

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 71/MP/2020

- Subject : Petition seeking approval under Section 17(3) and 17 (4) and Section 79(1)(c) of the Electricity Act, 2003 read with Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 and Article 15.3 of the Transmission Service Agreement dated 6.1.2016.
- Petitioners : 1. Warora Kurnool Transmission Limited
2. Yes Bank Limited
3. IDBI Trustee Services Limited
- Respondents : Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) and Ors.
- Date of Hearing : 9.7.2020
- Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
- Parties present : Shri Amit Kapur, Advocate, Petitioners
Ms. Poonam Verma, Advocate, Petitioners
Ms. Aparajita Upadhyay, Advocate, Petitioners
Ms. Sakshi Kapoor, Advocate, Petitioners
Shri Mehul Desai, Yes Bank
Ms. K. S. Priyadarshini, Yes Bank
Shri V. Bahety, Yes Bank
Shri S. N. Sunkari, WKTL
Shri Vivek Singla, ATL
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri B. Rajeshwari, TANGEDCO
Shri R. Ramalakshmi, TANGEDCO
Dr. R. Kathiravan, TANGEDCO
Shri Anurav Patnaik, Advocate, BESCO
Shri Shikhar Saha, Advocate, BESCO
Shri Krishnamurthy, BESCO

Record of Proceedings

The matter was listed for hearing through video conferencing.



2. Learned counsel for the Petitioners submitted that the present Petition has been filed by Warora Kurnool Transmission Limited (WKTL) and its lead lender, Yes Bank Limited along with Security Trustee, IDBI Trusteeship Services Limited, *inter-alia*, seeking approval of the Commission to transfer the shares and management control of WKTL in favour of nominee of WKTL's lenders, namely Adani Transmission Limited (ATL). Learned counsel further submitted as under:

(a) The Commission in its order dated 24.5.2017 in Petition No. 78/MP/2017 had granted in-principle approval for creation of security interest in favour of Security Trustee for the benefit of the lead lender, Yes Bank Limited. In the said order, the Commission also granted leave to WKTL and its lenders to approach the Commission for approval of assignment of assets of WKTL in favour of lenders nominee in case of default in debt repayment by WKTL so as to enable the Commission to evaluate such nominee's experience in development, design, construction, operation and maintenance of transmission lines, and its ability to execute the Project.

(b) Owing to the deteriorating financial condition of WKTL's holding company, namely, Essel Infraprojects Limited (Essel Infra), there were repeated defaults in debt repayment to its lenders. WKTL/Essel Infra could also not raise funds for completion of the transmission project and accordingly, lenders decided to exercise their substitution rights under the provisions of the Transmission Service Agreement (TSA) and have appointed ATL as their nominee in order to complete the project and discharge the debt obligations of WKTL to its lenders.

(c) In terms of Section 17(3) and Section 17(4) of the Electricity Act, 2003 (in short 'the Act'), a licensee is required to seek prior approval of the Commission for transfer of its utility or any part thereof by sale, lease, exchange or *otherwise*. Further, Article 15.3 of the TSA empowers the lenders to exercise their substitution rights in case of default in debt repayment by WKTL, with prior approval of the Commission.

(d) In order to discharge all obligations of WKTL under the TSA, the nominee is required to take control of the ownership and management of WKTL in order to protect the interest of the lenders and to recover the funds advanced by the lenders. Accordingly, the entire shareholding of Essel Infra in WKTL including the management control of WKTL is proposed to be transferred to ATL by way of a Share Purchase Agreement.

(e) Substitution of Essel Infra by ATL as the holding company of WKTL shall not prejudice any interest or benefits of the beneficiaries of WKTL or in any way weaken the obligations of WKTL under the transmission licence and project documents.

(f) The contention of the Respondent, Bangalore Electricity Supply Company Limited (BESCOM) that the Petitioners cannot seek transfer of shareholding of WKTL to its nominee under Section 17(3) and Section 17 (4) of the Act, Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related



matters) Regulations, 2009 (in short ‘ the Transmission Licence Regulations’) and Article 15.3 of the TSA as the same relate to ‘assignment of licence’ and ‘transfer of utility’, is misplaced and premised on wrongful interpretation of Section 17 of the Act and the provisions of the TSA.

(g) Article 16.2 of the Facility Agreement empowers the lenders to take a number of measures, in the event of default in debt repayments, which *inter-alia* include (i) enforcement of security interest under the security documents; (ii) enforcement of security including transfer of project to a new operator, and (iii) exercise of any other rights of the lenders under the applicable law.

(h) The proposed transaction of transfer of shareholding from Essel Infra to ATL is in fact beneficial to the LTTCs as opposed to assignment of transmission licence or bulk transfer of WKTL’s utility. The proposed route of transfer of shareholding is more efficacious which will allow WKTL to retain its licence while securing the financial requirements of WKTL.

(j) The contention of BESCO that the proposed transfer of shareholding is contrary to Article 18.2 of the TSA and the lenders are trying to circumvent the provisions of the TSA by invoking substitution rights, is misplaced and seeks to subjugate “substance” to “form”. Lenders’ right to substitution (under Article 15.2.2 and 15.3) is not subservient to Article 18.2.1 of the TSA.

(k) Lenders are entitled to choose the form they prefer in exercise of their substitution right subject to approval of the Commission. Lenders have chosen to exercise their substitution right by way of transfer of shares of WKTL to the lender’s nominee instead of assignment of transmission licence as sought by BESCO.

(l) The proposed transfer of shares of WKTL in favour of ATL will not have any financial impact on LTTCs.

(m) It is trite law that while interpreting the contracts, the courts must always look at the substance and not the form of the contract. In this regard, reliance has been placed on the judgments of Hon’ble Supreme Court in the cases of (a) Bhopal Sugar Industries Limited v. Sales Tax Officer, Bhopal [(1977) 3 AIR SCC 147], (b) State of Andhra Pradesh v. Kone Elevators (India) Limited [2005 3 SCC 389], and (c) J. P. Srivastava & Sons (P) Ltd. v. Gwalior Sugar Co. Ltd. [(2005) 1 SCC 172].

3. Learned counsel for the Respondent, Tamil Nadu Generation and Distribution Corporation (TANGEDCO), submitted as under:

(a) Since IA No. 30/2020 filed by the Petitioners, seeking amendment to the Petition has been allowed only vide Commission’s order dated 15.6.2020, TANGEDCO may be permitted to file its reply on the amended Petition.

(b) Essel Infra, the promoter of WKTL, vide its letter dated 17.11.2017 informed TANGEDCO that it is seeking divestment of 49% of its shareholding under Article 18 of the TSA to the potential investors for raising capital for further investment



by the promoter in other infrastructure project. In the said letter, there was no mention about financial distress and equity lock-in requirement under Article 18.2 of the TSA had been acknowledged therein.

(c) Reliance placed by the Petitioners on the Commission's order dated 24.5.2017 in Petition No. 78/MP/2017 is misplaced. The said order does not allow the Petitioners to seek transfer of shares and management control of WKTL in favour of lenders' nominee in case of default in debt payments.

(d) Lenders were required to finance 70% debt portion of the project i.e. Rs. 2790 crore. Out of which, only around Rs.1200 crore has been disbursed to WKTL. As on date, only one element of project has achieved commercial operation whereas the balance elements are yet to be commissioned. During this period, WKTL is required to pay only IDC and the liability towards repayment of debt would accrue after commissioning of the project.

(e) When Article 18.2 of TSA specifically restricts Essel Infra from transfer of shares held by it in WKTL, Essel Infra cannot have any bilateral arrangement with nominee of the lenders for transfer of such shareholding it has in WKTL by circumventing the provisions of Article 18.2 of the TSA.

(f) In terms of Section 19 of the Act, the Commission may revoke a licence where the financial position of the licensee is such that he is unable fully and efficiently to discharge the duties and obligation imposed on him by his licence. Thereafter, only the Commission is empowered under Section 19 of the Act to invite applications for acquiring the utility, primarily on the basis of highest and best price offered for the utility. The lenders cannot act as a Bid Process Coordinator to choose the transmission licensee.

(g) Article 15.3 of the TSA provides for assignment of transmission licence to the nominee of lenders. However, in the present case, the Petitioners are seeking transfer of shares and management control of WKTL in favour of ATL.

(h) The Petitioners cannot seek transfer of shareholding of WKTL to its nominee under Section 17(3) and Section 17 (4) of the Act, Regulation 12 of the Transmission Licence Regulations and Article 15.3 of the TSA as the same relates to 'assignment of licence' and 'transfer of utility'. The aforesaid provisions are not applicable in the present case.

(i) If the prayers of the Petitioners are allowed, entire scheme of selecting the project developer on the basis of Tariff Based Competitive Bidding route would get defeated and would be unjust to the other bidders who had participated in the bidding process.

4. Learned counsel for the Respondent, BESCO submitted as under:

(a) Section 17(3) of the Act, Regulation 12 of the Transmission Licence Regulations and Article 15.3 of the TSA deal with either assignment of 'licence' or with a transfer of the 'utility'. However, they do not envision transfer of shareholding of the transmission licensee to another entity, which is otherwise prohibited under the TSA.



(b) Transfer of shareholding of the transmission licensee is a distinct transaction from assignment of licence or transfer of assets held by a licensee to another entity, which is governed by the Article 18.2 of the TSA. Article 18.2 of the TSA specifically stipulates that Essel Infra should continue to hold at least 51% of the shareholding of WKTL for at least 2 years post COD, which has not yet been achieved. Also, as per Article 13.1 (g) of the TSA, a breach of the equity lock-in commitment under Article 18.2 is an event of default and may lead to termination of TSA.

(c) As per Article 15.2.2 of the TSA, the lenders or the lenders' representative shall have entered into the Financing Agreements and agreed in writing to the provisions of the TSA. Therefore, it is not open to the Petitioners to enter into any transaction which is in contravention to explicit terms of TSA.

(d) Arrangement sought to be entered into, purportedly at the behest of the lenders, involves not just the transfer of shares which have been pledged as security (51%), but also the balance shares (49%) which are held by Essel Infra.

(e) It is a settled law that when a contract contains a clear prohibition against doing something, no other provisions of contract can be interpreted so as to circumvent such prohibition. Therefore, the Petitioners cannot be allowed to render Article 18.2 of TSA redundant by permitting a change in shareholding under Article 15.3 of the TSA.

(f) Reliance placed by the Petitioners on the Commission's order dated 24.5.2017 in Petition No.78/MP/2017 is misplaced in so far as the said order allowed creation of security interest only on the assets owned by WKTL and not on the shares of WKTL held by Essel or its group companies. The said order does not in any way grant approval for transfer of shareholding of WKTL to any entity that may have been nominated by the lenders.

(g) Learned counsel sought permission to file its response on the Petitioner's note for arguments.

5. In rebuttal, learned counsel for the Petitioners submitted that the Commission in its order dated 15.6.2020, had granted time to TANGEDCO to file reply to amended Petition. However, it has failed to do so. He further added that the letter referred to by TANGEDCO was issued by Essel Infra, whereas the Petition has been filed by WKTL along with its lenders exercising their substitution rights under the TSA. The Petitioners have also placed on record all the steps taken by the lenders for selection of the nominee.

6. The representative of the Petitioner No.2, Yes Bank Limited reiterated that the selection process of the nominee has been carried out after following the due process of law keeping in view the provisions of TSA as well RBI Guidelines. He further submitted that allowing the prayers of the Petitioners would not adversely affect the LTTCs.

7. After hearing the learned counsel for the parties, the Commission allowed the Respondents to file their reply/written submissions, if any, by 20.7.2020 with copy to the Petitioners who may file their rejoinder/response, if any, on or before, 30.7.2020.



8. The Commission directed the Petitioners to file the following information on affidavit by 20.7.2020:

(a) Information as per prescribed format (copy attached) along with auditor certificate and other annexures as stipulated in the format;

(b) Flow of loans availed for the instant project starting from the Commission's earlier approval granted vide order dated 24.05.2017 in Petition No. 78/MP/2017 till date by clearly mentioning the change in the lenders and corresponding approval of the Commission taken in this regard. If no permission was obtained, reasons thereof; and

(c) Status of the project including progress in project implementation during last one year.

9. Subject to the above, the Commission reserved order in the matter.

By order of the Commission

Sd/-

(T.D. Pant)

Deputy Chief (Law)



B Financial Information

Name of the Petitioner	
Name of the Project	

i)	ESTIMATED PROJECT COST AND MEANS OF FINANCE (As on the date of Financial Closure)			
	Original Financing plan agreed by the lenders as per Common loan agreement #			
On Initial approval	Original Estimated Project cost (as per agreement)	Rs. in Cr.	Means of Finance (as per agreement)	Rs. in Cr.
	Hard Cost	0.00	Equity share capital	0.00
	IEDC	0.00	Equity Share premium	0.00
	IDC	0.00	Loan / debenture from promoters, group companies	0.00
	(Please specify the other components, if any)	0.00	Secured loan / debt from External source	0.00
	Total	0.00	Others (Please specify)	0.00
			Total	0.00
Auditor's Certificate on actual infusion of equity capital, loan capital and actual expenditure incurred for the project as on date.				
# Once the financial closure is attained, the licensee has to submit to Commission the above informations as on financial closure date.				
on Subsequent Approval	Revised Financing plan before COD (if any) as per revised agreement entered with lender/other supporting document)*			
	cost (with supporting documents)	Rs. in Cr.	Revised estimated Means of Finance (with supporting)	Rs. in Cr.
	Hard Cost	0.00	Equity share capital	0.00
	IEDC	0.00	Equity Share premium	0.00
	IDC	0.00	Loan / debenture from promoters, group companies	0.00
	(Please specify the other components, if any)	0.00	Secured loan / debt from External source	0.00
	Total	0.00	Others (Please specify)	0.00
		Total	0	
* In case approval of Commission has been obtained for revised plan, please mention the details of petition nos and its order date				

Lender wise details (Rs. in Cr.)			
Sl No.	Lender's name	Sanctioned loan (as per loan agreement)	Actual loan as on date*
1			
2			
3....			
Total			

* any date 7 days prior to the filing the petition.

Lender wise details for secured loan / debt (Rs. in Cr.)			
Sl No.	Lender's name	Sanctioned loan (as per loan agreement)	Actual loan as on date*
1			
2			
3....			
Total			

* any date 7 days prior to the filing the petition.

ii)	ACTUAL PROJECT COST AND MEANS OF FINANCE (as on Application date)			
	Rs. in Cr.			
	Actual Project Cost duly certified by Auditor certificate) Rs. in Cr.			
	Particulars	As on COD*	As on application Date*	
	Gross Block of Fixed Assets			
	Actual means of Finance of the above cost duly certified by Auditor Certificate) Rs. in Crore			
	Particulars	As on COD	As on application Date*	
Equity share capital				
Equity Share premium				
Loan / debenture from promoters, group companies				
Secured loan / debt from External source				
Others (Pl specify)				
Total				

Lender wise details for secured loan / debt (Rs. in Cr.)			
Sl No.	Lender's name	Sanctioned loan (as per loan agreement)	Actual loan as on date*
1			
2			
3			
4....			
Total			

* any date 7 days prior to the filing the petition.

(Provide the flow of loan covering the earlier approvals.)