

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 381/MP/2018

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S. Jha, Member

Date of Order: 12th of March, 2019

In the matter of

Petition for approval seeking approval under Section 73 (3) and (4) of the Electricity Act, 2003 for creation of security interest by way of mortgage, hypothecation, charge or assessment over all the movable and immovable assets of Kohima-Mariani Transmission Ltd. and assignment of transmission licence in favour of the 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 transmission project build, owned, operated and maintained by Kohima Mariana Transmission Limited.

And

In the matter of

Kohima-Mariani Transmission Limited
A-63, FIEE Complex,
Okhla Industrial Area Phase-II,
New Delhi-110 020

Axis Trustee Services Limited
Axis House, Bombay Dyeing Mills Compound,
Pandurang Budhkar Marg, Worli Mumbai-400 025

...Petitioners

Versus

1. Department of Power,
Government of Arunachal Pradesh,
Vidyut Bhawan, Itanagar,
Pradesh-791 1112.

2. Assam Electricity Gird Corporation Limited
4thFloor, Bijulee Bhawan,
Paltan Bazar, Guwahati-I, Assam-781 0013.

3. Manipur State Power Distribution Company Limited
Electricity Complex, Patta No. 1293 under 87(2),
Khwai Bazar, Keishampat, District-Imphal West,
Manipur-795 0014.

4. Meghalaya State Power Distribution Company Limited
Lum Jingshai, Sort Round Road, Shillong,
Meghalaya-793 0015.

5. Department of Power
Government of Nagaland, A.G.Colony,
Kohima, Nagaland-797 005

6. Power and Electricity Department
Government of Mizoram
Mizoram Secretariat, Annexure-II,
Treasury Square Aizwal, Mizoram

7. Tripura State Electricity Corporation Limited
Bidyut Bhawan, Banamalipur,
Agartala, Tripura

The following were present:

Ms. Molshree Bhatnagar, Advocate, KMTL
Shri Ishaan Mukherjee, Advocate, KMTL

ORDER

The First Petitioner, Kohima-Mariani 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 "transmission of electricity for North Eastern Region Strengthening Scheme-VI" 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 10.7.2017.

2. The Petitioners, Kohima-Mariani Transmission Limited and Axis Trustee Services Limited, have jointly filed the present Petition for creation of security

interest over all the movable and immovable assets of the First Petitioner in relation to the project comprising of, amongst others, in favour of Second Petitioner, Axis Trustee Services Limited as Security Trustee pursuant to the Security Trustee Agreement and Facility Agreement, on project assets for the benefit of the lenders to the project. The Petitioners have made the following prayers:

“(a) Approve the creation and/pr perfection of Security Interest by way of (i) mortgage, hypothecation, charge or assignment over all movable and other immovable assets of the Petitioner No. 1 (including over the Petitioner No1’s benefits, rights, title and interest under the TSA and other Project documents); (ii) pledge over the Pledged Shares, in favour of the Security Trustee, acting on behalf of and for the benefit of the Lenders;

(b) Approve security documents (and other documents relating to the financing or refinancing of the Project of Petitioner No. 1) and execution thereof for creation and/or perfection of the foresaid 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 No1, by way of security in favour of the Security Trustee, acting for the benefit and on behalf of the Lenders; and

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

3. According to the First Petitioner, for the purpose of financing for the project, the First Petitioner requested Axis Bank Limited and Bank of Baroda (hereinafter referred to as ‘lenders’) for which lenders have agreed to make available financial assistance amounting to Rs. 994.67 crore which includes non-fund based facilities of Rs. 597 crore as sub-limit in the form of Letter of Credit, letter of commitment, bank guarantee and all other documentary credit as may be permitted by the lenders, on the terms and conditions set out in the Facility Agreement and Security Trustee Agreement (hereinafter referred to as the Financing Agreements). For this purpose, Axis Bank Limited has agreed to act as Facility Agent for the consortium of lenders

4. The First Petitioner and lenders have appointed the Second Petitioner,

namely, Axis Trustee Services Limited as Security Trustee (hereinafter referred to as 'Security Trustee') who has agreed to act as Security Trustee and has entered into Facility Agreement and Security Trustee Agreement on 27.12.2017.

5. The First Petitioner has submitted that pursuant to the Facility Agreement, the First Petitioner has agreed to provide the following security to secure the obligations under the loan facility:

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

(i) all the Petitioner No. 1`s immovable properties including civil structures, towers and cables, office buildings, right of way, both present and future;

(ii) all the Petitioner No.1`s movable assets including plant machinery, machinery spares, tools, accessories, operating cash flows, current assets, book debts, receivables, commissions, revenues of whatsoever nature, furniture, fixtures, vehicles and all other movable assets, whether intangible and tangible, goodwill, rights, undertakings, intellectual property, uncalled capital, all the accounts of the borrowers both present and future;

(iii) all the Petitioner No.1`s rights, title, interest, benefits, claims and demand whatsoever in the Project Documents (including the Transmission Service Agreement and Transmission Licence, as permitted under the Electricity Act, 2003 and CERC Regulations) duly acknowledged and consented to by the relevant counter parties to such project documents (as amended, carried and supplemented from time to time);

(iv) all the Petitioner No.1`s rights, title, interest, benefits, claims and demands whatsoever in the clearance;

(v) all the Petitioner No.1`s rights, title interest, benefits, claims and demands whatsoever in the letter of credit, guarantee, performance bond, corporate

guarantees, bank guarantees, etc. provided by any party to the material project documents; and

(vi) all the Petitioner No.1`s insurance contracts/proceeds under the insurance contract in relation to the Project.

6. The First 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 lenders, to enter into and to take possession of the assets/ properties, mortgaged/charged/assigned for their benefits and substitute themselves of any of the them or its nominees for the Petitioner No. 1 under any or all the project document(s).

7. 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.

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.

8. 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 acting on behalf of and for the benefit of the lenders pursuant to Facility Agreement and Security Trustee Agreement and other security creating documents/Financial Agreements 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 for the project in favour of Security Trustee pursuant to Security Trustee Agreement and Facility Agreement and other Financing Agreements.

9. The Petitioner, vide letter dated 8.2.2019, was directed to submit information in respect of the Project as per the format prescribed by the Commission. The Petitioner vide its affidavit dated 12.2.2019 has submitted the required information.

10. The Petition was heard on 14.2.2019 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 Petitioners. The First Petitioner approached the lenders, namely Axis Bank Limited and Bank of Baroda for a rupee term loan of Rs. 994.67 crore for the purpose of financing the Project on the terms and conditions contained in the Facility Agreement dated 27.12.2017 entered into between the First Petitioner and the lenders. The details of loan provided by the lenders are as under:

S. No.	Name of the Lenders	Total Commitment (Rs in crore)
1.	Axis Bank Limited	497.335.00 (including LC facility of Rs. 298.05 crore)
2.	IndusInd Bank Limited	497.335.00 (including LC facility of Rs. 298.05 crore)
Total		994.67 (including LC facility of Rs. 597.00 crore)

12. The lenders have agreed to grant rupee term loan of Rs. 994.67 crore to the First Petitioner subject to the terms and conditions set out in the financing documents. The First Petitioner vide its affidavit dated 12.2.2019 has submitted that banking arrangement has been changed by involving two more banks in the arrangement as under:

S. No.	Name of the Lenders	Total Commitment (Rs in crore)
1.	Axis Bank Limited	359.84
2.	Bank of Baroda	359.84
3.	Aditya Birla Finance Limited	150.00
4.	Tata Cleantech Capital Limited	125.00
Total		994.68

13. Perusal of the Petition and Facility Agreement dated 27.12.2017 entered into between First Petitioner and the lenders reveals that lenders, namely Axis Bank Limited and Bank of Baroda have agreed to provide the rupee term loan of Rs. 994.67 crore to the Petitioner. Since, the First Petitioner has not placed documents on records regarding change of banking arrangement, its submission dated 27.12.2017 in this regard is not being considered in the present Petition.

14. As per the Facility Agreement dated 27.12.2017 and information submitted by the First Petitioner vide affidavit dated 12.2.2019, estimated project cost is Rs. 1283.44 crore which will be sourced by the Promoter`s contribution amounting to Rs. 32.08 crore which includes equity share capital of Rs. 256.69 crore.

15. 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 lenders, namely Axis Bank Limited and Bank of Baroda have agreed to provide loan of Rs. 994.67 crore to the First 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.

16. 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.”

17. 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.

18. The First Petitioner and the lenders have appointed the Second Petitioner, namely Axis Trustee Services Limited as Security Trustee for creation of security over all the movable and immovable assets of the project. Accordingly, Security Trustee Agreement and Facility Agreement dated 27.12.2017 have been executed for a loan of Rs. 994.67 crore. As per the Security Trustee Agreement dated 27.12.2017, at the request of the First Petitioner, the lenders have agreed to provide a rupee facility in the aggregate not exceeding Rs. 994.67 crore including sub-limit by way of letter of credit of Rs. 597 crore within in the rupee facility for the project on the terms and conditions contained in the Facility Agreement and other Financing Documents. In our view, Axis Trustee Services Limited needs to be given comfort for creation of security for the benefit of lenders as security for the financial assistance provided by the lenders. We, therefore, accord in-principle approval allowing the First Petitioner to create security interest in favour of Axis Trustee Services Limited, by way of mortgage on project assets by execution of indenture of Mortgage and financing documents of the Project. The First Petitioner is directed to submit signed copy of Indenture of Mortgage for the Project immediately after its execution.

19. 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 assignment of licence and the assets of the First 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 First Petitioner as and when required by the Commission for any specific purpose.

20. With the above, Petition No. 381/MP/2018 stands disposed of.

Sd/-
(I.S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson