

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 25/RP/2021
in
Petition No.135/MP/2021**

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

Date of order: 28th February, 2022

In the matter of

Review Petition seeking review of order dated 31.8.2021 passed in Petition No. 135/MP/2021 under Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

**And
In the matter of**

Warora Kurnool Transmission Limited,
C 105, Anand Niketan,
New Delhi-110021.

....Petitioner

Vs.

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 – 530 013, Andhra Pradesh.

4. Southern Distribution Company of Telangana Limited,
2nd Floor, H. No. 6-1-50, Mint Compound,
Hyderabad – 500 063.

5. Northern Power Distribution Company of Telangana Limited,
H. No. 2-5-31/2, Corporate Office, Vidyut Bhavan, Hanamkonda,
Warangal – 506 001.



6. Bangalore Electricity Supply Company Limited,
Krishna Rajendra Circle,
Bangalore – 560 001.

7. Gulbarga Electricity Supply Company Limited,
Station Road, Kalaburagi,
Karnataka – 585 102.

8. Hubli Electricity Supply Company Limited,
Corporate Office, P.B. Road, Navanagar,
Hubli – 580 025.

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 – 570 017.

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 – 605 001.

13. Electricity Department, Government of Goa,
Vidyut Bhavan, Near Mandvi Hotel,
Panaji, Goa – 403 001.

14. SBICAP Trustee Company Limited,
202, Maker tower, 'E', D Cuffe Parade, Colaba,
Mumbai – 400 005, Maharashtra.

....Respondents

Parties Present:

Shri Amit Kapur, Advocate, WKTL
Ms. Poonam Verma, Advocate, WKTL
Ms. Aparajita Upadhyay, Advocate, WKTL
Ms. Sakshi Kapoor, Advocate, WKTL
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri Bhavesh Kundalia, WKTL
Shri Afak Pothiawala, WKTL
Dr. R. Kathiravan, TANGEDCO
Ms. R. Ramalakshmi, TANGEDCO
Shri R. Srinivasan, TANGEDCO

ORDER

The Review Petitioner, Warora Kurnool Transmission Limited (WKTL) has filed the present petition seeking review of the order dated 31.8.2021 in Petition No. 135/MP/2021 (“Impugned Order”) under Regulation 103 of of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

Background

2. WKTL had filed Petition No. 135/MP/2021 under Section 17 of the Electricity Act, 2003 (hereinafter referred to as “the Act”), *inter-alia*, seeking approval of the Commission for creation of security interest over the Transmission System (as per the Transmission Service Agreement) in favour of new Security Trustee, namely, SBICAP Trustee Company Limited (in short, “SBICAP Trustee”) in order to secure the rights of new lender, namely, State Bank of India (“SBI”). SBI has sanctioned the following loan facilities of Rs.2368 crore in favour of WKTL for construction of the Transmission System:

Sr. No.	Facility sanctioned	Amount (Rs. in crore)
1.	Term loan facility	2254
2.	Contract Performance Bank Guarantee (“ CPBG ”) facility	110
3.	Hedging/ Loan Equivalent Risk (“ LER ”) facility (for import of components of the Transmission System of Rs.200 crore)	4
Total value of facilities		2368

3. The Commission, after considering the submissions of the parties, by order dated 31.8.2021, allowed creation of security interest in favour of SBICAP Trustee for the benefit of lender i.e. SBI. While the Commission allowed creation of security against the term loan facility of Rs.2254 crore, the CPBG facility of Rs.110 crore and hedging facility of Rs.4 crore were excluded from the total facilities availed by WKTL. Aggrieved by the exclusion of CPBG facility and hedging (LER) facility, the Review

Petitioner has filed the present Review Petition seeking limited review of the order dated 31.8.2021. The Review Petitioner has made the following prayers:

- “(a) Allow the present Petition;*
- (b) Review Paras 18 and 25 of the Impugned Order dated 31.08.2021 passed in Petition No. 135/MP/2021;*
- (c) Allow creation of security interest in the Transmission System Assets of WKTL with respect to the entire loan facility of Rs. 2368 Crores sanctioned by SBI which include:
 - (i) Term loan facility of Rs. 2254 crore;*
 - (ii) BG facility of Rs. 110 crore; and*
 - (iii) Hedging facility of Rs. 4 crore**
- (d) Pass such other and further orders as may be deemed fit under the facts and circumstance of the present case.”*

4. The matter was heard on 20.1.2022 through video conferencing. During the course of hearing, learned counsel for Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) objected to maintainability of Review Petition and sought time to file its reply. After hearing the parties, the Commission reserved the order on admissibility. Accordingly, TANGEDCO and Review Petitioner were permitted to file their reply and rejoinder respectively.

5. Vide order dated 14.2.2022, the Commission dismissed the preliminary objections raised by TANGEDCO on admissibility of the Review Petition and the Commission admitted the Review Petition. The Respondents and the Review Petitioner were directed to file their reply and rejoinder on merits. However, no reply has been filed on merit by any of the Respondents.

Hearing dated 24.2.2022

6. The matter was heard on 24.2.2022 through video conferencing.

7. On merit, the Review Petitioner, WKTL has mainly made the following submissions:

(a) The present Petition seeks limited review of paragraph 18 and paragraph 25 of the Impugned Order vide which the Commission has declined to consider the request of WKTL in respect of CPBG facility and hedging facility holding that WKTL cannot avail loan facility more than the loan component of the Transmission System.

(b) As a result, WKTL is not able to create security over the entire loan of Rs.2368 crore. Consequentially, SBI (the lender) can execute security documents relating to the facility of Rs.2254 crore and not for CPBG facility and hedging facility sanctioned to WKTL. In this regard, SBI has requested WKTL to seek approval from the Commission for entire amount of Rs.2368 crore.

(c) Under Section 94(1)(f) of the Act, the Commission is vested with the powers of a Civil Court in respect of reviewing its decision. A Civil Court under Section 114 read with Order XLVII and Rule 1 of the Code of Civil Procedure, 1908 ('CPC') can review its decision on account of discovery of new evidence, mistake or error apparent or for any other sufficient reason.

(d) The words '*sufficient reason*' in Order XLVII Rule 1 of the CPC are wide enough to include a misconception of fact or law by a court or even an advocate. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in the case of *Board of Control for Cricket in India vs. Netaji Cricket Club & Ors.*, [reported as (2005) 4 SCC 741].

(e) SBI had agreed to extend total loan facilities of Rs.2368 crore which included the term loan facility (Rs.2254 crore), CPBG facility (Rs.110 crore) and hedging facility (Rs.4 crore). However, since the Commission has only considered the term loan facility of Rs.2254 crore for the purpose of creating security, SBI's rights under the SBI Facility Agreement with respect to CPBG facility and hedging facilities will remain unsecured. Further, WKTL cannot execute security documents for entire loan amount of Rs.2368 crore. In the

event, adequate security is not created, SBI may cancel loan towards CPBG facility and hedging facility.

(f) WKTL's parent company (i.e. ATL) has committed an equity contribution of Rs.966 crore. Accordingly, additional facilities for CPBG facility and hedging facility (amounting to Rs.114 crore) can only be funded by the lender i.e. SBI. Therefore, the Commission may consider all loan facilities offered to WKTL and, accordingly, give its approval for security creation for Rs.2368 crore.

(g) The findings of the Commission in paragraph 18 and paragraph 25 are erroneous since neither the TSA nor the financing documents preclude WKTL from availing additional facilities to fund its obligations under the TSA. In fact, as per Article 3.1 of TSA, WKTL is required to provide CPBG to its LTTCs for a period up to 3 months beyond the date of commercial operation of the Transmission System. BG is a security given to LTTCs (beneficiary) which can be invoked by them to recover the liquidated damages as per the provision of TSA. Hence, CBPG facility is an essential requirement for completion of the Transmission System.

(h) Further, hedging/ LER facility is being availed by the Petitioner for hedging its financial risk towards import of components of the Transmission System of a value of up to Rs.200 crore, for future requirement.

(i) Accordingly, WKTL has availed these additional facilities only in the interest of construction of the Transmission System. The Commission has erred in holding that SBI has only agreed to refinance the loan facility of Rs.2254 crore whereas, SBI has sanctioned loan facilities amounting to Rs.2368 crore.

(j) Further, vide order dated 24.5.2017 in Petition No. 78/MP/2017 (*WKTL & Anr. vs. TANGEDCO & Ors.*), the Commission had granted approval for security creation towards entire loan facility of Rs.2900 crore (including additional facility towards CPBG of Rs.110 crore) and had not made any distinction regarding term loan facility and additional facility. In effect, the Commission had allowed creation of security on all amounts payable under

the Facility Agreement dated 22.3.2017 and other amounts agreed by the parties.

(k) Accordingly, there is an inconsistency in treatment by the Commission regarding loan facilities availed by WKTL as allowed vide order dated 24.5.2017 in Petition No. 78/MP/2017 (from Yes Bank in 2017) and in the impugned order (from SBI in 2021). It is noteworthy that from the lender's perspective, CPBG limit and hedging limit are exposure to the borrower for funding the Transmission System and same needs to be secured as per terms of the SBI Facility Agreement which are required to be secured in line with rupee term loan exposure.

(l) Article 15.2.2 of the TSA, specifically enables WKTL to create encumbrance over assets of the Transmission System in favour of the lender as security amount payable under the financing agreements and any other amounts agreed by the parties.

(m) The Commission, in the past, vide order dated 6.10.2015 in Petition No. 163/MP/2015 (Jaypee Powergrid Limited v. Jayprakash Power Ventures & Ors.) and order dated 15.4.2015 in Petition No. 79/MP/2015 (NRSS XXXI B Transmission Limited v. UPPCL and Ors.) has allowed creation of security on additional facilities availed by transmission licensees in respect of working capital facility and BG facility.

(n) Further, BG issued by WKTL to LTTCs and CPBG facility sanctioned by the lender are distinct and there is no relation between them. The creation of security interest for CPBG facility will provide comfort to lender whereas, the BG issued to LTTCs will protect the rights of LTTCs for payment of liquidated damages, should the need arise.

(o) The sanctioned facility of Rs.2368 crore (for which security is proposed to be created) is significantly lesser than the cost of the Transmission System i.e., Rs.3220 crore. Further, since WKTL's tariff for the Transmission System has been adopted pursuant to a competitive bidding process, inclusion of CPBG facility and hedging facility in the total loan for creation of security will not have any impact on the tariff payable by LTTCs.

8. During the course of hearing, learned counsel for the Petitioner referred to the Commission's order dated 14.2.2022 and submitted that by the said order, the Commission has already rejected TANGEDCO's objections on the admissibility of the Review Petition and has recognised that WKTL has made out a case for review of the Impugned Order while admitting the present Review Petition.

9. During the course of the hearing, learned counsel for the Respondent, TANGEDCO mainly submitted the following:

(a) While the Commission has admitted the Review Petition vide order dated 14.2.2020, the maintainability of the Review Petition on the merit has to be examined against the limited grounds for review as prescribed under Order 47 Rule 1 of the CPC.

(b) In the Impugned Order, the amount corresponding to CPBG facility of Rs.110 crore had not been considered by the Commission in view of the specific clarification made by WKTL that it had not sought creation of security on CPBG as per the terms of sanction letter dated 11.8.2020 and Article 8.1 of the Facility Agreement dated 30.1.2021.

(c) When WKTL itself withdrew its prayer for creation of security on CPBG, it cannot now seek review of the findings of the Commission which were on the basis of the specific clarification made by WKTL. The present Review Petition does not meet any of the grounds for review as specified under Order 47 Rule 1 of the CPC.

(d) At paragraph 18 of the Impugned Order, the Commission has also held that since WKTL cannot avail loan facility more than the loan component of cost of the Transmission System, its request with regard to CPBG facility and hedging facility were not considered. The said findings of the Commission on merit cannot be challenged under the review jurisdiction.

(e) As per Article 15.2.1 of the TSA, WKTL is required to keep CPBG free from encumbrance since it is the right of LTTCs to encash CPBG anytime, if there is a default on the part of TSP/ violation of terms of TSA. The Scheduled

Commissioning Date of the Transmission System has already lapsed and, hence, WKTL is liable to pay the liquidated damages as per the TSA. WKTL has also failed to furnish the additional CPBG as mandated in the TSA.

(f) Reliance placed by WKTL on the Commission's order dated 24.5.2017 in Petition No. 78/MP/2017 is misplaced in view of the specific clarification made by WKTL in the present case.

(g) WKTL has sought to argue that BG issued by WKTL to LTTCs and CPBG facility sanctioned by lender (SBI) are distinct in purpose and independent. However, the said submission is not tenable. Clearly, the CPBG facility from the lender has been sought for CPBG under the TSA with both the amounts being identical. Seeking to securitize the CPBG furnished under the TSA indicates a lack of accountability on part of WKTL.

10. In rebuttal, learned counsel for the Review Petitioner, WKTL submitted that the submissions of TANGEDCO pertaining to creation of security on CPBG has already been dealt with and rejected by the Commission vide order dated 14.2.2022. WKTL had clarified in the rejoinder dated 3.2.2022 that it has not sought creation of security on CPBG. The security is sought to be created on assets of the Transmission System. Learned counsel further submitted that the Commission has also accepted the said submission made by WKTL in paragraph 12 of the order dated 14.2.2022 and consequently, rejected the objection raised by TANGEDCO in paragraph 13 of the order. Learned counsel further submitted that there cannot be security interest on CPBG facility given by the lender itself. Learned counsel added that WKTL had never stated that it did not seek to create security interest for CPBG facility and hedging facility which were part of the entire loan sanctioned by SBI and also placed reliance on Recital 'C' of the Facility Agreement dated 31.1.2021.

Analysis and Decision

11. We have considered the submissions made by the Review Petitioner and the Respondent, TANGEDCO. The Review Petitioner had approached the Commission in Petition No. 135/MP/2021 seeking approval for substitution of erstwhile lenders, namely, Yes Bank, Exim Bank and IREDA with State Bank of India (SBI) and for creation of security interest in favour of Security Trustee, namely, SBICAP Trustee Company Limited for the benefit of the new lender (SBI). The new lender had agreed to sanction a term loan facility of Rs.2,254 crore, BG facility of Rs.110 crore and hedging facility of Rs.4 crore (aggregate loan of Rs.2368 crore).

12. Vide order dated 31.8.2021, the Commission accorded approval for substitution of erstwhile lenders with SBI and in-principle approval for creation of security interest in favour of Security Trustee for the benefit of the new lender. While the Commission allowed creation of security in respect of the term loan facility of Rs.2254 crore, the request of the Review Petitioner for creation of security with regard to CPBG facility and hedging facility were not considered. Aggrieved by the said decision, the Review Petitioner has sought through the present Review Petition review of paragraph 18 and paragraph 25 of the impugned order to allow security creation for the entire loan amount of Rs.2368 crore. The relevant extract of the Impugned Order is as under:

“18. The Respondent, TANGEDCO has raised objection on the creation of encumbrance over CPBG and liability of the Petitioner on account of non-compliance of the obligations of the Petitioner under the TSA. The Petitioner has clarified that the Petitioner has not sought creation of security on CPBG as per the terms of sanction letter dated 11.8.2020 and Article 8.1 of the Facility Agreement dated 30.1.2021. Since the Petitioner cannot avail loan facility more than the loan component of cost of the Project, its request with regards to CPBG and Hedge facility is not being considered.

25. Accordingly, we, accord approval for substitution of erstwhile lenders, namely, Yes Bank, EXIM Bank and IREDA, with State Bank of India who has agreed to refinance of Rs.2,254 crore for the projects/transmission assets and accord in

principle approval for creation of security interest in favour of Security Trustee, namely SBICAP Trustee Company Limited for the benefit of lender i.e. SBI.”

13. In the above mentioned background, we now proceed to consider whether the case for review has been made out by the Review Petitioner in terms of Order 47 Rule 1 of the CPC read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. Section 94(1)(f) of the Act provides that the Commission has the same power as that of a civil court to review its decisions, directions or orders. Under Order 47 Rule 1 of CPC, a person aggrieved by order of a court can file review on the following grounds, if no appeal against the said order has been filed:

- (a) Discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made;
- (b) On account of some mistake or error apparent on the face of record; and
- (c) For any other sufficient reason.

14. In light of the above provisions, we consider the grounds raised in the Review Petition for review of order dated 31.8.2021 in Petition No 135/MP/2021.

15. The Review Petitioner has submitted that the new lender, SBI had under the Facility Agreement dated 30.1.2021 agreed to extend the total loan facilities of Rs.2368 crore which included the term loan facility (Rs.2254 crore), CPBG facility (Rs.110 crore) and hedging facility (Rs.4 crore) and, therefore, SBI's rights were to be secured by creating security interest over assets of the Transmission System for the entire loan facilities availed by it amounting to Rs.2368 crore. However, by consideration of only term loan facility of Rs.2254 crore by the Commission for the purpose of creating security, SBI's rights under the Facility Agreement with respect

to CPBG facility and hedging facility will remain unsecured and may also lead to cancellation of CPBG facility and hedging facility. WKTL has relied upon the SBI's e-mail dated 6.10.2021 asking WKTL to seek approval of the Commission for creating security interest for the entire loan facilities of Rs.2368 crore.

16. *Per contra*, TANGEDCO has reiterated its submission regarding creation of encumbrance/ security interest over CPBG being not permissible in terms of the provisions of the TSA. We note that the aforesaid issue with regard to creation of security on CPBG has already been dealt with by the Commission in its order dated 14.2.2022. The relevant extract of the said order reads as under:

"8. TANGEDCO has mainly objected to admissibility of the Review Petition on the ground that creation of encumbrance over Contract Performance Bank Guarantee is not permissible in terms of the provisions of the TSA. TANGEDCO has also contended that the Article 15.2.1 of the TSA mandates that neither party shall create nor permit to subsist any encumbrance over all or any of its rights and benefits under the TSA. It is the right of the LTTCs to encash the CPBG anytime, if there is default on the part of TSP/ violation of terms of the agreement. Therefore, the Petitioner should keep the CPBG free from encumbrance. Per Contra, WKTL has clarified that WKTL has not sought creation of security on the transmission project assets of WKTL and not on the BG facility itself.

.....

10. In its rejoinder dated 3.2.2022, WKTL has clarified that it is only seeking security to be created on the assets of transmission project to cover the entire loan facilities sanctioned by SBI amounting to Rs.2368 crore (which also includes loan amount of Rs.110 crore towards BG facility). WKTL has further clarified that no encumbrance is sought to be created on the BG facility, which shall remain valid in the hands of the LTTCs.

11. In this regard, security on which encumbrance is sought to be created is defined in the Facility Agreement dated 30.1.2021 as under:

.....

12. It is evident from Article 8.1 of the Facility Agreement quoted above that CPBG is not included in the definition of the "Security" in terms of the Facility Agreement. Thus, it is evident that the Review Petitioner is not proposing to create security on the CPBG but on the assets, rights and title of the borrower i.e. WKTL against the loan availed by WKTL to this extent.

13. In view of the above, we are of the view that the objections raised by TANGEDCO are not relevant and beyond the scope of the present Review Petition...

17. Thus, in the aforesaid order, the Commission has considered the submissions made by the Review Petitioner that it is only seeking creation of security on the assets of Transmission System to cover the entire loan facilities sanctioned by SBI amounting to Rs.2368 crore and that no encumbrance is sought to be created on CPBG which shall remain valid in the hands of LTTCs. Further, taking note of the Article 8.1 of the Facility Agreement, the Commission also concluded that WKTL is not proposing to create security on CPBG but on the assets, rights and title of the borrower i.e. WKTL against the loan availed by WKTL to this extent.

18. However, TANGEDCO has sought to argue that exclusion of CPBG facility and hedging facility from the total loan facilities for the purpose of creation of security interest was in view of the specific clarifications made by the Review Petitioner, WKTL to effect that it had not sought creation of security on CPBG and, therefore, it has contended that the present Review Petition is not maintainable on merit. However, as rightly pointed out by the Review Petitioner and as has been observed by the Commission vide order dated 14.2.2022, the approval was sought for creation of security interest over assets of the Transmission System only in order to secure the rights of lender, SBI for the total sanction facilities, which apart from term loan facility also included CPBG facility and hedging facility. In other words, the permission for creating security interest was sought in respect of CPBG facility (along with term loan facility and hedging facility) to be provided by lender to WKTL and not on the said CPBG facility to be provided by the lender itself. Therefore, these clarifications made by the Review Petitioner, as recorded at paragraph 18 of the

Impugned Order, cannot come in the way of considering the grounds raised by the Review Petitioner for seeking review of impugned findings.

19. Further, in the Impugned Order, the Commission has held that since the Petitioner cannot avail loan facility more than the loan component of the Transmission System, its request with regard to CPBG facility and hedging facility for creation of security is not being considered. Contesting the said findings, the Review Petitioner has submitted that neither the TSA nor financing documents preclude the Review Petitioner from availing additional facilities (BG/hedging) to fund its obligation under the TSA. The Review Petitioner has submitted that the Commission vide its order dated 24.5.2017 in Petition No. 78/MP/2017 [WKTL and Anr. v. TANGEDCO and Ors.] i.e. in the case of Review Petitioner itself, had accorded approval for creation of security interest for entire loan facility of Rs.2900 crore (inclusive of CPBG facility of Rs.110 crore) without making any distinction regarding term loan facility and additional facilities and also not limiting the same to the loan component of the cost of the Transmission System.

20. We have considered the submissions made by the Review Petitioner and find some merit in the submissions as put forth. It is observed that Article 15.2.2 of the TSA enables WKTL to create encumbrance over assets of the Transmission System in favour of the lender as security amount payable under the financing agreements and any other amounts agreed by the Parties. Article 15.2.2 of the TSA is extracted below:

*“15.2.2 However, the TSP may create 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 Lender’s Representative on their behalf, **as security for amounts payable under the Financing Agreements and any other amounts agreed by the Parties.**”*

21. Clearly, the TSA provides for creation of security over all or part of the receivables, Letter of Credit and other assets of the project in favour of lender or lender's representative for the amount payable under the Financing Agreements and any other amounts agreed by the parties.

22. In the instant case, indisputably, as per Recital 'C' and Article 2 of the Facility Agreement dated 30.1.2021 (entered into between the lender, SBI and WKTL), SBI has sanctioned total 'Facility' of Rs.2368 crore which comprise of term loan facility of Rs.2254 crore, CPBG facility of Rs.110 crore and hedging facility of Rs.4 crore. Hence, the amount payable or agreed between the parties under the Facility Agreement i.e. total loan facilities, is Rs.2368 crore. Further, as per Article 8.1 of the Facility Agreement, this entire 'Facility' is required to be secured as under:

"8.1 Security

The **Facility** together with all the Outstandings payable to the Lenders and their trustees and agents (if any) and the Account Bank as stipulated under this Agreement or the other Financing Documents, **shall be secured by**

- (a) *First pari passu Security Interest over the immovable assets including but not limited to towers, conductors, insulators etc. and the Project Land acquired for the Substation, both present and future, of the Borrower;*
- (b) *First pari passu Security Interest in favour of the Security Trustee, on entire moveable assets, both present and future, of the Borrower;*
- (c) *First pari passu Security Interest in favour of the Security Trustee on the entire Current Assets including but not limited to all operating accounts, deposits, inventory, investments, book debts, operating cash flows, receivables, commissions, revenues of whatsoever nature and whenever arising, both present and future, of the Borrower;*
- (d) *First pari passu Security Interest in favour of the Security Trustee on all the accounts of the Borrower (including the Accounts opened and maintained pursuant to the Trust and Retention Account Agreement), the Debt Service Reserve Account and the monies credited or deposited therein, to the extent of Borrower's interests thereon, both present and future;*
- (e) *First pari passu Security Interest in favour of the Security Trustee on:*
 - (i) *all the rights, title, interest, benefits, claim and demands whatsoever of the Borrower in the Project Documents, Clearances, loss protection covers, if any;*

- (ii) *all the rights, title, interest, benefits, claim and demands whatsoever of the Borrower in any letter of credit, guarantee, performance bond provided by any counterparty to the Project Documents, in relation to the Project, if any;*
- (iii) *all the rights, title, interest, benefits, claim and demands whatsoever of the Borrower in the insurance contracts, policies, insurance proceeds, procured by the Borrower or procured by any of its contractors favoring the Borrower in relation to the Project;*
- (iv) *all the rights, title, interest, benefits, claim and demands whatsoever of the Borrower on the Transmission License, subject to approvals to be obtained from CERC.*
- (f) *First pari passu Security Interest in favour of the Security Trustee on all intangible assets including but not limited to goodwill, rights, undertakings and uncalled capital, both present and future, of the Borrower;*
- (g) *Pledge of 51% (fifty one percent) of the Shares of the Borrower held by the Promoter;*
- (h) *Non disposal undertaking with respect to 25% (twenty five percent) of the Shares of the Borrower held by the Promoter (other than the shares pledged in accordance with sub clause (g) above.*

*The security detailed above shall be collectively referred to as the “**Security**”. The Security shall be duly created and perfected by the Borrower and/or Promoter, as applicable in the form and manner acceptable to the Lenders within the timelines stipulated by the Lenders. The Security created in favour of the Lenders/Security Trustee shall be in a form and manner satisfactory to the Lenders.”*

23. We are of the view that since the Transmission System in question is a competitively bid project, therefore, the capital structure and debt financing including availing the facilities of BG, hedging, letter of credit and working capital etc. are commercial decisions of the TSP and there is no need for the Commission to intervene so long as these do not violate provisions of the TSA. Further, it is the prerogative of the lender to decide the quantum of loan to be sanctioned against the assets of the Transmission System. In the present case, the lender has agreed to provide, over and above the term loan facilities of Rs. Rs.2254 crore, additional loan facility of Rs.110 crore towards CPBG facility and Rs.4 crore towards hedging facility by way of creation of security on the same assets. Therefore, exclusion of such additional facilities from the total loan facilities while considering the approval for

creation of security interest, in our view, might not be proper and deserves to be reviewed.

24. Further, as rightly pointed out by the Review Petitioner, the Commission has allowed creation of security interest in respect of additional facilities availed by transmission licensee under the financing agreement. In fact, in the case of WKTL itself, the Commission has granted approval for creation of security interest in respect of entire loan facilities of Rs.2900 crore (Rupee term loan facility of Rs.2790 crore + CPBG facility of Rs.110 crore) without making any distinction between the term loan facility and additional facilities nor limiting the same to the loan component of the Transmission System which was Rs.2790 crore.

25. TANGEDCO had contended that the Review Petitioner ought not be permitted to create security on its transmission assets for availing CPBG facility, which is for the purpose of Contract Performance Guarantee under the TSA. However, we do not find any merit in the aforesaid submission since Article 15.2.2 of the TSA, as already noted above, permits creation of security over the assets of the Transmission System for the amounts agreed to under the financing agreements. Further, we observe that all the objections of TANGEDCO mainly stem from its apprehension regarding right of LTTCs to encash the CPBG furnished by the Review Petitioner under TSA in case of default, being adversely affected. However, the said apprehension, in our view, is unfounded in view of the fact that no encumbrance is being created on the BG facility, which shall remain valid in the hands of the LTTCs. Thus, the creation of charge on the entire loan facility will not, in any way, prejudice the rights and interests of the parties under the TSA and shall not prejudice the right of LTTCs to invoke the Contract Performance Guarantee furnished under the TSA.

26. In view of the foregoing discussion, we are of the view that the Impugned Order deserves to be reviewed and consequently, we accord in-principle approval to the Review Petitioner to create the security interest in respect of entire loan facilities of Rs.2368 crore which include term loan facility of Rs.2254 crore, BG facility of Rs.110 crore and hedging facility of Rs.4 crore, subject to the condition that the Contract Performance Guarantee furnished under the TSA shall remain unencumbered and there shall be no prejudice to the rights of LTTCs as regards invoking the same.

27. The Review Petition 25/RP/2021 is disposed of in terms of the above.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson