of the Borrower, including but not limited to the Account and the Sub-Accounts (including the DSRA) (or any account in substitution thereof) that may be opened in accordance with the Transaction Documents, and in all funds from time to time deposited therein (including the reserves), all designated account opened with designated banks and the Permitted Investments or other securities representing all amounts credited to the Account and a first charge on the Receivables;
- (c) A first charge on all intangible assets of the Borrower including but not limited to goodwill, rights and undertakings and intellectual property rights and uncalled capital, book debts, current assets, operating cash flows, commissions, revenues of whatsoever nature pertaining to the Project, both present and future;
- (d) A first charge on all the immovable assets (if any) of the Borrower pertaining to the Project, present and future;
- (e) Assignment of:

- (i) All the rights, title, interest, benefits, claims and demands whatsoever of the Borrower in, to and under all the Project Documents and Additional Project Documents (if any) including the Transmission Service Agreement, duly acknowledged and consented to by the counter parties to the Project Documents by executing the consent to assignment if such Project Document requires prior consent of such counter parties before creation of Security Interest as within-mentioned, all as amended, varied or supplemented from time to time;
  - (ii) The right, title and interest and benefits of the Borrower in, to and under all the Clearances (including the Transmission License) to the extent the same are assignable;
  - (iii) All the right, title, interest, benefits, claims and demands whatsoever of the Borrower in, to and under any letter of credit, guarantee including contractor guarantees and liquidated damages, consent agreements, side letters and performance bond provided by any party to the Project Documents and Additional Project Documents (if any) (including any security/letter of credit that may be available to the Borrower pursuant to the Transmission Service Agreement or in relation to the Project and/or guarantees issued by EPC Contractors in favour of the Borrower, which may be legally assigned); and
  - (iv) All the right, title, interest, benefits, claims and demands whatsoever of the Borrower in, to and under all Insurance Contracts and Insurance Proceeds pertaining to the Project.
- (f) Pledge of equity shares, all other instruments including but not limited to compulsorily convertible debentures, nonconvertible debentures or any other

instruments (as and when entered into by the Borrower) representing at least 51% of the Equity Share Capital representing at least 51% voting rights.

The security shall in all aspects rank *pari passu se* amongst the lenders.

5. The first Petitioner has submitted that the total cost of construction and development of the project is estimated to be Rs. 1372 crore of which Rs. 302 crore is proposed to be funded as equity contributions which is 22% of the total cost and Rs. 1070 crore is proposed to be funded as facility contribution which is 78% of the total cost under the Financing Agreements.

6. The first Petitioner has submitted that it has agreed to create security interest in favour of the representative of the lenders pursuant to Unattested Deed of Hypothecation, Declaration and undertaking and Financing Agreements, by way of mortgage/hypothecation/assignment in accordance with the provisions of the Unattested Deed of Hypothecation and the Financing Agreements, and has agreed that it shall be lawful for the representatives of the lenders to enter into and take possession of mortgaged properties along with all the movables, intangibles and any future assets under the project comprised in financial agreement and thenceforth, the first petitioner shall take no action inconsistent with or prejudicial to the right of the Lenders Representatives/Security Trustee acting on behalf of the Lenders and their assigns, transferees and novatees/Security Trustee quietly to possess, use and enjoy the same and to receive the income, profits and benefits thereon without interruption or hindrance by the first petitioner or any person or persons whatsoever.

7. The first petitioner has submitted that under the financial agreements and on enforcement of the security interest, it shall be lawful for the Lenders Representative/Security Trustee, acting on behalf of and for the benefit of the Lenders/Security Trustee, and their assigns, transferees and novatees/security trustee, to enter into and take possession of the assets/properties mortgaged/charged/assigned for their benefit and substitute themselves or any of the them or its nominees for the first petitioner under any or all of the projects document(s).

8. 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.

9. 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 relinquishment 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/Lenders and for any subsequent transferees, assigns, novatees thereof and any refinancing lenders to the project, acting on behalf of and for the benefit of the lenders pursuant to Unattested Deed of Hypothecation, Declaration and Undertaking and other security creating documents and other security creating documents/Financial Agreements and for future refinancing transactions, by way of mortgage/hypothecation/assignment of mortgaged properties and 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 interest, over all assets including the movable and immovable assets in favour of Security Trustee by way of hypothecation and equitable mortgage on project assets, pursuant to Unattested Deed of Hypothecation, Declaration and Undertakings and other Financing Agreements for the project..

10. 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.

11. 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.



12. 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 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 first petitioner and the 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 and Financing Agreement dated 28.2.2017 have been executed for a loan of Rs. 1070 crore. In accordance with Article 15.2 of the TSA, the Transmission Service Provider has been allowed to create an 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 representatives of the lenders, as security for amounts payable under the Financing Agreements and other amounts agreed by the parties.

13. 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.”

14. 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 and other Financing documents by way of hypothecation and equitable mortgage on project assets. 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. The Representative of the petitioner during the hearing submitted that the Petitioner company is a 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. The petitioner has submitted that the total project cost is estimated to be Rs. 1372 crore out of which Rs. 302 crore is proposed to be funded as equity contributions and Rs. 1070 crore is proposed to be funded as facility contributions under the Financing Agreements. Before agreeing to transfer 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.

15. With the above, Petition No. 106/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**