

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 113/MP/2024

Coram:

**Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri Ramesh Babu V., Member**

Date of Order: 13th June, 2024

In the matter of

Petition under Sections 17(3) & 17(4) of Electricity Act, 2003 seeking approval for creation of Security Interest over all of the Petitioner's Assets in favour of Respondent No. 2 (as the Security Trustee acting for the benefit of the Lender) in respect of the Petitioner's Project.

And

In the matter of

**Khavda II-A Transmission Limited,
C-105, Anand Niketan, South Delhi,
New Delhi- 110021**

....Petitioner

Versus

**1. Central Transmission Utility of India Limited,
Plot No. 2, Sector 29,
Gurgaon -122001, Haryana**

**2. Catalyst Trusteeship Limited,
GDA House, Plot No. 85,
Bhusari Colony (Right),
Paud Road, Pune-411 038**

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

....Respondents

Parties present:

Shri Vishal Binod, Advocate, KATL
Ms. Priyal Modi, Advocate, KATL

ORDER

The Petitioner, Khavda II-A Transmission Limited (KTL), has been granted a transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') to establish the "Transmission scheme for evacuation of the 4.5 GW RE Injection at Khavda PS under Phase II- Part A" (hereinafter referred to as "the Transmission System" or "Project") on a Build, Own, Operate, and Transfer (BOOT) basis, the details of which are specified in the schedule attached to the licence issued vide order dated 9.8.2023 in Petition No. 124/TL/2023.

2. The Petitioner has filed the present Petition seeking approval for the creation of Security Interest by way of the hypothecation/mortgage/charge/pledge/ assignment, etc., over all assets, including movable and immovable assets, project accounts and documents (including assignment of transmission licence), etc. of the Petitioner in favour of the Security Trustee (or its replacement or successor) to secure the Petitioner's obligations towards the Power Finance Corporation Limited (PFC Limited) under financing documents for the hedge and for their subsequent transferees, assigns, novatees including any refinancing lenders and substitutes thereof and any future or any other Secured Party to the Project by executing the deed of hypothecation and power of attorney in relation thereto, indenture of mortgage, mortgage by deposit of title deeds and such other security documents as per law. The Petitioner has made the following prayers:

“(a) Approve the creation of Security Interest by way of hypothecation/mortgage/charge/pledge/assignment (as applicable), over all Assets including the Assets listed at Paragraph 9 above, and all the movable and immovable Assets, accounts, Project documents (including assignment of transmission licence) etc., both present and future, of Petitioner in terms of the

Financing Documents, or as may be agreed between the Petitioner and the Lender from time to time, in favour of Lender/Security Trustee to secure the financial assistance availed/to be availed from the Lender and its subsequent transferees, assigns, novatees and substitutes thereof and any refinancing lenders to the Project, by executing deed of hypothecation and power of attorney in relation thereto, Indenture of Mortgage, Mortgage by deposit of title deeds and such other security documents as per law or as may be required by the Lender from time to time through which a charge can be created; and

(b) Pass any or such further orders as may be deemed fit and proper in the facts and circumstances of the case.”

3. According to the Petitioner, for the purpose of financing the project, the Petitioner requested the PFC Limited (hereinafter referred to as ‘the lender’), for which the lender has agreed to provide financial assistance to the tune of Rs. 815.50 crore by way of Rupee Term Loan for the project. For this purpose, the Petitioner and PFC Limited have appointed Respondent No. 2, namely, Catalyst Trusteeship Limited, as a Security Trustee (hereinafter referred to as “the Security Trustee”) who has agreed to act as Security Trustee for the lender and has entered into the Security Trustee Agreement and the Rupee Term Loan Agreement on 30.1.2024.

4. The Petitioner has submitted that pursuant to the terms of the Facility Agreement, the secured obligations are secured by,

a) A first charge by way of mortgage over all immovable properties, if any, (including over the freehold interest, leasehold interest or sub-leasehold interest of the Petitioner in such properties immovable) together with all appurtenances thereon, both present and future, wherein the availability along with the quantum of the immovable properties shall be certified by the Project Management Agency/ Lender’s Financial Advisor in its periodic report;

- b) A first charge by way of hypothecation, on all the Petitioner's movable properties and assets, including plant and machinery, machinery spares, equipment, tools and accessories, furniture, fixtures, vehicles, encumbrance (first charge) over the assets of the Project as permitted under the TSA and all other movable assets, wherever situated, both present and future;
- c) A first charge on all the Petitioner's current assets, including but not limited to, book debts, operating cash flows, uncalled capital, receivables, commissions, revenue of whatsoever nature and wherever arising, both present and future;
- d) A first charge over all accounts of the Petitioner, including, the Trust and Retention Account and the Sub-Account(s), the Debt Service Reserve Account (DSRA) or any account created for any reserve(s) to be created and maintained (or any account in substitution thereof) that may be opened in accordance with the Trust and Retention Account Agreement and the Financing Documents, or any of the other Project Documents and all funds from time to time deposited therein, the receivables and all permitted investments or other securities representing all amounts credited to the Trust and Retention Account, any letter of credit and other reserves and any other bank accounts of the Petitioner present and future wherever maintained;
- e) Assignment in favour of the lender, on the following:
- (i) all the rights, titles, interests, benefits, claims and demands whatsoever of the Petitioner in the Project Documents [and shall include amendments or modifications to such Project Documents, if any, except Transmission Service Agreements (TSA) and Transmission Licence] duly acknowledged and consented to by the relevant counter parties to such Project

Documents. Provided that the Borrower shall assign the Transmission Licence/Transmission Service Agreement, as applicable, in favour of the lender within thirty days of receipt of the approval, if granted by the appropriate authority;

(ii) all the rights, titles, benefits, claims, demands and interest of the Petitioner in, to and under all the clearances related to the Project (and shall include amendments or modifications to such clearances, if any);

(iii) all the rights, titles, interests, licences, benefits, claims and demands whatsoever of the Petitioner in any letter of credit, guarantee, performance bond, corporate guarantee, bank guarantee (and shall include amendments or modifications thereto, if any) provided by any Project participant;

(iv) all the rights, titles, interests, benefits, claims and demands whatsoever of the Petitioner under all Insurance Contracts (and shall include amendments or modifications to such Insurance Contracts, if any) and Insurance Proceeds;

(v) Guarantees (and shall include amendments or modifications thereto, if any) provided by the EPC Contractor / module supplier (if any) relating to the Project;

(vi) all intangible assets of the Petitioner, including but not limited to goodwill, intellectual property rights, undertaking, present and future, in a form and manner acceptable to the lender.

f) Pledge of equity shares both present and future, held by the Pledgor, aggregating to the specified percentage, free from all restrictive covenants, lien or other encumbrance under any contract, arrangement or agreement including but not limited to any shareholders agreement (if any) of the Petitioner;

g) A pledge over 51% of the quasi equity infused in the Petitioner by the Promoter, until the final settlement date;

5. The Petitioner has submitted that in terms of the Financing Documents, the Petitioner is required to create security, which is the transaction security (as defined under the Facility Agreement), in favour of a Security Trustee for the benefit of the lender.

6. The Petitioner has stated that Article 15.2.2 of the Transmission Service Agreement entered into between the Petitioner and the beneficiaries of the project provides that the Petitioner is free to create any encumbrance over all or part of the receivables, Letter of Credit or other assets of the project in favour of the lenders or the representative of the lenders as security for the amount payable under the Financing Agreements and any other amounts agreed by the parties. The Petitioner has submitted that in terms of Article 15.2.4 of the TSA, the Petitioner is required to take permission from this Commission prior to relinquishing or transfer of its rights and obligations in the TSA.

7. The Petitioner has stated that in view of the provisions of sub-sections (3) and (4) of Section 17 of the Act, the Petitioner, as a licensee, cannot create a Security Interest over all the movable and immovable assets of the Petitioner in favour of a Security Trustee acting on behalf of lender pursuant to a Facility Agreement dated 30.1.2024 and a Security Trustee Agreement dated 30.1.2024 without approval of the Commission. Accordingly, the Petitioner has filed the present Petition seeking prior approval of the Commission for the creation of a Security Interest over all assets,

including the movable and immovable assets for the Project in favour of the Security Trustee pursuant to a Security Trustee Agreement and a Facility Agreement.

Hearing dated 19.4.2024

8. The Petition was called out for the hearing on 19.4.2024 after notice to the Respondents. Vide Record of Proceedings for the hearing on 19.4.2024, the Respondents were granted the opportunity to file their respective replies within a week. However, no reply has been filed by the Respondents.

Hearing dated 29.5.2024

9. Since the order in the matter (which was reserved on 19.4.2024) could not be issued prior to one Member of this Commission, who formed part of the Coram, demitting the office, the matter was re-listed for the hearing. Vide Record of Proceedings for the hearing dated 29.5.2024, the Petitioner was directed to implead the lender as a party to the Petition and to file a revised memo of parties immediately. The Petitioner has impleaded the lender, PFC Limited as a party to the Petition and has served a copy of the Petition on it to file the reply. However, no reply has been filed by the lender.

Analysis and Decision

10. We have considered the submissions made by the Petitioner and perused the documents available on the record. The Petitioner approached the lender for the purpose of part financing in the implementation of the Project. The lender has agreed to grant financial assistance aggregating to Rs. 815.50 crore.

11. The Petitioner has submitted that it had appointed Catalyst Trusteeship Limited as a Security Trustee who agreed to act as a Security Trustee and had entered into a Facility Agreement and a Security Trustee Agreement on 30.1.2024.

12. As per the Rupee Facility Agreement, the estimated cost of the Project is Rs. 1165 crore. In terms of the financing plan submitted by the Petitioner, the Project shall be funded through debt of Rs. 815.50 crore and equity of Rs. 349.50 crore. The Petitioner has submitted the following details, as per the Auditor's Certificate dated 3.2.2024, for capital expenditure of Rs. 86 crore incurred for its construction Project till 31.12.2023:

(Rs.in crore)

Particular	Amount incurred
Promoters Contribution	-
Loan/ Debenture from Promoters group companies	86
Secured Loan/Debt from external sources	-
Total	86

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

(Rs. in crore)

Original Estimated Project Cost (As per Agreement)	Amount	Means of finance (As per the Agreement)	Amount
Hard Cost	964.00	Equity share capital/Share Premium	87.38
IEDC	106.00	Loan/ Debenture from promoters group companies	262.00
IDC and Finance Charges	86.00	Secured Loan/Debt from external sources	815.62
Contingency	5.00		-
WC & DSRA	4.00		
Total	1165.00	Total	1165.00

14. The Petitioner has submitted details of the project cost and means of finance as under:

(Rs. in crore)

Actual Project Cost and Means of Finance (As on 31-12-2023)		
Particulars	As on COD	As on 31-12-2023
Total Project Cost	1165	86
Actual means of Finance of the Above cost duly certified by the Auditor Certificate		
Particulars	As on the COD	As on 31.12.2023
Equity Share Capital	87.38	-
Accumulated profit		
Equity Share Premium		
Loan/Debenture from Promoters, group companies	262	86
Secured loan/debt from external source	816	-
Others		
Total	1165	86

15. The transmission projects are capital intensive projects requiring huge capital investments and are financed through loans. It is a normal practice followed by the financial institutions/ banking industry to ask for sufficient security from the borrower to back the loan in order to mitigate the credit risk of the lender. In the instant case, the lender, namely, PFC Limited. has agreed to provide a loan of Rs.815.50 crore to the Petitioner.

16. The Petitioner has submitted that in terms of the Financing documents, the Petitioner is required to create a Security Interest on a first charge basis for the lender. The Petitioner has submitted that under the Financing Agreements and on enforcement of a security interest, it shall be lawful for the lender and its assigns, transferees, and novates to enter into and take possession of the assets/properties

mortgaged/hypothecated/charges assigned for their benefits and substitute themselves or any one of them or its nominees for the Petitioner under any or all of the project document(s). Article 15.2.2 of the TSA provide 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:

Provided that:

The Lenders or the Lender`s Representative on their behalf shall have entered into the Financing Agreements and agreed in writing to the provisions of this Agreement; and

Any encumbrance granted by the TSP in accordance with this Article 15.2.2 shall contain provisions pursuant to which the Lenders or the Lender`s Representative on their behalf agrees unconditionally with the TSP to release from such encumbrances upon payment by the TPS to the Lenders of all amounts due under the Financing Agreements.”

In accordance with the above provision, the Transmission Service Provider has been allowed to create an encumbrance over all or part of the receivables, Letters of Credit, or other assets of the Project in favour of the lenders or the lenders’ representatives or their representatives, as security for amounts payable under the Financing Agreements and any other amounts agreed by the parties.

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

“17. (3) No licensee shall any time assign his licence or transfer his utility, or any part hereof, by sale, lease, exchange or otherwise without the prior approval of the Appropriate Commission.

(4) Any agreement relating to any transaction specified in sub-section (1) or sub-section (3), unless made with the prior approval of the Appropriate Commission, shall be void.”

As per the above provisions, a licensee is required to obtain approval of the Commission for assigning its licence or transferring its utility or any part thereof by way

of sale, lease, exchange or otherwise and entering into an agreement relating to any of these transactions.

18. The Petitioner and the PFC Limited have appointed Catalyst Trusteeship Limited as a Security Trustee for the creation of a Security Interest over all the movable and immovable assets of the project. In our view, Catalyst Trusteeship Limited needs to be given comfort for the creation of security for the benefit of the lender, PFC Limited as the security for the financial assistance provided by it. We, therefore, accord in-principle approval allowing the Petitioner to create a Security Interest in favour of the Catalyst Trusteeship Limited by way of mortgage or any other security document on project assets by execution of an indenture of Mortgage and financing documents of the Project. The Petitioner is directed to submit a signed copy of the Indenture of Mortgage for the Project immediately after its execution.

19. This in-principle approval is being approved with the condition that the transmission licence granted by the Commission to the Petitioner cannot be assigned in favour of the Security Trustee or nominee of the lender without prior approval of the Commission at the time of creating rights in favour of such a nominee. Before agreeing to the assignment of the licence and the assets of the Petitioner to the nominee of the lender, the Commission will evaluate such a nominee's expertise in the development, design, construction, operation, and maintenance of the transmission lines and its ability to execute the Project and undertake the transmission of electricity. The licensee, lender, security trustee, and nominee, accordingly, shall be jointly required to approach the Commission to seek approval. This will allow the Commission to satisfy itself of the circumstances necessitating such a 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.”

20. Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lender, Security Trustee, and nominee, approve the assignment of the licence to a nominee subject to the proper due diligence of the process. Therefore, specific prior approval of the Commission for assigning the licence to the nominee of Security Trustee or transferring any assets to them is a mandatory requirement. Lastly, the financial documents and statements are to be filed by the Petitioner as and when directed by the Commission.

21. Petition No. 113/MP/2024 is disposed of in terms of the above.

Sd/-
(Ramesh Babu V.)
Member

sd/-
(Arun Goyal)
Member

sd/-
(Jishnu Barua)
Chairperson