

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 71/MP/2020

**Coram:
Shri P. K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member**

Date of Order: 27th January, 2021

In the matter of

Petition seeking approval under Section 17(3) and 17(4) of the Electricity Act, 2003, read with Article 15.3 of the Transmission Service Agreement dated 6.1.2016 and Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 and in the matter of Lender`s right to substitute performance of the Borrower with the Nominee of the Lenders and consequent assignment of transmission licence and assignment of other financing documents and movable and immovable projects assets of Warora Kurnool Transmission Limited in favour of the Nominee of the Security Trustee/Lenders.

**And
In the matter of**

1. Warora Kurnool Transmission Limited
6th Floor, Plot No. 19,
Film City, Sector 16, Gautam Buddha Nagar,
Noida, Uttar Pradesh - 201 301

2. Yes Bank Limited
Yes Bank Tower, IFC-2, 15th Floor,
Senapati Bapat Marg,
Prabhadevi (West), Mumbai - 400 013

3. IDBI Trustee Services Limited
Asian Building, Ground Floor,
17 R, Kamani Marg, Ballard Estate
Mumbai- - 400 001

.....Petitioners

1. Tamil Nadu Generation and Distribution Corporation Limited
144, Anna Salai,
Chennai - 600 002.

2. Southern Distribution Company of Andhra Pradesh Limited
D.No. 19-13-65/A, Srinivasapuram,
Tiruchhanur Road, Kesavayana Gunta,
Tirupati - 517 503, Andhra Pradesh
3. Eastern Distribution Company of Andhra Pradesh Limited
P&T Colony, Seethmmadhara,
Vishakhapatnam - 530013, Andhra Pradesh
4. Southern Distribution Company of Telangana Limited
2nd Floor, H. No. 6-1-50, Mint Compound,
Hyderabad - 500063
5. Northern Power Distribution Company of Telangana Limited
H. No. 2-5-31/2, Corporate Office,
Vidyut Bhavan, Hanamkonda,
Warangal - 506001
6. Bangalore Electricity Supply Company Limited
Krishna Rajendra Circle,
Bangalore - 560001
7. Gulbarga Electricity Supply Company Limited
Station Road, Kalaburagi,
Karnataka - 585102
8. Hubli Electricity Supply Company Limited
Corporate Office, P.B. Road,
Navanagar, Hubli - 580025
9. Mangalore Electricity Supply Company Limited
Paradigm Plaza, A. B Shetty Circle,
Pandeshwar, Mangalore - 575001
10. Chamundeshwari Electricity Supply Company Limited
No. 29, CESC Corporate Office,
Hinkal, Vijaynagar 2nd Stage,
Mysuru - 570017
11. Kerala State Electricity Supply Company Limited
Vydyuthi Bhawanam, Pettom,
Tiruvananthapuram, Kerala - 695 004
12. Electricity Department, Govt. of Puducherry
137, NSC Bose Salai,
Puducherry - 605001

13. Electricity Department, Govt. of Goa
Vidyut Bhavan, Panaji,
Nr. Mandvi Hotel, Goa - 403001

14. Central Transmission Utility
Saudamini, Plot 2,
Sector - 29, Gurugram - 122001

15. Essel Infraprojects Limited
6th Floor, Plot No. 19,
Film City, Sector -16, Gautam Buddha Nagar,
Noida, Uttar Pradesh - 201 301

16. Export-Import Bank of India
21st Floor, Centre One Building,
World Trade Centre Complex,
Cuffe Parade, Mumbai - 400005.

17. Indian Renewable Energy Development Agency Limited
Core- 4A, 1st Floor, India Habitat Centre,
East Court, Lodhi Road, New Delhi - 110003

18. Adani Transmission Limited
Adani House, Nr. Mithakhali Six Roads,
Navrangpura, Ahmedabad - 380009

.....**Respondents**

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

ORDER

The Petitioners, Warora Kurnool Transmission Limited (in short 'WKTL'), its lead lender, Yes Bank Limited (in short, 'Yes Bank') and IDBI Trusteeship Services Limited (in short, 'IDBI Trustee') (hereinafter collectively referred to as 'the Petitioners') have jointly filed the present Petition under Section 17(3) and (4) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') 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 (hereinafter referred to as 'the Transmission Licence Regulations') and Article 15.3 of the Transmission Service Agreement (in short, 'the TSA') dated 6.1.2016 seeking approval of the Commission to transfer the shares and management control of WKTL in favour of the nominee of WKTL's lenders.

2. Subsequently, the Petitioners filed Interlocutory Application No. 30/2020 seeking amendment of the Petition to formally place on record the name and credentials of nominee of lender. The Petitioners have submitted that in terms of Article 15.3 of the TSA, the lead lender, Yes Bank, has selected a nominee, Adani Transmission Limited (in short, 'ATL'), Respondent No. 18, for execution of the project. Therefore, the entire shareholding of M/s Essel Infraprojects Limited (hereinafter referred to as 'Essel Infra') in WKTL including the management control of WKTL is proposed to be transferred to ATL by way of a Share Purchase Agreement. ATL shall discharge the debt liabilities of WKTL and shall execute the transmission system in terms of the TSA. The Petitioners have submitted that in order to successfully discharge all obligations of WKTL under the TSA, ATL 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 funding advanced by the lenders. The Petitioners have made the following prayers in the amended Petition:

“(a) Allow the present Petition;

(b) Allow the Lenders to exercise their substitution rights under Article 15.3.1 and 15.3.2 of the TSA;

(c) Grant approval for transfer of 100% shareholding/ any other securities held by Essel Infra or its affiliates (including that which is held under pledge by the Lenders) in WKTL in favour of ATL (Adani Transmission Limited) by execution of Share Purchase Agreement.”

Background

3. WKTL is a fully owned subsidiary of Essel Infra which was selected as a successful bidder through the international tariff based competitive bidding process under Section 63 of the Act to establish the transmission system of the “*Additional inter-Regional AC link for import into Southern Region i.e. Warora-Warangal and Chilakaluripeta-Hyderabad-Kurnool 765 kV Link*” (hereinafter referred to as “the Transmission System” or “the Project”) on Build, Own, Operate and Maintain (BOOM) basis and to provide transmission service to the Long Term Transmission Customers (LTTCs) of the Project.

4. WKTL was incorporated as a special purpose vehicle by PFC Consulting Limited (PFCCL) as part of Tariff Based Competitive Bidding process for implementing the Project on BOOM basis. Essel Infra participated in the competitive bidding process conducted by PFCCL and upon emerging as the successful bidder, Letter of Intent (LOI) was issued by PFCCL to Essel Infra on 29.2.2016. In accordance with the bidding documents, Essel Infra acquired 100% of the shareholding in WKTL by executing a Share Purchase Agreement with PFCCL on

6.7.2016. WKTL entered into the Transmission Service Agreement (TSA) with LTTCs on 6.1.2016. The Commission in its order dated 29.9.2016 in Petition No. 111/TL/2016 granted transmission licence to WKTL for inter-State transmission of electricity. As per the TSA, the transmission system comprised of seven elements and Scheduled Commercial Operation Date (SCOD) for elements 1 to 6 of the transmission system was 40 months from the effective date, whereas element seven was to be commissioned matching with Warora Pool-Ranganandgaon 765 kV D/C line by November, 2018.

5. For the purpose of financing the Project, WKTL had requested lender, namely, Yes Bank to provide financial assistance to the extent of Rs.2790 crore (with Letter of Credit facility of Rs. 1400 crore) as Rupee Term Loan for construction, development and implementation of the Project on the terms and conditions set out in the Facility Agreement dated 22.3.2017 and other financing documents. Yes Bank agreed to act as lead bank for the consortium, if any, of the lenders. For this purpose, WKTL and the lender appointed IDBI Trusteeship Services Limited as Security Trustee who agreed to act as Security Trustee for the lender and its novates, assignees and transferees and entered into Security Trustee Agreement on 22.3.2017. WKTL, thereafter, approached the Commission in Petition No. 78/MP/2017 for approval under Section 17(3) and 17(4) of the Act read with Article 15.2.2 of the TSA to create security interest over all movable and immovable assets of the Project in favour of IDBI Trusteeship Services Limited, acting for the benefit and on behalf of the lender. The Commission in its order dated 24.5.2017 in Petition No. 78/MP/2017 accorded in-principle approval allowing WKTL to create security interest in favour of IDBI Trusteeship Services Limited, acting as Security Trustee

pursuant to Security Trustee Agreement by way of mortgage and/or hypothecation and/or assignment and/or substitution and/or charge, as the case may be, on project assets by execution of indenture of mortgage for the Project. Accordingly, WKTL entered into Deed of Hypothecation with IDBI Trusteeship Services Limited on 29.6.2017 creating a first charge in favour of IDBI Trustee.

6. Subsequently, Yes Bank transferred its commitment under the Facility Agreement to an extent of Rs. 200 crore each to Exim Bank and IREDA. Out of Rs. 2790 crore loan facility, WKTL has been disbursed Rs.1200 crore so far.

7. The Petitioners have submitted that the implementation of the Project has been impeded due to various RoW issues and other Force Majeure events faced by WKTL and has already been delayed by over six months. The Petitioners have further submitted that, on account of deteriorating financial condition of Essel Infra, there has been continuous default by WKTL in its debt repayment to its lenders. It has been pointed out that it was not feasible for Essel Infra to raise funds needed for equity infusion or for leveraging WKTL for completion of the Project. Apprehending further time and cost over-run, the lenders have decided to exercise 'Lender's Substitution Rights' as per Article 15.3 of the TSA and identified ATL as its nominee to acquire management control and shareholding of WKTL for completion of the Project and discharge the debt obligations of WKTL to its lenders.

8. In light of the above, the Petitioners have filed the present Petition under Section 17(3) and (4) of the Act read with Regulation 12 of the Transmission Licence Regulations and Article 15.3 of the TSA dated 6.1.2016 seeking approval of the Commission for substitution of Essel Infra with ATL for execution of the Project.

9. TANGEDCO had raised preliminary objection with regard to the maintainability of the Petition. The Commission in its order dated 15.6.2020 rejected the objections of TANGEDCO and held the Petition as maintainable. The Respondents were directed to file their reply on merits and the Petitioners to file rejoinders to the replies, if any. Pursuant to the said directions, Bangalore Electricity Supply Company Limited (BESCOM) and TANGEDCO have filed their replies and the Petitioners have filed their responses to the replies. The Petition was heard on 9.7.2020 and the parties were allowed to file their written submissions which have been filed.

Submissions of the Respondents

10. TANGEDCO has submitted that WKTL has willfully delayed the Project in violation of the provisions of the TSA and has sought tagging of present Petition along with Petition No.334/MP/2020 filed by WKTL seeking relief under force majeure conditions and extension of SCOD. As regards the delay, TANGEDCO has submitted as under:

(a) There is an inordinate delay in completion of the Project as against the SCOD of Assets 1 to 6 that was on 5.11.2019. As per Article 6.4.1 of the TSA, the TSP is liable to pay liquidated damage from SCOD to actual COD of the Project for which TANGEDCO has issued notice dated 21.3.2020 in accordance with the TSA.

(b) The TSP is liable to pay the transmission charges from the SCOD of the line bays and reactors executed by PGCIL till the COD of the associated lines under the scope of WKTL.

(c) Without quantifying the liability of WKTL on account of delay in execution of the Project and embedding this liability with the bidder, transfer of licence or

100% shareholding to another TSP will result in irreversible damages to the LTTCs.

11. On merits, TANGEDCO in its reply dated 20.7.2020 has submitted as under:
 - (a) Section 17(3) and (4) of the Act specifically deals with transfer of licence by the licensee and does not deal with transfer of shareholding of the TSP.
 - (b) Article 18.2 of the TSA clearly prohibits transfer of shareholding to third parties. The selected bidder, Essel Infra, to which the Bid Process Coordinator had transferred 100% shareholding in WKTL is mandated to maintain 51% (majority and controlling shareholding) for a period of 2 years after COD and 26% (which will give a right to veto special resolutions) for a period of two years thereafter, as per Article 18.2 of the TSA.
 - (c) The nominee of the lenders, therefore, cannot acquire such share in contravention of the provisions of Article 18.2 of the TSA. The Petitioners are attempting to circumvent the above provisions of Article 18.2 by wrongly relying on Article 15.3.2 of the TSA. Applicability of Article 15.3 of the TSA is only during the period of operation and maintenance of the project i.e. post COD, when the TSP defaults in debt repayment. Article 15.3.2 of the TSA provides for assignment of the licence subject to Article 15.3.1 of the TSA. Article 15.3 of the TSA does not provide for takeover of 100% shareholding of Essel Infra in WKTL prior to operation and maintenance of the project. Thus, Article 18.2 of the TSA puts an embargo on the transfer of shares by Essel Infra or WKTL even post COD. The Articles of TSA have to be read harmoniously. Since the project has not been commissioned as on date, the present Petition is liable to be dismissed.
 - (d) The reliance of the Petitioners on Section 17(3) and Section 17(4) of the Act is misplaced as conjoint reading of the said Section read with Part IV of the Act i.e. Section 12 to Section 24 makes it clear that the licensee is not entitled to transfer of its licence/ utility unless such transfers are based on open competitive selection process by calling for applications from eligible

purchaser on the basis of higher and best price by the Commission. Section 19 of the Act empowers the Commission to revoke the licence in case of default by the licensee. Further, Regulation 20(1)(g) of the Transmission Licence Regulations provides that the transmission licence shall be revoked if the licensee breaches any of the provisions of the TSA during the construction or operation period. In this context, Section 20 of the Act mandates acquisition of the utility of the licensee whose licence has been revoked through open competitive selection process by calling for applications from eligible purchaser on the basis of higher and best price offered for the utility.

(e) The Petitioner cannot override the express provisions of Section 19 and Section 20 of the Act by relying on the order of the Commission in Petition No. 78/MP/2017. The findings of the Commission at paragraph 11 of the said order dated 24.5.2017 are in relation to assignment of licence with the approval of the Commission. The lenders have no authority to appoint a Bid Process Coordinator to choose the transmission licensee under any provision of the Act.

(f) Regulation 12 of the Transmission Licence Regulations empowers the lenders to assign the licence to a nominee of the lenders. The regulation deals with assignment of licence. However, the Petitioner in its rejoinder dated 26.5.2020 has specifically stated that in its amended Petition “it is not praying for transfer of WKTL’s transmission licence to the nominee of lenders”. Since there is no prayer for transfer of licence, Regulation 12 of the Transmission Licence Regulations is not applicable.

(g) The Commission in its order dated 29.9.2016 has granted transmission licence to the Petitioner, WKTL with specific terms and conditions. As per the direction of the Commission in the said order dated 29.9.2016, there should not be any lapse on the part of the licensee to meet the scheduled COD. Since the licensee did not comply with the conditions stipulated in the licence/ the TSA and the provisions under the appropriate Regulations and the Act, the licence is liable for revocation.

(h) As per Article 15.3.2 of the TSA, purchaser is required to fulfill the conditions stipulated under Regulation 6 of the Transmission Licence Regulations for grant of licence. Regulation 6(a) provides that the licence can only be assigned or granted to any person who is selected through a transparent process as per the competitive bidding guidelines. The lender has no authority to select the eligible applicant for transfer of licence.

(i) The lenders have not initiated any action as per law against WTKL to recover the loan amount. They have not produced any document related to the discharged loan amount. The lenders are making an attempt to act as a mediator/ facilitator for illegal transfer of licence which is against the law. The provisions under Section 230 and Section 231 of the Companies Act, 2013 should have been complied with by the lenders.

(j) Essel Infra by its letter dated 17.11.2017 to the LTTCs sought approval under Article 18.1.1 and 18.2.1 of the TSA for divestment of stake in the TSP to potential investors. The said letter also states that *“divestment of stake in the TSP primarily for the purposes of raising capital for further investment by our promoter in other infrastructure projects in India.”* There is no mention of any financial difficulty faced by the TSP or Essel Infra. Moreover, only Rs. 1200 crore has been paid out of the total loan of Rs. 2700 crore. In other words, the repayment will commence only after the project is commissioned and operational after the entire loan is disbursed. The contention of the Petitioners that the TSP is under financial stress is not substantiated in the facts and circumstances of the case. From the facts of the present case, it is evident that Essel Infra or the TSP is not interested in completing the project which they bid for but are more interested in the business of raising capital for further investment by their promoters in other infrastructure projects in India. This is contrary to the terms and conditions of the licence granted by the Commission.

12. BESCO vide its reply dated 30.6.2020 and written submission dated 20.7.2020 has submitted as under:

(a) The prayer sought for transfer of 100% shareholding of WKTL is directly hit by the completely clear and unambiguous prohibition provided under Article 18.2.1 of the TSA as in terms thereof Essel Infra is required to continue to hold at least 51% of the shareholding of WKTL for at least 2 years post COD.

(b) Article 15.3 of the TSA deals with assignment of the transmission licence. It allows such an assignment, with the permission of the Commission, in case of failure of WKTL in repaying its lenders. Similar stipulation also exists under Regulation 12 of the Transmission Licence Regulations.

(c) Section 17(3) of the Act deals with different modes of assignment/transfer by a licensee of the licence or its utility, and not a transfer of the shareholding of the licensee itself. Even the expression 'or otherwise' refers to other modes of transfer apart from sale, lease, exchange of the licence or the utility, and not a transfer to the shareholding of the licensee itself. The provision clearly pertains only to the transfers that may be affected by the licensee itself, which does not include a transfer of its shareholding.

(d) It is clearly seen from the above that these contractual and statutory provisions deal with either assignment of the licence i.e. '*a licence granted under Section 14*' (Section 2(38) of the Act) or with a transfer of the 'utility' i.e. "*the electric lines... and includes all lands, buildings, works and materials attached thereto belonging to any person acting as a generating company or licensee under the provisions of this Act*" (Section 2(75) of the Act). In light of the fact that each of the terms used thereunder are specifically defined and have a clear meaning under the Act, no other or expanded meaning can be given to the said provisions. They clearly do not pertain to the transfer of shareholding of the transmission e i.e. '*licensee authorised to establish or operate transmission lines*' (Section 2(73) of the Act) to another entity.

(e) The clear and specific prohibition provided under Article 18.2 of the TSA cannot be disregarded. The transfer of shareholding proposed by the Petitioners ought not be allowed in the garb of exercise of the lenders' substitution rights under Article 15 of the TSA, when it is specifically prohibited

under Article 18.2 of the TSA. It is settled law that when there is a specific prohibition in a contract, the same cannot be rendered redundant. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in *M. Arul Jothi v. Lajja Bal*, [(2000) 3 SCC 723].

(f) Article 18.2 of the TSA operates in a different sphere than the provisions relied upon by the Petitioners. Even the reliance placed by the Petitioners on Article 16 of the TSA is misplaced as it does not in any manner allow a transfer of shareholding in derogation of the Article 18.2.1 of the TSA.

(g) It is denied that the shareholding of WKTL 'must be transferred' to ATL for the transmission system to be completed. As regards Petitioner's contention that the lenders are proposing a 'more efficacious' route through share purchase, it is clarified that simply because the particular mode of performance of lenders substitution right as provided in the TSA i.e., assignment of the licence, may be onerous, cannot be a reason to absolve the Petitioners from complying with the stipulation provided under Article 18.2.1 of the TSA which has been specifically agreed upon. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in *Excise Commr. v. Issac Peter*, [(1994) 4 SCC 104].

(h) The Hon'ble Supreme Court in its judgment in the case of *Alopi Parshad and Sons Ltd. vs. Union of India* [AIR 1960 SC 588] has held that *"there is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an un contemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an un contemplated turn of events since the date of contract."*

(i) The Petitioners in support of their contentions have relied on the judgment of Hon'ble Supreme Court in *Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr.* [(2018) 11 SCC 508]. However, the mere fact

that the 'Principle of Business Efficacy' has been relied upon, clearly shows that the arrangement sought to be entered into is admittedly not provided for in the TSA.

(j) The Petitioners' understanding and submission based on the 'Principle of Business Efficacy' is completely misplaced and misleading. The invocation of the said principle cannot be resorted to as a matter of course, as is being done in the instant case. Further, it cannot be used to override a specific stipulation under the contract. Reliance in this regard has been placed on the judgments of Hon`ble Supreme Court in the case of *Satya Jain v. Anis Ahmed Rushdie*, [(2013) 8 SCC 131] and *Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission and Others* [2019 SCC On Line SC 813].

(k) In the instant case, it cannot be said that a transfer of shareholding is necessary to give efficacy to the contract. It is always open to the lenders to enforce their substitution rights by assignment of licence, or in any other manner which is not inconsistent with Article 18.2.1 of the TSA. It cannot be said that it 'goes without saying' that the lenders substitution right includes a transfer of shareholding, to the contrary, the parties who are large commercial entities with expertise in the field had specifically contemplated that in case of default by WKTL, the consequence would be assignment of the licence, and had separately contemplated that change in shareholding would be restricted by Article 18.2.1 of the TSA. Since the Petitioners' plea is contrary to the clear and express terms of the Article 18.2.1 of the TSA, there is no question of applying the 'Principle of Business Efficacy'.

(l) Reliance of the Petitioners only on a part of Article 15.2.2 of the TSA to contend that the said Article specifically permits creation of charge over the Transmission Project in favour of the lenders while suppressing the proviso to the said Article is clearly misleading. In fact, the lenders are required to comply with the terms of the TSA, without any restriction or exceptions as is clear from a bare reading of the proviso to Article 15.2.2 of the TSA.

(m) It is not open to the lenders of WKTL to enter into any transaction which is in contravention to the explicit terms of the TSA. Any security in favour of the lenders is subject to the provisions of the TSA and cannot be invoked in a manner inconsistent thereto including Article 18.2.1 of the TSA. It cannot be expected that the lenders, who are financial institutions, were not aware of the difference between transfer of shareholding of the transmission licensee, WKTL and an assignment of the licence or the assets held by a licensee to another entity. After having accepted the shareholding restriction with open eyes, the said restriction cannot be circumvented. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in *State of Haryana v. Jage Ram* [(1980) 3 SCC 599].

(n) The Petitioners, including lenders, cannot on one hand rely on their substitution rights under the TSA and on the other hand seek to abrogate Article 18.2.1 of the TSA. It is not open to the Petitioners to pick and choose provisions of the TSA as per their convenience. Reliance in this regard has been placed on the decision of the Hon'ble Supreme Court in *Bharti Cellular Ltd. v. Union of India*, [(2010) 10 SCC 174] which clearly holds that a person cannot approbate and reprobate the same instrument.

(o) The contention of the Petitioner that the lenders are entitled to choose the form they prefer to adopt for exercise of the substitution right, is a wholly misleading submission which completely mischaracterizes the dispute at hand. It is not open to the lenders to select a form which is contrary to the terms of the TSA.

(p) It is noteworthy that as per Article 13.1(g) of the TSA, a breach of the equity lock-in commitment under Article 18.2 of the TSA is an event of default and may lead to termination of the TSA. A change of shareholding of WKTL by the Petitioners in contravention of the terms of the TSA cannot be allowed as it would be a ground for revocation of the transmission licence granted to WKTL under Regulation 20(1)(g) of the Transmission Licence Regulations.

(q) The lenders specifically created a security interest with respect to only 51% of the shares of WKTL which have been pledged to the lenders. It is, therefore, now not open to them to seek a transfer of 100% of the shares. The Petitioners are now estopped from participating in any transaction with respect to 100% of the shares in furtherance of the lenders' security interest. Further, the fact that the lenders under Article 15.2.2 of the TSA have a right to "*create any encumbrance over all or part of the receivables or other assets*" whereas they have chosen to create a security interest with respect to only 51% of the shares, indicates that the enforcement of security interest by transfer of shares is a completely distinct transaction from assignment of the project assets or the transmission licence. Further, any transfer of shares of WKTL beyond the 51% pledged to the lenders would be a voluntary transfer of the shares by Essel Infra and cannot be considered as part of the exercise of lenders substitution rights.

(r) The case laws cited by the Petitioners in this regard are of no assistance and are completely distinguishable.

(s) The 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 Infra or its group entities. The said order does not in any way grant any approval for transfer of shareholding of WKTL to any entity that may have been nominated by the lenders.

Replies of the Petitioner

13. The Petitioners, in response to the submissions made by the Respondents, have filed their written submissions dated 24.7.2020 and have submitted as under:

(a) The lenders have appointed ATL (through a transparent competitive bidding process) as their nominee who shall acquire the management control and shareholding of WKTL in order to expeditiously construct the transmission project and discharge the debt obligations of WKTL to its lenders. The said

transaction involves transfer of WKTL's shares, over which charge has been created in favour of lenders (by way of pledge agreement(s) between Essel Infra and the Security Trustee) and for which prior approval of the Commission is not required under the TSA.

(b) However, since WKTL is a transmission licensee under the Act and is constructing a regulated transmission project, and its lenders have considered it prudent to file the present Petition and apprise the Commission of the steps proposed to be taken by the lenders to recover their dues from WKTL and seek approval for the same. Accordingly, the present Petition has been filed invoking (a) Section 17(3) and (4) and Section 79 of the Act under which a licensee is required to seek prior approval of the Appropriate Commission for transferring its utility or any part thereof, by sale, lease, exchange or 'otherwise'; and (b) Section 79(1)(c) of the Act which empowers the Commission to 'regulate inter-State transmission of electricity' and confers plenary powers on the Commission in this respect.

(c) The proposed transfer of shares of WKTL from Essel Infra to ATL does not prejudice any rights of the LTTCs under the TSA and the same also does not entail any financial liability on the LTTCs. The transaction is a result of default in the debt re-payment under the financing documents and only relates to the rights and liabilities of the lenders, WKTL and Essel Infra. LTTCs are not affected by the transfer of shares of WKTL.

(d) TANGEDCO in its reply dated 20.7.2020 has again substantially raised the same contentions pertaining to application of Section 17 of the Act and Article 15 of the TSA before COD; compliance of the Companies Act, 2013; revocation of licence under Sections 19 and 20 of the Act; collusion of WKTL and lenders to file a common Petition; the Petition being contrary to Regulation 6 of the Transmission Licence Regulations; and the lenders exercising their substitution rights in the absence of any financial stress to WKTL, which were raised in TANGEDCO's reply dated 20.5.2020 and the same were rejected by the Commission in its order dated 15.6.2020.

(e) There is no provision in the Act or the TSA which prohibits the lenders to approach the Commission before COD of the project. Therefore, ensuring debt repayment to the lenders cannot be linked to the COD of the transmission project.

(f) The contention of BESCO that Section 17(3) and (4) of the Act, Regulation 12 of the Transmission Licence Regulations and Article 15.3 of the TSA relates only to 'assignment of licence' and 'transfer of utility' is misleading and premised on a wrongful interpretation of Section 17 of the Act and provisions of the TSA.

(g) Section 17(3) and (4) and Section 79 of the Act empower the Commission to grant approval of the proposed transfer of WKTL's shares and ownership held by Essel Infra to ATL. Further, Article 15.3 of the TSA read with the Regulation 12 of the Transmission Licence Regulations empower the lenders to exercise their rights in case of default in debt repayment by the TSP with the approval of the Commission and safeguard the interests of the lenders who have provided financial assistance for the implementation of the transmission project and to ensure operationalization of the same.

(h) The rights of the lenders have been secured under the relevant financing and security documents, for which the Commission has already given its prior approval by order dated 24.5.2017 in Petition No. 78/MP/2017. Article 16 of the Facility Agreement provides events of default, which includes failure of WKTL in the debt repayments to lenders as per the repayment schedule provided under the Facility Agreement.

(i) Article 16.2 of the Facility Agreement deals with consequences of the aforesaid events of default and empowers the lenders to take a number of measures to secure performance of the Facility Agreement which *inter alia* include (i) enforcement of security interest under the security documents [Article 16.2.1(b)], (ii) enforcement of security including transfer of project to a new operator [Article 16.2.1(g)], and (iii) exercise of any other rights of the lenders under the applicable law [Article 16.2.1(h)].

(j) BESCOM by making such technical objections cannot seek to negate the rights of the lenders who have advanced public money for the development of the transmission project and whose rights must be protected at all times.

(k) The lenders are proposing a more efficacious route through transfer of shares, which will let WKTL retain its transmission licence (including all permits, consents and approvals) while securing the financial needs of WKTL without wasting of time for setting up the transmission business afresh by the nominee and thereby delaying the transmission project.

(l) BESCOM's contention that the Petitioners cannot be allowed to transfer the shareholding of WKTL to ATL only because it is the easier option is incorrect. Commercially transferring the shareholding of WKTL to nominee is not very different from transferring the utility of WKTL.

(m) The artificial difference created by BESCOM regarding the right of lenders to transfer the transmission licence and entire utility of WKTL in favour of nominee as opposed to transferring the shareholding of WKTL does not give business efficacy to terms of TSA. If lenders are empowered under the TSA to replace licensee (WKTL) altogether by a new entity (nominee), then it cannot be said that the lenders do not have the right to transfer the shareholding of such licensee in the hands of a more financially viable nominee. The objective of creating a security interest in favour of the lenders under Article 15.2 (Permitted Charges) of the TSA is to ensure that the dues of lenders are recovered and that the project is implemented by an entity who has the required experience and financial capability to construct and operate the project.

(n) Courts and Tribunals have the power to give meaning and efficacy to a contract considering the intention of the prudent businessmen at the time of the formation of the contract (Principle of Business Efficacy). Reliance in this regard has been placed on the judgment in the case of Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr. [(2018) 11 SCC 508].

(o) TANGEDCO in its reply dated 20.5.2020 has clearly admitted that substitution rights of the lenders are an exception to Article 18.2 of the TSA. It is trite law that in subsequent pleadings wherein the party changes its stand is liable to be ignored. In this regard, reliance is placed on the judgments of the Hon'ble Supreme Court in the cases of *Mumbai International Airport Pvt. Ltd. v. Golden Chariot Airport & Anr* [(2010) 10 SCC 422 (para 50)], *Modi Spinning & Weaving Mills Co. Ltd. & Anr. v. Ladha Ram & Co.* [(1976) 4 SCC 320 (para 6-12)] and *Joint Action Committee of Air Line Pilots' Association of India (ALPAI) & Ors. v. Director General of Civil Aviation & Ors.* [(2011) 5 SCC 435].

(p) Article 15.2.2 of the TSA specifically permits creation of charge over the transmission project in favour of the lenders to secure the amounts payable to the lenders under financing documents. The Commission in its order dated 24.5.2017 in Petition No.78/MP/2017 has granted approval for creation of such charge in favour of the lenders and directed the lenders to approach the Commission, in case WKTL defaults in re-paying the loan before exercising their substitution rights.

(q) The lenders are entitled to choose the form they prefer to adopt for exercise of the substitution right subject to approval of the Commission. Lenders have chosen to exercise their substitution rights by way of transfer of shares of WKTL to the lender's nominee instead of assignment of transmission licence as sought by BESCO.

(r) It is a baseless allegation that the Petitioners are circumventing any provisions of the TSA. The rights of the lenders under the financing documents cannot be curtailed based on the Respondents' unsubstantiated claim that lenders rights and the security created under Article 15.2.2 of the TSA would be subject to Article 18.2.1 of the TSA.

(s) A conjoint reading of the aforesaid definition with Article 15.2.2 of the TSA clearly provides that WKTL is permitted to create a security in favour of the lenders for financing the transmission project and for this purpose, lenders will be bound by the terms of TSA to the extent that any enforcement of security by

the lenders shall not increase the liability of the LTTCs. The proposed transfer of shares of WKTL in favour of ATL will not have any financial impact on LTTCs.

(t) In terms of the Facility Agreement, 51% shares of WKTL held by Essel Infra were pledged in favour of the lenders. Article 12.7 of the Facility Agreement allows the lenders to seek additional security including up to 100% shares of WKTL. In pursuance of the same, 99.9% shares of WKTL are at present pledged in favour of the lenders. Therefore, there is no bar on the lenders to enforce the security created over WKTL's shares.

(u) It cannot be the intent of the Act or Article 18.2 of the TSA or the order dated 24.5.2017 that, if a licensee is unable to pay its debts, the lenders should continue to infuse more funds until 2 years after the COD. Only when the licensee becomes bankrupt and the dues of the lenders cannot be paid back, could the transfer of the control of the licensee be allowed in favour of a nominee. This is completely contrary to any commercial practice.

(v) The Commission as the sector regulator under Section 79(1)(c) of the Act has plenary powers over 'regulation of transmission of electricity'. It is empowered to consider the present case and allow the transfer of shareholding of WKTL held by Essel Infra in favour of lenders nominee (ATL) to enable the revival of the transmission project which is beneficial to both the lenders, the beneficiaries under the TSA and the public. Hon'ble Supreme Court in a catena of judgments has held that the Commission has plenary powers to meet the ends of justice which cannot be curtailed on the basis of technical objections raised by the Respondent LTTCs. In this regard, reliance has been placed on the judgments of Hon'ble Supreme Court in *PTC India Ltd. vs. CERC* [(2010) 4 SCC 603], *Transmission Corporation of AP Ltd. vs. Rain Calcining Ltd.* [2019 SCC On Line SC 1537], *U.P. Power Corpn. Ltd. v. NTPC Ltd.*, [(2009) 6 SCC 235], *A.P. TRANSCO v. Sai Renewable Power (P) Ltd, Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd.*, [(2016) 8 SCC 743] and *Energy Watchdog & Ors. vs. CERC & Ors.* [(2017) 14 SCC 80].

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

(x) The Respondent LTTCs' objection is based on procedural technicalities. It is a settled position of law that procedure is the handmaid of justice. Procedural technicalities should never come in the way of substantive justice. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in *B.K. Narayana Pillai v. Parameswaran Pillai* [(2000) 1 SCC 712].

(y) The Commission may direct that no separate approval of the LTTCs would be required by the Petitioners for transferring the shares and management control of WKTL, once the same is allowed by the Commission.

Analysis and Decision

14. We have considered the submissions made by the Petitioners and the Respondents. The Respondents have raised the following preliminary objections in response to the Petition:

(a) The present Petition should be tagged with the Petition No.334/MP/2020 filed by WKTL seeking relief under force majeure conditions and extension of SCOD in respect of the transmission project.

(b) The Petitioners are seeking an order in violation of the Act and there is a need for revocation of licence under Section 19 of the Act and thereafter, sale of utility under Section 20 of the Act.

(c) Neither sub-sections (3) and (4) of Section 17 of the Act nor Article 15.3 of the TSA are applicable in the present case as the project has not achieved COD.

(d) The Petitioners are seeking an order in the Petition in violation of provisions of the Companies Act, 2013.

15. The Petitioners have submitted that the present Petition and Petition No. 334/MP/2020 are based on separate causes of action and hence, both the Petitions cannot be combined. The Petitioners have also refuted the other preliminary objections of TANGEDCO.

16. We have considered the submissions made by TANGEDCO and the Petitioners. As regards the first objection that the present Petition should be tagged with Petition No.334/MP/2020, the Commission is of the view that both Petitions are based on separate and distinct causes of action and no useful purpose will be served by tagging both Petitions. In the present Petition, the Petitioners are seeking prior approval for exercising their right of substitution under the TSA. Though there is passing reference regarding delay in execution of the transmission project in the Petition, no relief has been prayed in the Petition in this regard. Therefore, the present Petition has been filed with a limited scope of lenders' exercising their rights under the TSA to substitute Essel Infra with ATL. The Petitioners have categorically submitted that the proposed transfer of shares of WKTL in favour of ATL will not have any financial impact on the LTTCs. It is observed that even after substitution of Essel Infra with ATL, WKTL shall continue to be the licensee and the TSA signed by WKTL and LTTCs shall remain intact. Therefore, any claims of force majeure or change in law made by WKTL shall be decided as per the provisions of the TSA. In

our view, the issue of delay in implementation of the project which is a subject matter of Petition No. 344/MP/2020 does not have any material bearing on the issue of transfer of shareholding from Essel Infra to ATL which is the subject matter of the present Petition and, therefore, the two Petitions have to be dealt with separately. Accordingly, we reject the objection of TANGEDCO on this ground.

17. As regards submissions of TANGEDCO that the present Petition has been filed in violation of the Act, the Commission in its order dated 15.6.2020 has considered and decided the said objection as under:

“27. We have considered the submissions of the parties. 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. Under Section 19 of the Act, the Commission after making an enquiry and after being satisfied that public interest so requires, revoke the licence of a licensee (a) if the licensee makes wilful and prolonged default in doing anything required of him by or under the provisions of the Act or the rules or regulations made thereunder; or (b) breaks the terms and conditions of licence breach of which is expressly declared to render the licence liable for revocation or (c) the financial condition of the licensee is such that he is unable to fully and efficiently discharge the duties and obligations imposed on it under the licence. Section 17 of the Act is not subject to Section 19 of the Act. Therefore, the maintainability of the Petition filed under Section 17(3) and (4) of the Act cannot be tested on the consideration that instead of giving approval under Section 17(3) and (4) of the Act, it is more appropriate to initiate action for revocation of licence under Section 19 of the Act. If TANGEDCO seeks revocation of licence of WKTL for the reasons mentioned in its reply, it has to move an appropriate application under Section 19 of the Act. In the absence of an appropriate application for revocation of licence, no action under Section 19 of the Act based on the submission of TANGEDCO in the present Petition can be initiated. In any case, the present Petition has been filed for transfer of the Project to a financially viable nominee for completion of the Project so that terms and conditions of the licence are complied with. In the light of the above discussion, we reject the submission of TANGEDCO that the present Petition filed under Section 17 of the Act is in violation of Chapter 4 of the Act.”

18. As regards the submissions of TANGEDCO that sub-sections (3) and (4) of Section 17 of the Act and Article 15.3 of the TSA are not applicable in the present

case as the project has not achieved COD, the Commission has considered and decided the said objection in order dated 15.6.2020 as under:

“31. We have considered the submissions of the Petitioners and TANGEDCO. On perusal of Section 17(3) and 17(4) of the Act, it is observed that these provisions are applicable to the licensees. As per Article 15.3.2 of the TSA, if the TSP defaults in debt repayment, the lender may make an application to the Commission for assignment of the licence to the nominee of the lender. If the default in debt payment occurs prior to COD, there is no embargo on the lender to approach the Commission under Article 15.3.2 of the TSA. In the absence of any provision that the lender cannot approach the Commission for assignment of licence before COD, the objection of TANGEDCO to the maintainability of the Petition on this ground cannot be sustained.”

19. As regards the objection of TANGEDCO that the Petitioners are seeking an order in the Petition in violation of provisions of the Companies Act, 2013, the Commission has considered and decided the said objection in order dated 15.6.2020 as under:

“33. The Commission is of the view that it has no jurisdiction to look into the allegations that the Petitioners have not complied with the provisions of the Companies Act, 2013. Further, Article 15.3.2 does not require that the lenders should have taken action under Article 230 and 231 of the Companies Act, 2013 before approaching the Commission for approval of substitution of licensee with the nominee of the lenders. In our view, the objection of TANGEDCO on this count is not relevant and is, therefore, rejected.”

20. Therefore, the preliminary objections raised by TANGEDCO have already been considered and rejected by the Commission in its order dated 15.6.2020. The Petitioner is barred by *res judicata* to raise the same objections which already stand decided in order dated 15.6.2020.

21. On merit, the Respondents have broadly made the following objections to the prayers of the Petitioner in the Petition:

(a) There is a clear prohibition under Article 18.2 of the TSA for transfer of the shares during the lock-in period and the lenders cannot transfer the

shareholding under Article 15.3 of the TSA in disregard of the provisions of Article 18.2 of the TSA.

(b) Section 17(3) and (4) of the Act provides for transfer or assignment of the licence and not transfer of shareholding and hence the payer cannot be granted.

(c) ATL does not fulfill the qualifications and requirements of Transmission Licence Regulations.

(a) Objection with regard to lock-in period under Article 18.2 of the TSA

22. The Respondents have submitted that as per Article 18.2.1 of the TSA, there is mandatory equity-lock-in commitment for Essel Infra to maintain equity shareholding of 51% in WKTL for at least 2 years post COD of the project and the lenders cannot circumvent it by relying on Article 15.3.2 of the TSA. BESCO has relied on the judgment of the Hon'ble Supreme Court in the case of *Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr.* [(2018) 11 SCC 508] and has submitted that the present case does not fit on the pedestal of 'principles of business efficacy' as set by the Hon'ble Supreme Court particularly, when the plea of the Petitioners is contrary to the clear and express terms of the Article 18.2.1 of the TSA. BESCO has also relied on the judgment of the Hon'ble Supreme Court in the case of *M. Arul Jothi v. Lajja Bal*, [2000] 3 SCC 723] to contend that when there is a specific prohibition in a contract, the same cannot be rendered redundant.

23. *Per Contra*, the Petitioners have submitted that the rights of the lenders have been secured under the relevant financing and security documents, for which the Commission in its order dated 24.7.2017 in Petition No. 78/MP/2017 has already given prior approval. The Petitioners have submitted that Article 16 of the Facility

Agreement provides Events of Default under the said agreement, which includes failure of WKTL in the debt repayments to lenders as per the repayment schedule provided under the Facility Agreement. Further, Article 16.2 of the Facility Agreement deals with consequences of the aforesaid Events of Default and empowers the lenders to take a number of measures to secure performance of the Facility Agreement including 'Enforcement of Security including transfer of project to a new operator'. The Petitioners have contended that the rights of the lenders under the financing documents cannot be curtailed based on the Respondents' unsubstantiated claim that lenders rights and the security created under Article 15.2.2 of the TSA will be subject to Article 18.2.1 of the TSA.

24. We have considered the submissions of the parties. Article 15 of the TSA provides 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 License granted by the Appropriate Commission and the provisions of this Agreement and cannot assign the Transmission License 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 License to the nominee of the Lenders subject to the fulfilment of the qualification requirements and provisions of the Central Electricity Regulatory Commission (Procedure, terms and Conditions for grant of Transmission License and other related matters) Regulations, 2006 or as amended from time to time.

25. TSP and Successful Bidder or Selected Bidder have been defined in the TSA as under:

"Transmission Service Provider" or "TSP" shall mean the 'Waroora Karnool Transmission Limited' which has executed the Transmission Service Agreement and has been/shall be acquired by the Successful Bidder."

“Successful Bidder” or “Selected Bidder” shall mean the Bidder selected pursuant to the RFP to acquire one hundred percent (100%) equity shares of Waroora-Karnool Transmission Limited along with all its related assets and liabilities, which will be responsible as the TSP to establish the Project on build, own, operate and maintain basis as per the terms of the TSA and other RFP Documents.”

26. As per the above definitions of TSP and Successful Bidder (or Selected Bidder), WKTL is the TSP which is responsible for execution of the transmission project and Essel Infra is the Successful Bidder selected as per the RFP to acquire WKTL along with its related assets and liabilities. The Commission has granted licence to WKTL as the TSP to execute the transmission project. Under Article 15.3.1 of the TSA, WKTL as the TSP is required to operate and maintain the project under the provisions of the Transmission Licence and the TSA 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 Commission. This provision is *pari materia* with provisions of Section 17(3) of the Act which provides that *“no licensee shall at 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”*. Article 15.3.2 of the TSA carves out an exception to Article 15.3.1 and provides that in case of default on the part of TSP in debt repayments, on an application from the lenders, the Commission may assign the transmission licence to the nominee of the lenders if the said nominee fulfills the qualification requirements and provisions of the Transmission Licence Regulations. The present application has been filed by the lenders for transfer of 100% shareholding of Essel Infra to ATL which is the nominee of the lenders as Essel Infra defaulted in debt payment and delayed the execution of the transmission project.

27. The Respondents have submitted that in view of the equity lock-in requirement under Article 18 of the TSA, the lenders cannot transfer the TSP to their nominee. Article 18 of the TSA dealing with equity lock-in commitment on the part of the Selected Bidder is extracted as under:

“18.2 Equity Lock-in Commitment:

18.2.1 The aggregate equity share holding of the Selected Bidder in the issued and paid up equity share capital of Warora- Kurnool Transmission Limited shall not be less than the following:

(a) Fifty one percent (51%) up to a period of two (2) years after COD of the Project; and

(b) Twenty six percent (26%) for a period of three (3) years thereafter:

Provided that in case the Lead Member or Bidding Company is holding equity through Affiliate/s, Ultimate Parent Company or Parent Company, such restriction as specified in (a) and (b) above shall apply to such entities.

Provided further, that in case the Selected Bidder is a Bidding Consortium, the Lead Member shall continue to hold equity of at least twenty six percent (26%) upto a period of five (5) years after COD of the Project and any Member of such Bidding Consortium shall be allowed to divest its equity as long as the other remaining Members (which shall always include the Lead Member) hold the minimum equity specified in (a) and (b) above.”

28. Article 18.2 of the TSA provides for equity lock-in commitment of the Successful Bidder i.e. Essel Infra. In terms of Article 18.2.1 of the TSA, the aggregate equity shareholding of Essel Infra in issued and paid-up equity share capital of WKTL shall not be less than (i) 51% up to a period of two (2) years after COD of the project and (ii) 26% for a period of three years thereafter. The above restrictions are also applicable to the affiliates, ultimate parent company or parent company of the bidding company if Essel Infra is holding equity in the WKTL through such entities. Article 18.2.1 requires Essel Infra to maintain the equity lock-in requirements at certain percentage upto certain period after the COD of the transmission project. Thus, what is prohibited under Article 18.2.1 of the TSA is the

voluntary action on the part of the Essel Infra to divest its shares in WKTL during the equity lock-in period. But this provision cannot prevent the lenders to transfer the shares of Essel Infra in WKTL to its nominee in the event of default of Essel Infra in debt repayment under the provisions of Article 15.3.2 of the TSA. Precisely for this reason, the provisions of Article 15.3.2 of the TSA have not been made subject to the provisions of Article 18.2.1 of the TSA. If the equity lock-in period is applied even in case of exercise of right of substitution by the lenders, then the provisions of Article 15.3.2 of the TSA would be rendered otiose and non-implementable and the lenders would be rendered remediless with uncertainty about the implementation of the transmission project. In our view, while the provisions of Article 18.2.1 of the TSA would be applicable in case of voluntary transfer of shares by Essel Infra in WKTL, the said Article cannot forbid or curtail the power of the lenders to transfer the TSP to their nominee in the interest of successful execution and operation of the transmission project and protection of the investment of the lenders. In other words, the provisions of the TSA (Article 18.2.1 and Article 15.3.2) operate independent of each other.

29. The implication of equity lock-in period for transfer of shares of a generating company at the instance of the lenders was considered by the Appellate Tribunal for Electricity (in short, 'the Appellate Tribunal') in its judgment dated 27.9.2019 in Appeal No 183 of 2019 (*Renasant Power Ventures Private Limited vs UPERC*). In the said case, the RFP contained an equity lock-in period like Article 18.2.1 of the TSA in the present case. But there was no provision in the PPA or RFP akin to Article 15.3.2 of the TSA for exercise of the lender power of substitution. The lenders approached the State Electricity Regulatory Commission (SERC) for waiver of the

equity lock-in requirement in RFP for sale of the shares of the generating company in order to recover its dues and salvage the project which was refused by the SERC. The Appellate Tribunal held that the SERC was not correct in not allowing the request of the lenders since the equity lock-in requirement in RFP was applicable in case of voluntary transfer of shares only and not in case of financial commitment of the generating company with the lenders. The relevant extract of the above judgment is as under:

“106. The reason for filing Petition No.1403 of 2019 by the 2nd Respondent-SBI seems to be on account of one clause in RFP document i.e., clause 2.7.4.1. Clause 2.7.4.1 of RFP document reads as under:

“2.7.4.1. The aggregate equity shares holding of the selected bidder in the issued and paid up equity share capital of the seller shall not be less than the following:

(a) Fifty One percent (51%) up to (2) two years after COD of the Power Station; and

b) Twenty – Six (26%) for a period of three (3) years thereafter.”

107. The above clause clearly indicate that from the date of COD (happens to be 26.05.2017) if the shares of PPGCL were to be transferred, after 25.05.2019 74% of equity shares could be transferred. It also refers to maintaining minimum 26% of equity for three years which would end in the present case on 25.05.2022. This would mean without any restriction/condition the 100% equity share can be transferred by 25.05.2022 by PPGCL. In that situation, necessity of seeking approval/waiver for transfer of shareholding would not arise at all. Similarly, question of examining capital structure vis-a-vis the price offered by the purchaser of shares does not arise for consideration of appropriate Commission.

108. The Respondent-Commission has wrongly held in the impugned order that maximum of 49% of equity holding can be transferred after 26.05.2019 and 74% of equity can be transferred after 25.05.2022. It seems to be quite contrary to the terms of clause 2.7.4.1. One more aspect has to be seen at this stage. The said clause refers to transfer of equity share capital of PPGCL that means the said clause refers to voluntary transfer of equity share capital by PPGCL. The transfer/sale in question was not at the instance of the PPGCL (voluntarily), but it emerged out of financial commitment made by PPGCL with the lenders of project led by State Bank of India.”

30. In the light of the above judgment, we are of the view that the equity lock-in requirement in Article 18.2.1 of the TSA is applicable in case of voluntary transfer of

shares by the successful bidder and not in case where the lenders seek to transfer the shares in exercise of their right of substitution under Article 15.3.2 of the TSA.

31. BESCO has contended that 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 the TSA. We have gone through Article 13 of the TSA and noted that the said Article clearly envisages situation wherein the lenders can exercise their substitution rights irrespective of the equity lock-in period stipulated in Article 18 (i.e. even during the construction period) of the TSA. The relevant portion of Article 13 of the TSA is extracted as under:

“ARTICLE: 13

13 EVENTS OF DEFAULT AND TERMINATION

13.1 TSP Event of Default

The occurrence and continuation of any of the following events shall constitute a TSP Event of Default, unless any such TSP Event of Default occurs as a result of a breach by the Long Term Transmission Customers of their obligations under this Agreement, the Long Term Transmission Customers Event of Default or a Force Majeure Event:

- a. After having taken up the construction of the Project, the abandonment by the TSP or the TSP's Contractors of the construction of the Project for a continuous period of two (2) months and such default is not rectified within thirty (30) days from the receipt of notice from the Lead Long Term Transmission Customer in this regard*
- b. The failure to commission any Element of the Project by the date falling six (6) months after its Scheduled COD*
- c. XXX*
- g. Failure on the part of TSP to comply with the provisions of Article 18.2 of this Agreement; or*
- h. XXXX*

13.3 Termination Procedure for TSP Event of Default

- a. Upon the occurrence and continuance of any TSP's Event of Default under Article 13.1 the Majority Long Term Transmission Customers, through the Lead Long Term Transmission Customer, may serve notice on the TSP, with a copy to*

the Appropriate Commission and the Lenders' Representative, of their intention to terminate the Agreement (a "Long Term Transmission Customer's Preliminary Termination Notice"), which shall specify in reasonable detail, the circumstances giving rise to such Long Term Transmission Customer's Preliminary Termination Notice.

b. Following the issue of a Long Term Transmission Customer's Preliminary Termination Notice, the Consultation Period shall apply and would be for the Parties to discuss as to what steps shall be taken with a view to mitigate the consequences of the relevant Event of Default having regard to all the circumstances.

c. During the Consultation Period, the Parties shall, save as otherwise provided in this Agreement, continue to perform their respective obligations under this Agreement, and the TSP shall not remove any material, equipment or any part of the Project, without prior consent of the Lead Long Term Transmission Customer.

*d. Following the expiry of the Consultation Period, unless the Parties shall have otherwise agreed to the contrary or the circumstances giving rise to Long Term Transmission Customers Preliminary Termination Notice shall have ceased to exist or shall have been remedied, the Long Term Transmission Customers may terminate this Agreement by giving written notice of thirty (30) days ("Long Term Transmission Customers' Termination Notice") to the TSP, with a copy to the Lenders' Representative and the Appropriate Commission. **Unless the Lenders have exercised their rights of substitution as per the provisions of Article 15.3 of this Agreement and the Appropriate Commission has agreed to such substitution rights of the Lenders or otherwise directed by the Appropriate Commission, this Agreement shall terminate on the date of expiry of such Long Term Transmission Customers' Termination Notice.** Upon termination of the Agreement, the Lead Long Term Transmission Customer shall approach the Appropriate Commission seeking revocation of the Transmission License and further action as per the provisions of the Electricity Act, 2003."*

32. Perusal of the above provisions of TSA reveals that the abandonment of work or delay in achieving commercial operation within six months of SCOD constitute TSP events of default under Article 13.1(a) and (b) of the TSA. Similarly, failure on part of TSP to comply with the provisions of Article 18.2 of the TSA constitutes TSP event of default under Article 13.1(g) of the TSA. In such TSP events of default, LTTCs have the right to terminate the TSA after following the due procedure and such termination will come into effect on the date of expiry of the termination notice

unless the lenders have exercised their substitution rights under Article 15.3 of the TSA and the Commission has agreed to such substitution rights. Thus, the scheme of the TSA is such that even in case of termination of TSA on account of TSP event of default, the lenders have been empowered to save the TSA from such termination by exercising their substitution rights and that such right has to be exercised with the approval of the Commission.

(b) Objection with regard to non-compliance of Section 17(3) of the Act and Regulation 12 of the Transmission Licence Regulations

33. The Respondents have submitted that Article 15.3.2 of the TSA, Regulation 12 of the Transmission Licence Regulations and Section 17(3) of Act deal with either 'assignment of the licence' or 'transfer of the utility'. It has been submitted that the aforesaid provisions do not envision the transfer of shareholding of the transmission licensee to another entity. BESCO has contended that Section 17(3) of the Act deals with different modes of assignment/ transfer of the licence or its utility by a licensee and not transfer of the shareholding of the licensee itself. It has been argued that even the expression 'or otherwise' refers to other modes of transfer apart from sale, lease, exchange of the licence or the utility, and not a transfer to the shareholding of the licensee itself.

34. *Per contra*, the Petitioners have submitted that the contention of the Respondents that Section 17(3) and (4) of the Act, Regulation 12 of the Transmission Licence Regulations and Article 15.3 of the TSA relates only to 'assignment of licence' and 'transfer of utility' is premised on a wrongful interpretation of Section 17 of the Act, Transmission Licence Regulations and provisions of the TSA. According to the Petitioners, lenders are entitled to choose the mode of transfer

they prefer to adopt for exercise of the substitution right subject to approval of the Commission. It has been argued that if lenders are empowered under the TSA to replace the transmission licensee (WKTL in the instant petition) altogether by a new entity, then it cannot be said that the lenders do not have the right to transfer the shareholding of such licensee in the hands of a more financially viable nominee. The Petitioners have relied on the judgments of Hon'ble Supreme Court on principle of business efficacy to contend that courts and statutory tribunals have the power to give meaning and efficacy to a contract considering the intention of the prudent businessmen at the time of the formation of the contract.

35. We have examined the submissions of the parties. Respondents have referred to provisions of Article 15.3.2 of the TSA in arguing that only 'assignment of licence' or 'transfer of utility' is allowed under the TSA. In our view, strict reading of the term 'assignment of licence' under Article 15.3.2 of the TSA as proposed by the Respondents may put restriction on lenders to exercise their right of substitution only by way of assignment of transmission licence and not by way of transfer of shares to its nominee, which cannot be the intent of the said Article.

36. The term 'assignment of the licence' used in Article 15.3.2 of the TSA for substitution of TSP cannot be read in a narrow and pedantic manner. The Hon'ble Supreme Court in its judgment in the case of Union of India vs. M/s. D.N. Revri & Co. and [(1961) 3 SCR 1020 Ors.12] has held that the contract has to be read to give efficacy to the contract rather than to invalidate it. The relevant portion of the said judgment is extracted as under:

"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract"

rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.....”

37. Accordingly, the meaning of Article 15.3.2 of the TSA must not be thwarted by narrow, pedantic and legalistic interpretation. We cannot ignore the objective with which parties entered into the relevant provisions of the TSA, which was, to allow change of ownership as provided under Article 15.3.2 of the TSA. Even on the pedestal of ‘Officious Bystander Test’, it goes without saying that the Article 15.3.2 of the TSA is intended to transfer the ownership of the licensee to lender’s nominee. Further, as decided in issue No. 1 above, the exercise of substitution rights by lenders is not against any specific stipulation in the contract including equity lock-in commitment specified in Article 18 of the TSA. Therefore, Article 15.3.2 of the TSA ought not to be read in a restrictive manner to impede its implementation. Consequently, it must be the prerogative of the lenders to change the ownership of the licensee either through assignment of licence or by transfer of shareholding. In light of the above, we do not find merit in the submission of the Respondents to restrict change in ownership only through ‘assignment of licence’.

38. Moreover, Article 15.3.2 of the PPA cannot be read in isolation. We note that under Article 15.2.2 of the TSA, TSP has been allowed to create any encumbrances over all or part of the receivables, letter of credit or other assets of the Project in favour of the lenders as security amounts payable under the ‘Financing Agreements’. The relevant extract of Article 15.2.2 of the TSA is as under:

“However, the TSP may create any 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

Lenders' Representative on their behalf, as security for amounts payable "under the Financing Agreements and any other amounts agreed by the Parties."

39. Therefore, in our view, the provision of Article 15.3 of the TSA does not come in the way of the lenders in seeking substitution of Essel Infra with ATL. We also note that security interest has been created for the benefit of the lenders by way of pledging of shares and as per Article 16.2 of the Facility Agreement (entered into between WKTL and its lenders), in the event of default in debt repayments, lenders are, *inter-alia*, entitled to enforce their rights under security documents. Contention of the Respondents is, therefore, rejected.

40. Now, we examine the contention of the Respondents as regards Regulation 12 of the Transmission Licence Regulations. The Commission in its order dated 24.5.2017 in Petition No.78/MP/2017 accorded in-principle approval allowing WKTL to create security interest over all movable and immovable assets of the project in favour of IDBI Trusteeship Services Limited, acting for the benefit and on behalf of the lender. The Commission in the said order dated 24.5.2017 further directed that, in case of default by the licensee in debt repayment, 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. The relevant portion of the said order dated 24.5.2017 is extracted as under:

"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.

41. Vide above order, in terms of Regulation 12 of the Transmission Licence Regulations, the Commission has allowed transfer of ownership of the licensee either through assignment of licence or through transfer of assets subject to prior approval of the Commission. In the present Petition, the Petitioners have sought approval for transfer of shares held by Essel Infra in WKTL to ATL, which in effect is transfer of assets of Essel Infra to ATL by way of transfer of shareholding. Therefore, we do not find that Regulation 12 of the Transmission Licence Regulations read with order of the Commission dated 24.5.2017 in Petition No. 78/MP/2017 comes in the way of the prayer of the Petitioners.

42. BESCO has contended that Section 17(3) of the Act deals with different modes of assignment/ transfer of the licence or its utility by a licensee. Section 17(3) of the Act allows transfer of utility by sale, lease, exchange or otherwise with the approval of the Commission as under:

“(3) No licensee shall at 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.”

43. BESCO has argued that ‘or otherwise’ in the Section 17(3) of the Act does not include transfer of shareholding. It has not explained why such an interpretation needs to be given to the phrase ‘or otherwise’. In our view, the terms ‘transfer of utility’ and ‘otherwise’ have broad connotations which may include the transfer of the management of the licensee through 100% transfer of its shareholding as in the

instant case of transfer of the shareholding by the lenders to their nominee by exercising their right of substitution. The Act has clearly envisaged role of the Commission in giving meaning to the phrase 'or otherwise' and that is the reason why any assignment or transfer of utility in any manner cannot be done without prior approval of the Commission.

44. It is pertinent to mention that the Commission, while granting in-principle approval for creation of security interest over all movable and immovable assets of the project in favour of IDBI Trusteeship Services Limited acting for the benefit and on behalf of the lender, had specifically directed 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 lenders have now approached for transfer of 100% share in WKTL to their nominee ATL which has been selected through a transparent process of bidding. WKTL is the transmission licensee and transfer of 100% of its shareholding to ATL means transfer of the management and control of WKTL from Essel Infra to ATL which has the same effect as assignment of licence to nominee of the lenders.

45. Further, the Commission has already considered the change in ownership by way of transfer of the equity shareholding under Section 17(3) of the Act in its order dated 7.8.2017 in Petition No.31/MP/2017 (Reliance Infrastructure Limited v. PGCIL and Ors.). The Commission in the said order permitted transfer of entire shareholding of Reliance Infrastructure Limited in transmission licensees, Western Transco Power Limited and Western Transmission (Gujarat) Limited to Adani Transmission Limited under Section 17(3) of the Act.

46. In view of the above, we are of the view that transfer of 100% shareholding of Essel Infra in WKTL by the lenders to their nominee ATL is permissible under Section 17(3) of the Act read with Article 15.3.2 of the TSA and Regulation 12 of the Transmission Licence Regulations.

(c) Objection with regard to the necessary qualification and expertise of ATL to carry out the business of transmission

47. The estimated project cost as per the Financial Closure Agreement (i.e. Facility Agreement) is Rs. 4000 crore. According to the Petitioners, the lead lender, Yes Bank vide its sanction letter dated 30.12.2016 agreed to provide financial assistance amounting to Rs. 2790 crore (69.75% of project cost) as rupee term loan with capital expenditure letter of credit sub-limit to the extent of Rs. 1400 crore and Rs. 110 crore as Performance Bank Guarantee. Thereafter, certain commitments of Yes Bank under the aforesaid loan facility were transferred/ novated in favour of EXIM Bank and IREDA to the extent of Rs. 200 crore each by executing necessary novation/ assignment deeds. Accordingly, the present loan commitment of each of the lenders, i.e. Yes Bank, EXIM Bank and IREDA are as under:-

S.No	Lenders	Rupee Facility (Rs. in crore)	LC Facility (Rs. in crore)
1	Yes Bank	2390	1249
2	EXIM Bank	200	151
3	IREDA	200	-
Total facility sanctioned in favour of WKTL		2790	1400

**Performance Bank Guarantee Facility of Rs. 110 crore has also been sanctioned by Yes Bank*

48. The Petitioners have submitted that WKTL defaulted in repayment of its debt to the lenders. On evaluating the financial condition of WKTL, the lenders realized that it was not feasible for WKTL to raise resources on its own and complete the

Transmission System which was stalled since February 2019 due to force majeure events. The Petitioners have submitted that Yes Bank, EXIM Bank and IREDA have disbursed Rs. 1067 crore, Rs. 44 crore and Rs. 83 crore respectively to WKTL and the outstanding interest payment due to Yes Bank, Exim Bank and IREDA is Rs. 75 crore (as on 1.5.2020), Rs 5.09 crore (as on 31.1.2020) and Rs. 6.37 crore (as on 31.1.2020) respectively. It is further noticed from the minutes of the Consortium Meeting of WKTL held on 8.7.2019 that on account of severe liquidity issues faced by it in ongoing verticals, Essel Group had suggested for change of management as Resolution Plan for account which was agreed by the lenders. In this context, we had observed in the order dated 15.6.2020 wherein we had decided on maintainability of the Petition that it is the lenders' prerogative to take a call whether the TSP is in default of repayment of loan after considering all relevant factors and whether to invoke the provisions of Article 15.3.2 of the TSA. The lenders after assessing the liquidity position of Essel Infra and the default of repayment of interest have decided in consultation with Essel Infra for change of management of WKTL and have invoked their right of substitution in terms of Article 15.3.2 of the TSA. It is reiterated that it is neither envisaged in any regulation nor it is considered necessary for the Commission to go into the question whether the lenders have properly exercised their right of substitution or not.

49. TANGEDCO has submitted that Essel Infra vide its letter dated 17.11.2017 sought approval of LTTCs under Article 18.1.1 and 18.2.1 of the TSA for divestment of stake stating the reason as *"divestment of stake in the TSP primarily for the purposes of raising capital for further investment by our promoter in other infrastructure projects in India"*. In view of this, TANGEDCO has contended that

Essel Infra had no financial difficulty and that the present Petition has been filed only for commercial gains. TANGEDCO has also submitted that it is a case where Essel Infra and WKTL are not interested to execute the project and, therefore, is a fit case for termination of TSA. However, we observe that there is no denying the fact that Essel Infra has defaulted in debt repayment and on account of the delay in execution of the project and that the lenders have a reasonable apprehension about non-recovery of the debts unless the project is salvaged. We have gone through the letter of WKTL dated 17.11.2017. Article 18.2.1 of the TSA mandates that the issued and paid up equity share capital of the selected bidder in WKTL shall not be less than 51% upto a period of two years after COD of the project. Accordingly, Essel Infra proposed to transfer 49% of the equity shares to potential investors in compliance with the shareholding restrictions of 51% stipulated in Article 18.2.1 of the TSA. Considering that the proposal of Essel Infra was in terms of the TSA, we do not find any infirmity in its proposal for divestment of its stake. Further, the Commission had considered the apprehensions raised by TANGEDCO on the exercise of substitution rights by the lenders in view of precarious financial condition of Essel Infra in its order dated 20.6.2020 and decided as under.

20. We have considered the submission of TANGEDCO and the Petitioners. The objection of TANGEDCO is that there is only default in payment of IDC and no default in repayment of loan and hence Petition by the lenders seeking approval in exercise of right of substitution under Article 15.3.2 is premature and not maintainable. It is observed that the Petitioners have placed on record in the Petition and in the amended Petition the default letters issued by the lenders to WKTL. The Petitioners have submitted in their rejoinder that Yes Bank, EXIM and IREDA have disbursed Rs. 1067 crore, Rs. 44 crore and Rs. 83 crore respectively to WKTL and the outstanding interest payment due to Yes Bank, Exim Bank and IREDA is Rs. 75 crore (as on 1.5.2020), Rs 5.09 crore (as on 31.1.2020) and Rs 6.37 crore (as on 31.1.2020) respectively. It is further noticed from the Minutes of the Consortium Meeting of WKTL held on 8.7.2019 (which has been placed on record by the Petitioners vide their submission dated 26.5.2020) that on account of severe liquidity issues faced by it in

*ongoing verticals, Essel Group had suggested for change of management as Resolution Plan for account which was agreed by the lenders. **In our view, it is the lenders' prerogative to take a call whether the TSP is in default of repayment of loan after considering all relevant factors and to invoke the provisions of Article 15.3.2 of the TSA. The lenders after assessing the liquidity position of Essel Infra and the default of repayment of interest have decided in consultation with Essel Infra for change of management of WKTL and have invoked their right of substitution in terms of Article 15.3.2 of the TSA. It is neither envisaged nor considered necessary for the Commission to go into the question whether the lenders have properly exercised their right of substitution or not. Therefore, the objection with regard to the maintainability of the Petition on this count is rejected.***

50. We do not find it necessary to go into the financial condition of Essel Infra at this moment and neither such matter is before us.

51. The Petitioners have submitted that after detailed deliberations during the meeting held on 8.7.2019, the lenders decided for 'change in management' of WKTL from Essel Infra to the nominee of lenders and to conduct a time bound bidding process to select the nominee. It is noted that the consortium of lenders appointed a third party consultant, namely, BDO India LLP (BDO) as Bid Process Coordinator to ensure a transparent and independent bidding process. The Petitioners have also summarized the process adopted by BDO and justification for selection of ATL as the nominee of lenders.

52. As regards selection of nominee by the lenders, TANGEDCO has submitted that as per Article 15.3.2 of the TSA, the Appropriate Commission may assign the transmission licence to the nominee of the lenders subject to fulfillment of the qualification requirements and provisions of the Transmission Licence Regulations. TANGEDCO has contended that in terms of Regulation 6(a) of the Transmission Licence Regulations, the licence can only be assigned or granted to any person who

is selected through a transparent process as per the competitive bidding guidelines. TANGEDCO has contended that the lenders have no authority to select the eligible applicant for transfer of licence since the powers of the Bid Process Coordinator or the Commission cannot be exercised by the lenders.

53. We have considered the submissions of TANGEDCO. We note that Regulation 6(a) of the Transmission Licence Regulations refers to grant of transmission licence to a person who has been selected through the process of competitive bidding. In the present case, WKTL has been selected through the competitive bidding process conducted by PFCCCL as per the guidelines of Ministry of Power, Government of India and licence was granted under Transmission Licence Regulations vide order dated 29.9.2016 in Petition No. 111/TL/2016. Therefore, the requirement of selection of TSP through competitive bidding as per Regulation 6(a) of the Transmission Licence Regulations has been complied with. The issue in the present Petition pertains to substitution of Essel Infra with the nominee of the lenders i.e. ATL as per Article 15.3.2 of the TSA. The Petitioners have not prayed for assignment of transmission licence in favour of ATL. As per request of the Petitioners, the licence shall remain with WKTL and only the shareholding shall be transferred from Essel Infra to ATL. The present Petition has been filed in terms of Article 15 of the TSA where the lenders have been authorized to select their nominee. Further, the present proceedings shall not amend the discovered tariff adopted by the Commission under Section 63 of the Act. Therefore, the reliance of TANGEDCO on Regulation 6 of the Transmission Licence Regulations is misplaced.

54. The Petitioners vide their written submissions dated 24.7.2020 have informed that in terms of the Facility Agreement, 51% shares of WKTL held by Essel Infra were pledged in favour of the lenders. The Facility Agreement under Article 12.7 of the TSA permits the lenders to seek additional security including up to 100% shares of WKTL. In pursuance of the same, 99.9% shares of WKTL are at present pledged in favour of the lenders.

55. The Petitioners have clarified that transfer of shares and management control of WKTL in favour of ATL would not adversely affect the tariff discovered through competitive bidding process and the interest of beneficiaries/ LTTCs of the project would remain protected. The transfer process would not prejudice any interest or benefits of the beneficiaries of WKTL or in any way weaken the obligations of the licensee under the transmission licence and project documents.

56. Further as submitted by the Petitioners and TANGEDCO, the transmission system being implemented by WKTL is of strategic importance to the nation and critical for transfer of bulk quantum of electricity to the Southern Region as well as evacuation of power from renewable energy sources being established in large scale in the Southern Region. However, the Petitioners vide its affidavit dated 17.7.2020 in compliance of RoP dated 9.7.2020 have submitted that no progress in construction of the project has been made since February 2019.

57. The Commission in its order dated 24.5.2017 in Petition No. 78/MP/2017 had observed that before agreeing to transfer the licence or 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. As regards experience of ATL in transmission sector, the company has been operating inter-State and intra-State 400 kV to 765 kV transmission lines. ATL is also constructing and operating various transmission systems under competitive bidding route. ATL, presently, owns 11,477 circuit kilometers of transmission lines, with a total transmission capacity of 18,330 MVA. Therefore, in our view, ATL possesses the necessary qualification and expertise to carry out the business of transmission.

58. In light of the above, the Commission allows transfer of shareholding of WKTL from Essel Infra to ATL under Article 15.3.2 of the TSA read with Section 17(3) of the Act subject to the following conditions:

- (a) On transfer of entire shareholdings of Essel Infra in WKTL to ATL, WKTL shall become fully owned subsidiary of ATL. It is directed that ATL shall ensure that such transfer does not contravene any provisions of the applicable laws.
- (b) Since after the transfer, WKTL shall become wholly owned subsidiary of ATL, the transmission licence held by WKTL shall not be assigned or transferred in any manner in favour of ATL without approval of the Commission.
- (c) ATL shall ensure that WKTL complies with all its obligations under the various Agreements in force and Agreements to be entered including the obligations towards its lenders and LTTCs.
- (d) ATL shall not divest any of its interest in WKTL or otherwise part with this company without the prior approval of this Commission.
- (e) As committed by WKTL, there shall be no change in the transmission charges being paid/to be paid by the beneficiaries of WKTL pursuant to this process which shall continue to be governed as per the TSA.

59. Further, the Commission had directed the Petitioners, vide RoP of the hearing held on 9.7.2020, to submit the flow of loans availed for the instant project starting from the Commission's earlier approval granted vide order dated 24.5.2017 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 were required to be submitted. The Petitioners vide affidavit dated 17.7.2020 have submitted as under:

a) Rupee Loan of Rs. 2790 crore was sanctioned/ underwritten by Yes Bank by way of the Facility Agreement dated 22.3.2017. The said Facility Agreement made provisions for subsequent addition of new lenders by way of novation/ assignment/ transfer. Such new lenders would then be added in Schedule-I of the Facility Agreement.

b) In terms of the Security Trustee Agreement, security interest was created in favour of Yes Bank and all of its transferees, novatees and assigns, which would subsequently be added as party to the Facility Agreement and the Security Trustee Agreement. Article 10.5 of the Security Trustee Agreement provided for assignment, conveyance or otherwise transfer of any of the lenders right, title or interest in and to the Security Trustee Agreement to any bank/ financial institution by way of accession to the Security Trustee Agreement.

c) EXIM Bank and IREDA have only acceded to the Facility Agreement (in terms of Article 20.8 of the Facility Agreement) and agreed to take over some parts of the overall Rupee Faculty of Rs. 2790 crore and PBG facility of Rs. 110 crore. No new loan was sanctioned by EXIM Bank and IREDA to WKTL. No separate loan agreement has been executed between WKTL and these lenders.

d) The security created in favour of Yes Bank under the Security Trustee Agreement has also been extended to EXIM Bank and IREDA, upon signing the assession/ novation deeds. No new security has been created for the two

subsequent lenders. No separate Security Trustee Agreement has been executed by these lenders.

e) Accordingly, there was no requirement to approach the Commission under Sections 17(3) and (4) of the Act seeking approval for creation of security interest. Such security had already been approved by the Commission under the terms of Facility Agreement and Security Trustee Agreement by its order dated 24.5.2017 in Petition No. 78/MP/2017 and the same is valid in favour of subsequent lenders to be added to the consortium of lenders.

60. Admittedly, the First Petitioner did not approach the Commission for approval on the ground that the accession of loan has been made with the same terms and conditions. The Commission is of the view that the 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 in future failing which it would be considered as breach of terms and conditions of the transmission licence granted by the Commission.

61. The Petition No. 71/MP/2020 is disposed of in terms of the above. Pending IAs, if any, also stand(s) disposed of.

Sd/-
(Arun Goyal)
Member

sd/-
(I.S.Jha)
Member

sd/-
(P.K.Pujari)
Chairperson