

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 384/MP/2018

Coram:

Shri P.K.Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S.Jha, Member

Date of Order: 22nd January, 2020

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 Debenture Trustee, by way of mortgage.

And

In the matter of

Kudgi Transmission Limited
TCTC Building, 1st Floor,
P.B. No. 979, Mount Poonamallee Road,
Manapakkam, Chennai-600 089

..... **Petitioner No. 1**

IDBI Trusteeship Services Limited
Ground Floor, Asian Building,
17 R.Kamani Marg,
Mumbai-400 001

.... **Petitioner No. 2**

Vs

1. Bangalore Electricity Supply Company Limited (BESCOM),
K.R.Circle, Bangalore-560 001
2. Gulbarga Electricity Supply Company Limited (GESCOM),
Station Main Road, Gulbarga
3. Hubli Electricity Supply Company Limited (HESCOM),
Navanagar, PB Road, Hubli
4. Mangalore Electricity Supply Company Limited (MESCOM),
Paradigm Plaza,
AB Shetty Circle, Mangalore-575 001
5. Chamundeshwari Electricity Supply Company Limited (CESCOM),



927, LJ Avenue, Ground Floor, New Kantharaj Urs Road,
Saraswatipuram, Mysore-570 009

6. Northern Power Distribution Company of Andhra Pradesh Limited (APNPDCL), H.No. 2-5-3 1/2, Vidyut Bhawan, APNPDCL, Corporate Office, Nakkal Gutta, Hanamkonda, Warangal-506 001
 7. Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL), 3rd Floor, Corporation Office P & T Colony, Seethmmadhara, Vishakhapatnam-530 013
 8. Southern Power Distribution Company of Telangana Limited 6-1-50, Mint Compound, Hyderabad-500 063
 9. Northern Power Distribution Company of Telangana Limited, House No.: 2-5-31/2, Corporate office: Vidyut Bhawan, Nakkalgutta, Hanamkonda, Warangal-506 001
 10. Kerala State Electricity Board (KSEB) Vaidyuti Bhavanam, Pattom, Trivandrum-696 004
 11. Power Company of Karnataka Limited Cauvery Bhawan, K.G. Road, Bangalore-560 001
 12. Tamil Nadu Generation and Distribution Company Limited (TANGEDCO) NPKRR Malligai, 144, Anna Salai, Chennai 600 002
- .. Respondents**

Parties Present:

Shri Alok Shanker, Advocate, KTL

ORDER

The First Petitioner herein, Kudgi Transmission Limited (hereinafter also referred to as "KTL), has been granted transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as "the Act") to undertake the business of establishing,



commissioning, operation and maintenance of the “Transmission system required for evacuation of power from Kudgi TPS (3 x 800 MW in Phase-I) of NTPC Limited” (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 7.1.2014.

2. According to the First Petitioner, the Project cost at the time of financial closure was estimated at Rs. 1350 crore. Accordingly, the First Petitioner infused Rs. 193 crore as equity and availed the debt of Rs. 1157 crore from the consortium of lenders comprising of Bank of India, Dena Bank, Indian Bank, IDBI Bank, Union Bank of India and Export Import Bank of India. For this purpose, the First Petitioner had entered into a common loan agreement with the aforesaid consortium of lenders and the Second Petitioner, IDBI Trusteeship Services Limited, as Security Trustee, dated 24.2.2014. The First Petitioner has issued non-convertible debenture of Rs. 128 crore to Yes Bank. Therefore, the total loan commitment as on financial closure i.e 24.2.2014 was Rs. 1157 crore. The First Petitioner has submitted that upon successful completion of the Project, the total cost actually incurred was Rs.1491 crore against the original estimated cost of Rs. 1350 crore. The cost over run in the Project was primarily due to delay in obtaining the Right of Way (RoW), higher land cost and the resultant increase in cost of funding due to higher interest rate during construction to the tune of Rs. 141 crore. Subsequently, the First Petitioner undertook refinancing of the above loan by way of issuance of Non-Convertible Debentures (hereinafter also referred to as “NCDs”) having



aggregate face value of Rs. 1500 crore and entered into Debenture Trust Deed dated 27.6.2017 and Deed of Hypothecation dated 28.6.2017 with the Second Petitioner.

3. Accordingly, Kudgi Transmission Limited and IDBI Trusteeship Services Limited have jointly filed the present Petition for approval of creation of security in favour of IDBI Trusteeship Services Limited as Debenture Trustee pursuant to the Debenture Trust Deed dated 27.6.2017 by way of mortgage on project assets to the project and for creation of hypothecation of movable assets in favour of Security Trustee by way of hypothecation in terms of the Deed of Hypothecation dated 28.6.2017. The Petitioners have made the following prayers:

“(a) Admit the present petition;

(b) Approve the creation of security interest, over the immovable assets of Petitioner No. 1 in favour of the Petitioner No. 2 by way of mortgage in terms of the DTD.

(c) Approve creation of hypothecation of movable assets of the Petitioner No.1 in favour of Petitioner No.2 by way of hypothecation in terms of the Deed of Hypothecation.”

4. According to the First Petitioner, for the purpose of refinancing of the entire loan of the project, the First Petitioner has issued 15000 rated, secured, listed, redeemable NCDs having face value of Rs. 10 lakh each of the aggregate face value of Rs. 1500 crore only pursuant to Debenture Trust Deed dated 27.6.2017 and Deed of Hypothecation dated 28.6.2017 executed between the First Petitioner and Second Petitioner, IDBI Trusteeship Services Limited. For the purpose of issuance of the above Debentures, the First Petitioner has appointed IDBI Trusteeship Services Limited as



Debenture Trustee who has agreed to act as Debenture Trustee for the Debenture Holders.

5. The First Petitioner has submitted that pursuant to the Deed of Hypothecation *inter alia* its all movable assets, right, title and interest in Project documents (including O & M Agreement) has been hypothecated in favour of the Debenture Trustee, namely IDBI Trusteeship Services Limited as under:

(a) All movable assets of the company, i.e movable plant and machinery, spares, tools and accessories, furniture, fixtures, vehicles, present and future, intangible, goodwill, intellectual property, present and future;

(b) All the rights, title, interest, benefit, claims and demands whatsoever of the First Petitioner in the Project documents and operation and maintenance related Agreements which the First Petitioner is party to, contractor, guarantees, liquidated damages and all other contracts relating to the Project, duly acknowledged consented by the relevant counter parties to such project documents;

(c) All the rights, title, interest, benefits, claims and demands whatsoever of the First Petitioner in the clearances pertaining to the Project, both present and future;

(d) All the rights, title, interest, benefits, claims and demands whatsoever of the company in any letter of credit, guarantee, performance bond, corporate guarantee, bank guarantee provided by any party to the Project documents;



(e) The proceeds of any insurance policies which have been or which in the future may be, procured by the company in relation to the Project;

(f) All the transaction account and the monies lying to the credit thereof, from time to time;

(g) All books debts, receivables, commissions, revenues of whatsoever nature and wherever arising, of the company (including without limitation Permitted Investment), present and future.

6. The First Petitioner has submitted that proceeds of non-convertible debentures were utilized for replacement of erstwhile loan of Rs. 1157 crore and further financed the cost over-run of Rs. 141 crore. The balance of Rs. 202 crore were raised for the repayment of promoter`s contribution to the Project and for payment of fees and expenses of non-convertible debentures. The First Petitioner has submitted that total outstanding loan has been repaid and as on 31.12.2017, Rs. 1602 crore is outstanding loan towards NCDs including the interest accrued till 31.12.2017.

7. The First Petitioner has submitted that it has agreed to create security in favour of Debenture Trustee acting for the benefit of the Debenture Holders pursuant to Debenture Trust Deed by way of mortgage in accordance with the provisions of the Debenture Trust Deed, and has agreed that it shall be lawful for Debenture Trustee, upon enforcement of Security Interest, to enter into and take possession of the Mortgaged Properties along with movable, intangibles and any future assets under the Project comprised in Debenture Trust Deed and thenceforth, the First Petitioner shall



take no action inconsistent with or prejudicial to the right of the representative of Debenture Holders/Debenture Trustee acting for the Debenture Holders quietly to possess, use and enjoy the same and to receive the income, profits and benefits thereof without interruption or hindrance by the First Petitioner or by any person or persons whatsoever.

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 assignment of its



rights and obligations in the TSA. The First Petitioner further submitted that the creation of security to such lenders who have provided fund for the Project prior to COD and such security creation do not attract the provision of Section 17 of the Act as the same is pre-approved under the provisions of the TSA.

10. The First Petitioner has stated that in accordance with sub-sections (3) and (4) of Section 17 of the Electricity Act, 2003, while no encumbrance on the licence or entire assets of the First Petitioner is being created, approval of the Commission has been sought in view of the Article 15 of the TSA which does not deal with rights of lenders who have refinanced the original loan. Accordingly, the present Petition has been filed for creation of security interest over all the movable and immovable assets of the First Petitioner in favour of Debenture Trustee/Debenture Holders acting on behalf of and for the benefit of the Debenture Holders by way of mortgage of mortgaged properties and projects assets through execution of Security Trustee Deed for the project.

11. The Petition was heard after notice to the Petitioners and the Respondents. No reply has been filed by the Respondents. None was present on behalf of the Respondents. The First Petitioner, vide Record of Proceedings for the hearing dated 26.11.2019, was directed to submit the following information:

(a) Auditor certificate with regard to 'Actual Means of Finance' as on COD and Auditor Certificate of the 'Project Cost' and 'Actual Means of Finance' as on application date as required in the prescribed format; and



(b) Actual COD submitted vide Petition of 'Madhugiri-Bidadi 400 k V D/C line' as 27.7.2016. However, the same is submitted as 13.7.2016 vide affidavit dated 3.9.2019. Submit the reason regarding mismatch in both the above dates.

12. The First Petitioner vide its affidavit dated 19.12.2019 has submitted the information called for. With regard to (a) above, the First Petitioner has submitted Auditor's Certificates of funds infused and funds utilized upto 27.7.2016 and upto 30.8.2018, and Auditor Certificate of cost of completion of the project as on 31.3.2016 and 23.9.2016. With regard to (b) above, the First Petitioner has submitted that Madhugiri-Bidadi 400 kV D/C line has achieved COD on 27.7.2016 not on 13.7.2016. According to the Petitioner, on 1.7.2016, line was inspected by CEA and approval for energization was accorded for the same on 4.7.2016 and notice to LTTCs was issued for readiness of the line on 5.7.2016 with the condition to provide inter-connection facility failing which KTL will declare the CoD of the line. Since no efforts were made by the LTTCs to provide the inter-connection facility, KTL declared CoD of the line in terms of the TSA. It appears that CoD of the line as 13.7.2016 was mentioned inadvertently.

Analysis and Decision

13. After grant of transmission licence, the First Petitioner had taken loan of Rs. 1157 crore from the lenders for construction and Development of the Project and accordingly, executed Common Loan Agreement dated 24.2.2014. However, 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 assignment of its rights and obligations in the TSA. The First Petitioner has further submitted that the creation of security to such



lenders who have provided fund for the Project prior to COD and such security creation do not attract the provision of Section 17 of the Act as the same is pre-approved under the provisions of the TSA. The Commission is of the view that the First Petitioner cannot claim ignorance of law and proceed with creating charges on the movable and immovable assets of the regulated transmission business without the approval of the Commission. We take a serious view in the matter and warn the First Petitioner to comply with the provisions of the Act failing which it would be considered as breach of terms and conditions of the licence.

14. It is noted that as per the CEA, the indicative cost of the Project was Rs. 1240 crore. The original estimated cost of the Project was Rs. 1350 crore and the actual project cost as on date of commercial operation was Rs. 1491 crore. The Petitioner has submitted the commissioning status of the lines, project cost and financing plan as under:

| Assets name | Effective Date | Scheduled COD | Actual COD |
|---|-----------------------|----------------------|-------------------|
| Kudgi TPS- Narendra (New) 400 KV 2XD/C quad lines | 30.8.2013 | 28.2.2015 | 4.8.2015 |
| Narendra (New)--Madhugiri 765 KV D/C line | 30.8.2013 | 31.12.2015 | 19.9.2016 |
| Madhugiri- Bidadi 400 KV D/C (quad) line | 30.8.2013 | 31.12.2015 | 27.7.2016 |

15. The First Petitioner has submitted the original estimated project cost and means of finance as under:

| Original Estimated Project cost (as per agreement) | Rs. in crore | Means of Finance (as per agreement) | Rs. in crore |
|---|---------------------|---|---------------------|
| Hard Cost | 1193 | Equity share capital | 193 |
| IEDC - (ROW+ SPV Acquisition) | 85 | Secured loan/debt from external source as per CLA | 1029 |



| | | | |
|---------------------------------------|-------------|---|-------------|
| IDC | 68 | Mezzanine debt from external sources backed by Promoter | 128 |
| Preliminary and Preoperative Expenses | 4 | | |
| Total | 1350 | Total | 1350 |

16. The Petitioner has submitted the actual project cost-Gross Block of fixed assets and means of finance as on COD, namely, 19.9.2016 as under:

| Actual Project cost | Rs. in crore | Means of finance | Rs. in crore |
|---------------------------------------|---------------------|---|---------------------|
| Hard Cost | 1149 | Equity share capital | 193 |
| IEDC- (ROW+ SPV Acquisition) | 173 | Secured loan / debt from External source as per CLA | 1029 |
| IDC | 149 | Mezzanine debt from External sources backed by Promoter | 128 |
| Preliminary and Preoperative Expenses | 20 | Current liability | 141 |
| Total | 1491 | | 1491 |

Note: The above is based on the prescribed format (vide affidavit dated 3.9.2019) supplemented by the Petitioner vide its affidavit dated 10.12.2018. The Petitioner has placed on record the auditor certificate dated 12.12.2019 certifying funds infused and funds utilized 'as on 27.7.2016' instead of 'as on project COD i.e., 19.9.2016'. The Petitioner has also placed on record another Auditor's certificate dated 22.3.2017 certifying project cost 'as on 23.9.2016' as Rs. 1493 crore.

17. Actual project cost-Gross Block of fixed assets and means of finance as on 31.8.2018 as submitted by the First Petitioner is as under:

| Actual Project cost (Funds utilization) | Rs. in crore | Means of finance | Rs. in crore |
|---|---------------------|----------------------------|---------------------|
| Payment against EPC (Engineering Procurement Construction cost) | 1149 | Equity Capital | 193 |
| Project Management Consultancy, ROW, SPV Acquisition, etc. | 355 | Non-convertible debentures | 1500 |
| Current Assets and Loans and Advances | 189 | | |
| Total | 1693 | | 1693 |

Note: The above cost is as per Auditor's certificate dated 12.12.2019 submitted by the Petitioner vide affidavit dated 3.9.2019 certifying 'funds infused and funds utilized' upto 31.8.2018. The amount is rounded-off to the nearest rupee value (in crore).

18. The First Petitioner has issued rated, secured, redeemable, listed, non-convertible debentures of face value of Rs. 10 lakh each aggregating upto to Rs. 1500 crore on a



private placement basis for refinancing the existing loan of Rs. 1157 crore from the existing lenders, namely, Bank of India, Dena Bank, Indian Bank, IDBI Bank, Exim Bank, Union Bank of India, NCD to Yes Bank and other expenses. The First Petitioner had approached IDBI Trusteeship Services Limited to act as the Debenture Trustee for the benefit of the Debenture Holders. IDBI Trusteeship Services Limited had agreed to act as the Debenture Trustee for the Debenture Holders on the terms and conditions agreed in the Debenture Trustee Agreement dated 27.6.2017. The First Petitioner vide its affidavit dated 10.12.2018 has submitted that the debenture proceeds have been utilized for replacement of erstwhile loan of Rs. 1157 crore, financed the cost over-run of Rs. 141 crore, and the balance of Rs. 202 crore have been raised for repayment of Promoter`s contribution to the Project and the payment of fees for issuance of non-convertible debentures and expenses thereto. The First Petitioner has placed on the record the Auditor Certificate certifying the fund infusion and utilization statement upto 31.8.2018. The First Petitioner and IDBI Trusteeship Services Limited have filed the present Petition seeking approval for creation of security interest in favour of Debenture Trustee for raising Rs. 1500 crore through debenture to refinance the loan from Bank of India, Dena Bank, Indian Bank, IDBI Bank, Exim Bank and Union Bank of India and other expenses. The First Petitioner has also placed on record `No Due Certificates` from IDBI Trusteeship Services Ltd. and from the above erstwhile lenders.

19. The transmission projects are capital intensive projects requiring huge capital investment. These projects are financed through equity of the project developer and loans by the financial institutions and issuance of debentures which is a form of loan. It



is a 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 lenders have appointed the Second Petitioner, namely, IDBI Trusteeship Services Limited as Debenture Trustee for creation of security over all the movable and immovable assets of the Project. Accordingly, Escrow Agreement dated 6.4.2017, debenture Trust Deed dated 27.6.2017 and Deed of Hypothecation dated 28.6.2017 have been executed for refinancing of erstwhile loan, the First Petitioner issued 15,000 non-convertible debentures of a face value of Rs.10 lakh each aggregating to Rs.1500 crore. 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.

20. 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.”

As per the above provision, a licensee is required to obtain prior 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.



21. The First Petitioner has approached for approval for creation of security interest in favour of IDBI Trusteeship Services Limited as Debenture Trustee. In our view, IDBI Trusteeship Services Limited as Debenture Trustee needs to be given comfort for creation of security for the benefit of the debenture holders/banks/financial institutions/non-banking financial companies as security for the financial assistance provided by the lenders. We, therefore, accord approval allowing the First Petitioner to create security in favour of IDBI Trusteeship Services Limited, presently acting as Debenture Trustee pursuant to Debenture Trust Deed by way of mortgage on project assets by execution of Debenture Trust Deed and other debenture and refinancing documents for the project for an amount not exceeding Rs. 1500 crore.

22. 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 Debenture 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 Debenture Trustee, the Commission shall evaluate such nominee's experience in development, design, construction, operation and maintenance of the transmission lines, and ability to execute the project and undertake transmission of electricity. The licensee, lenders, debenture trustee or its nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself about 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, Debenture Trustee or its 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 shall be necessary for assigning the licence to the Debenture Trustee or its nominee and transfer of any assets to them. Lastly, finance documents and statements shall be filed by the First Petitioner as and when required by the Commission for any specific purpose.

23. The Petition No. 384/MP/2018 is disposed of in terms of the above.

Sd/-
(I.S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson

