

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 162/MP/2021**

**Coram:**

**Shri P.K. Pujari, Chairperson**

**Shri I.S. Jha, Member**

**Shri Arun Goyal, Member**

**Shri P. K. Singh, Member**

**Date of order: 21<sup>st</sup> November, 2021**

**In the matter of:**

Petition for approval for creation of security interest under Section 17(3) and (4) of the Electricity Act, 2003 over the Petitioner No.1's assets in favour of the Petitioner No.2 (including its assignees, transferees, novatees) for the purpose of Petitioner No.1's Transmission Project.

**And**

**In the matter of**

Vapi-II North Lakhimpur Transmission Limited,  
F-1, The Mira Corporate Suites,  
1&2 Ishwar Nagar, Mathura Road,  
New Delhi – 110 065.

Power Finance Corporation Limited,  
Urjanidhi 1, Barakhamba Lane, Connaught Place,  
New Delhi-110 001

**....Petitioners**

**Versus**

1) Maharashtra State Electricity Distribution Company Limited,  
Hongkong Bank Building, M.G. Road, Fort,  
Mumbai- 400001

2) Gujarat Urja Vikas Nigam Limited,  
Sardar Patel Vidyut Bhawan,  
Race Course Road, Vadodara,  
Gujarat -390007

3) M. P. Power Management Company Limited,  
Shakti Bhawan, Vidyut Nagar, Rampur,  
Jabalpur, Madhya Pradesh - 482008

4) Chhattisgarh State Power Distribution Company Limited,  
Vidyut Sewa Bhavan, Danganiya,  
Raipur, Chhattisgarh – 492013



5) Goa Electricity Department,  
Electricity Department, 3rd Floor, Vidyut Bhavan,  
Panjim, Goa- 403001

6) DNH Power Distribution Corporation Limited,  
Vidhyut Bhavan, 66 KV Road,  
Near Secretariat, Amla, Silvassa,  
U.T. of Dadra & Nagar Haveli – 396230

7) Electricity Department, Daman & Diu,  
Vidyut Bhavan, Somnath, Kachigam Road,  
Kachigam, Daman -396210

8) Department of Power,  
Arunachal Pradesh Vidyut Bhavan,  
Zero Point Tinali, Itanagar,  
Arunachal Pradesh - 791111

9) Assam Power Distribution Company Limited,  
5th Floor, Bijulee Bhawan, Paltan Bazar,  
Guwahati-781001

10) Manipur State Power Distribution Company Limited,  
3rd Floor, New Directorate Building,  
Near 2nd MR Gate, Imphal-Dimapur Road,  
Imphal, Manipur- 795001

11) Meghalaya Energy Corporation Limited,  
Lumjingshai, Short Round Road,  
Shillong-793001 Meghalaya

12) Power and Electricity Department, Mizoram,  
Kawlphetha Building,  
New Secretariat Complex, Khatla,  
Aizawl Mizoram- 796001

13) Department of Power, Nagaland,  
Electricity House, A.G. Colony,  
Kohima, Nagaland- 797001

14) Tripura State Electricity Corporation Limited,  
Bidyut Bhaban, Banamalipur,  
Agartala, Tripura-799001

....Respondents

### **Parties Present**

- 1) Ms. Mandakini Ghosh, Advocate, VNLTL
- 2) Ms. Ritika Singhal, Advocate, VNLTL
- 3) Shri Manoj Dubey, Advocate, MPPMCL
- 4) Shri Anindya Khare, MPPMCL



## ORDER

The First Petitioner, Vapi-II North Lakhimpur Transmission Limited (“VNLTTL”), has been granted transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as ‘the Act’) to establish “Western Region Strengthening Scheme- XIX (WRSS-XIX) and North Eastern Region Strengthening Scheme- IX (NERSS-IX)” (hereinafter referred to as "the Project") 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 1.4.2021 in Petition No. 599/TL/2020.

2. The First Petitioner, Vapi-II North Lakhimpur Transmission Limited and the Second Petitioner, Power Finance Corporation Limited have jointly filed the present Petition for creation of security interest over all assets including movable and immovable assets of the First Petitioner in favour of lender and for its subsequent transferees, assignees, novatees thereof and any refinancing lenders to the Project, pursuant to deed of hypothecation and power of attorney in relation thereto, Indenture of Mortgage and other security creating documents/ Financing Agreements and for future refinancing transactions also, by way of mortgage/ hypothecation/ assignment of secured properties and Project assets. The Petitioners have made the following prayers:

*“(a) Approve the creation of Security Interest, over all assets including the movable and immovable assets, accounts, Project documents, etc. of Petitioner No. 1 and to the extent as mentioned in paras 5 and 6 above, in favour of Lender and for their subsequent transferees, assigns, novatees and substitutes thereof and any refinancing lenders to the Project, pursuant to deed of hypothecation and power of attorney in relation thereto, Indenture of Mortgage and other security creating documents/Financing Agreements and for future refinancing transactions also, by way of mortgage/hypothecation/assignment of Secured Properties and Project assets and for amendment of the security documents and any other Financing Agreements to include the assign, transferees and novatees of the Lender; and*

*(b) Pass any other order/directions that the Commission may deem fit and appropriate under the circumstances”*

3. The First Petitioner has submitted that it approached the Second Petitioner, Power Finance Corporation Limited (hereinafter also referred to as 'the lender') for financial assistance in the form of rupee term loan. The Second Petitioner vide its letter dated 16.9.2020 read with letters dated 15.10.2020 and 25.3.2021 sanctioned rupee term loan to the extent of Rs.2069.58 crore for financing the Project. In pursuance of the aforesaid sanction letters, the Second Petitioner and the First Petitioner entered into a Facility Agreement dated 19.10.2021 read with amendment thereto dated 27.3.2021 for availing loan of Rs.2069.58 crore.

4. In pursuance of the Facility Agreement dated 19.10.2021 read with amendment thereto dated 27.3.2021, the First Petitioner has agreed to provide *inter-alia*, the following securities to secure the secured obligations in favour of the lender:

*(i) a first charge by way of mortgage over all immovable properties (in case of leasehold land, mortgage over leasehold rights) of the Petitioner No. 1 together with all appurtenances thereon, both present and future;*

*(ii) a first charge by way of hypothecation, in a form and manner acceptable to the Lender, over all the Petitioner No. 1's tangible movable assets, including moveable plant and machinery, machinery spares, equipment, tools and accessories, furniture, fixtures, vehicles and all other movable assets wherever situated, both present and future;*

*(iii) a first charge by way of hypothecation, on all intangible assets of the Petitioner No. 1, including but not limited to, goodwill, intellectual property rights, undertaking and uncalled capital, present and future;*

*(iv) a first charge by way of hypothecation, on all the Petitioner No. 1's current assets, including but not limited to, book debts, operating cash flows, receivables, commissions, revenue of whatsoever nature and whenever arising of the Petitioner No. 1, both present and future;*

*(v) a first charge over all accounts of the Petitioner No. 1, including, the trust and retention account and the sub-account(s), the DSRA (of two quarter of principal and interest payment) or any account created for any reserve(s) to be created and maintained (or any account in substitution thereof) that may be opened in accordance with the trust and retention account agreement and the financing documents, or any of the other Project documents and all funds from time to time deposited therein, the receivables and all permitted investments or other securities*

*representing all amounts credited to the trust and retention account, any letter of credit, other reserves and any other bank account of the Petitioner No. 1 present and future, wherever maintained;*

*(vi) assignment of, pertaining to the Project:*

*a. all the right, title, interest, benefits, claims and demands whatsoever of the Petitioner No. 1 in the Project documents (except Transmission Service Agreement), duly acknowledged and consented to by the relevant counter-parties to such Project documents;*

*b. all the right, title, interest, benefits, claims and demands whatsoever of the Petitioner No. 1 in, to and under all the clearances relating to the Project;*

*c. all the right, title, interest, licenses, benefits, claims and demands whatsoever of the Petitioner No. 1 in any letter of credit, guarantee, performance bond, corporate guarantee, bank guarantee or such other security to be provided by counter party to the Project documents, including liquidated damages, performance guarantee, corporate guarantee and bank guarantee provided to the Petitioner No. 1 by any party under any of the Project documents;*

*d. all the right, title, interest, benefits, claims and demands whatsoever of the Petitioner No. 1 under all insurance contracts and insurance proceeds; and*

*e. all the guarantees from the EPC contractors/ supplier / sub-contractor (if any) relating to the Project;*

*including amendments/modifications regarding (i) to (vi) above from time to time.*

*The aforesaid security interest shall be created in a form and manner satisfactory to the Lender and shall constitute a first charge and shall in all respects rank pari passu inter se amongst the Lender without any preference or priority to one over the other or others.”*

5. It has been submitted by the First Petitioner that it has agreed to create security, to the extent as mentioned above ('the security interest') in favour of the lender pursuant to the deed of Hypothecation, Indenture of Mortgage and other security/ financing documents, by way of mortgage/ hypothecation/ assignment in accordance with the provisions of the deed of Hypothecation, Indenture of Mortgage

and other security/ financing documents and has agreed that it shall be lawful for the lender, upon enforcement of security interest, to enter into and take possession of the properties over which security interest has been created in terms of the Financing Agreements. The First Petitioner shall not take action inconsistent with or prejudicial to the right of the lender and its assignees, transferees and novatees to quietly possess, use and enjoy the same and to receive the income, projects and benefits thereof without interruption or hindrance by the First Petitioner or by any person or persons whosoever.

6. It has been further submitted that Article 15.2.2 of the Transmission Service Agreement ('TSA') 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 lender or the representative of the lender as security for amount payable under the Financing Agreements and any other amounts agreed by the parties provided that:

a) the lender or the lender's agent on their behalf shall have entered into the Financing Agreements and agreed in writing to the provisions of the TSA; and

b) Any encumbrance granted by the Petitioner in accordance with Article 15.2.2 shall contain provisions pursuant to which the lender or the representative of the lenders on their behalf agrees unconditionally with the Petitioner to release from such encumbrances upon payment by the Petitioner to the lender of all amounts due under the Financing Agreements.

7. The Petitioners have submitted that in terms of Article 15.2.4 of the TSA, the First Petitioner is required to take permission from this Commission prior to relinquishment or transfer of its rights and obligations in the TSA. It has also been

stated that in view of the provisions of Sub-sections (3) and (4) of Section 17 of the Act, the First Petitioner, as a licensee, cannot create security interest over the movable and immovable assets of the Petitioner in favour of lender 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 the lender pursuant to Facility Agreement dated 19.10.2021 read with amendment thereto dated 27.3.2021.

8. The Petition was called out for hearing on 14.10.2021 through video conferencing after notice to the Respondents. Reply to the Petition has been filed by the Respondent No. 3, MP Power Management Company Limited (MPPMCL), to which the Petitioner has also filed its rejoinder.

9. Respondent No.3, MPPMCL in its reply dated 27.10.2021 has submitted that the Petitioners have not filed any documents on the instance of the Second Petitioner requiring creation of any security interest. Further, the creation of security interest is governed by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (hereinafter referred to as 'the Securitisation Act'). Under Section 13 of the Securitisation Act, the lender may enforce the security interest created in its favour without the intervention of any Court or Tribunal. The lender may take possession on the secured assets simply through a written request to the Chief Metropolitan Magistrate or the District Magistrate in terms of Section 13 of the Securitisation Act. In such a scenario, the licensed activity may go into the hands of the lender and subsequently to third parties who may not be a transmission licensee. In case of creation of security interest, the rights of the beneficiaries of the project shall be affected adversely.

10. The Petitioners in its rejoinder dated 15.11.2021 have submitted that in the Petition, Petitioners have adequately mentioned about the relevant documents such as the Facility Agreement dated 19.10.2020 read with Amendment dated 27.3.2021 and Sanction letter dated 16.9.2020 read with letters dated 15.10.2020 and 25.3.2021 issued by the Second Petitioner, in terms of which the lender has agreed to extend the rupee term loan and have also filed such documents along with the Petition. The Petitioners have also placed on record the draft copies of security documents i.e. Deed of Hypothecation, Power of Attorney in relation thereto and Indenture of Mortgage proposed to be executed for creation of security interest. It has been further submitted that the requirement to create charge over the assets of the First Petitioner has been duly agreed and acknowledged in Article 15 of the TSA. Sub-section (3) of the Section 17 of the Act also permits for transfer of assets of licensee with prior approval of the Commission. Further, as per Article 15.3.2 of the TSA, in case of default by the licensee in debt repayment, the Commission may, on an application from the lender, assign the transmission licence to nominee of the lender who fulfils qualification criteria specified in the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2006 (hereinafter referred to as 'the Transmission Licence Regulations'). Therefore, it is imperative that the transmission licence can only be transferred if an entity fulfils the required qualification for holding transmission licence. It has also been submitted by the Petitioners that in project financing transaction (including for financing of transmission projects), it is a standard condition imposed by lenders, wherein rights of the borrowers/ licensees under the project documents, clearances and insurance policies, etc. are required to be assigned/ charged to the lenders of the Project. The Commission in its various orders has already acknowledged the same.



11. The Petition was called out for hearing on 16.11.2021 through video conferencing. The learned counsel for the Petitioners and MPPMCL reiterated the submissions made in their respective petition, reply and rejoinder which have not been repeated herein for the sake for brevity.

### **Analysis and Decision**

12. We have considered the submissions made by the Petitioners and MPPMCL. The First Petitioner approached the lender, namely, Power Finance Corporation Limited for a rupee term loan for the purpose of financing the Project. Consequently, the lender has agreed to grant rupee term loan of Rs.2069.58 to the First Petitioner subject to the terms and conditions set out in the Facility Agreement dated 19.10.2020 read with amendment agreement No.1 dated 27.3.2021.

13. As per the Facility Agreement, estimated cost of the Project is Rs.2854.59 crore. In terms of financing plan enclosed as Schedule 1 of the Facility Agreement, the Project shall be funded through debt of Rs.2069.58 crore and equity of Rs.785.01 crore. The Petitioner has submitted the Auditor's Certificate dated 17.8.2021 for capital expenditure of Rs.160.04 crore incurred for its under construction Project till 16.8.2021.

14. The Petitioner has submitted original estimated cost of the Project and means of finance as on the date of financial closure as under:

| <b>Original estimated Project cost<br/>(as per agreement)</b> | <b>Rs.<br/>in crore</b> | <b>Means of finance<br/>(as per agreement)</b>        | <b>Rs.<br/>in crore</b> |
|---|-------------------------|---|-------------------------|
| Hard Cost   | 2597.17                 | Equity share capital/<br>Share Premium                | 196.25                  |
| IEDC  | 257.42                  | Loan/debenture from promoters,<br>group companies     | 384.65                  |
|   |                         | Compulsorily Convertible<br>Debentures from Promoters | 204.11                  |
|   |                         | Secured loan/debt from external<br>sources            | 2069.58                 |

|       |         |       |         |
|-------|---------|-------|---------|
| Total | 2854.59 | Total | 2854.59 |
|-------|---------|-------|---------|

15. The Petitioner has submitted lender-wise details as under:

| Name of lender                    | Sanctioned loan (Rs. in crore)<br>(as per loan Agreement) | Actual loan disbursed as on<br>date of application (Rs. in crore) |
|-----------------------------------|---|---|
| Power Finance Corporation Limited | 2069.58   | 458.73  |
| TOTAL                             | 2069.58   | 458.73  |

16. During the course of hearing, the learned counsel for the Respondent No. 3, MPPMCL objecting to the creation of security interest by the First Petitioner submitted that upon creation of security interest, the lender may enforce the security interest created in its favour without intervention of any Court or Tribunal as per Section 13 of the Securitisation Act in case of default by the borrower. The learned counsel submitted that in such an eventuality, the licenced activity may go into the hands of the lender and subsequently to the third party, who may not be a transmission licensee and this may lead to the beneficiaries being left without any remedy and their rights being affected adversely. The learned counsel also added that in case the lender does not adhere to the provisions of the TSA, it may not be under the purview of this Commission.

17. *Per contra*, the learned counsel for the Petitioners, *inter alia*, submitted that the requirement to create charge over the assets of the First Petitioner has been duly agreed and acknowledged in Article 15 of the TSA. Sub-section (3) of the Section 17 of the Act also permits for transfer of assets of licensee with prior approval of the Commission. As per the TSA, the Commission may assign the transmission licence in case of default in debt repayment to nominee of the lender who fulfils qualification criteria of Transmission Licence Regulations. Therefore, the transmission licence

can only be transferred if an entity fulfils the required qualification for holding transmission licence.

18. We have considered the submissions of the learned counsels for the parties. The transmission projects are capital intensive projects requiring huge capital investment and 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, Power Finance Corporation Limited has agreed to provide loan of Rs.2069.59 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 Agreement and any other amounts agreed by the parties.

19. Sub-sections (3) and (4) of Section 17 of the Act provide as under:

*“17. (3) No licensee shall 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 subsection (3), unless made with the prior approval of the Appropriate Commission, shall be void.”*

20. As per the above provisions, a licensee is required to obtain approval of the Commission for assigning its licence or transferring its utility or any part thereof by way of sale, lease, exchange or otherwise and entering into an agreement relating to any of these transactions.

21. Thus, under Section 17 of the Act, the licensee is prohibited from taking certain actions such as acquiring or taking over or otherwise of the utility of any other licensee, merging its utility with the utility of any other licensee, assigning its licence or transfer of its utility or any part thereof by way of sale, lease, exchange or otherwise without prior approval of the Commission. Article 15.3 of the TSA entered into between the First Petitioner and the LTTCs provide as under:

“15.3 Substitution Rights of the Lenders

*15.3.1 The TSP would need to operate and maintain the Project under the provisions of the Transmission Licence granted by the Appropriate Commission and the provisions of this Agreement and cannot assign the Transmission Licence or transfer the Project or part thereof to any person by sale, lease, exchange or otherwise, without the prior approval of the Appropriate Commission.*

*15.3.2 However, in the case of default by the TSP in debt repayments, the Appropriate Commission may, on an application from the Lenders, assign the Transmission Licence to the nominee of the Lenders subject to the fulfilment of the qualification requirement and provisions of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2006 or as amended from time to time.”*

22. As per Article 15.3.2 of the TSA, in case of default in debt repayment, the lenders have to approach the Commission for assignment of licence and the Commission may on such application by the lenders, assign the transmission licence to the nominee of the lenders subject to the fulfilment of the qualification requirement and provisions of the Transmission Licence Regulations. As per proviso to Article 15.2.2 of the TSA, the lender or its agent is required to agree in writing the provisions of the TSA. Accordingly, in terms of the above, the Commission in its various orders has been specifically directing that in case of default in debt repayment, a joint application shall be made by the licensee, lenders, security trustee and nominee for assignment of the licence to the nominee of the lenders. The purpose of such direction is that the Commission will have the opportunity to satisfy itself about the circumstances necessitating such transfer.

23. Further, a similar provision also exists in Regulation 12 of the Transmission Licence Regulations, which provides that “*in case of default by the licensee in debt repayment, the Commission may, on an application made by the lenders, assign the licence to the nominee of the lenders*”.

24. Accordingly, it is very clear that transmission licence cannot be assigned to the nominee of the lenders without prior approval of the Commission in case of default by the licensee in debt repayment. Further, in such an eventuality if it arises, the Commission is required to examine as to whether the nominee of the lender fulfils the qualification criteria laid down in the Transmission Licence Regulations or not.

25. In addition, pertinently, the present proceedings shall not amend the discovered tariff adopted by the Commission under Section 63 of the Act. Creation of security interest in favour of lender would not adversely affect the tariff discovered through competitive bidding process and the interest of beneficiaries/ LTTCs of the project would remain protected.

26. Thus, the creation of security interest over all assets including the movable and immovable assets, etc. of the First Petitioner in favour of the lender would not prejudice any interest or benefits of the beneficiaries of the First Petitioner or in any way weaken the obligations of the licensee under the transmission licence and project documents. Therefore, the contention of MPPMCL in this regard is not sustainable.

27. The Petitioner and the lender have executed Facility Agreement dated 19.10.2020 read with amendment agreement No.1 dated 27.3.2021 for a loan of

Rs.2069.58 crore. As per the said Facility Agreement, at the request of the Petitioner, the lender has agreed to provide a loan of Rs.2069.58 crore for the Project on the terms and conditions contained in the Facility Agreement. In our view, lender, Power Finance Corporation Limited needs to be given comfort for creation of security interest over all assets including movable and immovable assets, accounts, project documents, etc. of the First Petitioner for the benefit of lender as security for the financial assistance provided by the lender. We, therefore, accord in-principle approval allowing the First Petitioner to create security interest in favour of Power Finance Corporation Limited, by way of mortgage/ hypothecation 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 and other Financing documents for the Project immediately after its execution.

28. 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 lender(s) 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 lender(s), the Commission will 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, lender 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. As already noted above, 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.”*

29. Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lender 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 lender or transfer of any assets to them shall always be needed. Lastly, financial documents and statements may be filed by the Petitioner as and when required by the Commission for any specific purpose.

30. The Petition No. 162/MP/2021 is disposed of in terms of the above.

Sd/-  
**(P.K. Singh)**  
Member

sd/-  
**(Arun Goyal)**  
Member

sd/-  
**(I. S. Jha)**  
Member

sd/-  
**(P. K. Pujari)**  
Chairperson