

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 271/MP/2023

Coram:

Shri Jishnu Barua, Chairperson

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 28th January, 2024

In the matter of

Petition under Sections 17(3) & 17(4) of the Electricity Act, 2003 seeking approval for creation of security interest over Petitioner No. 1's assets, in favour of Petitioner No. 2 (including its assignees, transferees, novates) in respect of Petitioner No. 1's transmission project.

And

In the matter of

1. Goa Tamnar Transmission Project Limited,

YC Co Working Space, 3rd Floor,
Plot No. 94 Dwarka Sector- 13,
Opp. Metro Station Near Radisson Blu,
New Delhi-110078

2. Power Finance Corporation Limited,

Urjanidhi', 1, Barakhamba Lane,
Connaught Place, New Delhi-110001.

...Petitioners

Versus

1. Maharashtra State Electricity Distribution Company Limited,

Hongkong Bank Building, M.G. Road, Fort,
Mumbai – 400001

2. Gujarat Urja Vikas Nigam Limited,

Race Course, Baroda- 390007, Gujarat

3. M.P. Power Management Company Limited,

Shakti Bhavan, Jabalpur– 482008,
Madhya Pradesh

4. Chhattisgarh State Power Distribution Company Limited,

Vidyut Sewa Bhavan, Daganiya,
Raipur- 492 013, Chhattisgarh

5. Goa Electricity Department,
Vidyut Bhavan, 3rd Floor,
Panaji, Goa - 403001

6. DNH Power Distribution Corporation Limited,
Vidyut Bhavan, Near 66 KV Amla S/S,
Besides Secretariat,
Silvasa, Dadar Nagar Haveli-396230

7. Electricity Department, Daman & Diu,
Vidyut Bhavan, Kachigam, Ringanwada,
Vapi, Daman-396215

..Respondents

The following were present:

Shri Gaurav Dudeja, Advocate, GTTPL
Shri Dhruval Singh, Advocate, GTTPL
Shri Sandeep Raj Purohit, GTTPL
Shri Manoj Dubey, Advocate, MPPMCL
Shri Anup Jain, Advocate, MSEDCL
Shri Vyom Chaturvedi, Advocate, MSEDCL

ORDER

The First Petitioner, Goa Tamnar Transmission Project Limited, has been granted a transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as "the Act") to establish the transmission system for "Additional 400 kV feed to Goa and Additional System for power evacuation from the generation projects pooled at Raigarh (Tamnar) Pool" on a 'Build, Own, Operate and Maintain' (BOOM) basis, the details of which are specified in the schedule attached to the licence issued, vide order dated 13.7.2018.

2. The Petitioners, Goa Tamnar Transmission Project Limited and Power Finance Corporation Limited, have jointly filed the present Petition for the creation of security interest over all the movable and immovable assets of the First Petitioner in relation to the project comprising of, amongst others, in favour of Second Petitioner, Power Finance Corporation Limited as Security Trustee pursuant to the Facility

Agreement, on project assets for the benefit of the lenders to the project. The

Petitioners have made the following prayers:

“(a) Approve the creation of a security interest, over all assets including the movable and immovable assets, accounts, project documents etc. of the Petitioner No. 1 and to the extent mentioned in para 10, in favour of the lender and for its subsequent transferees, assigns, novates and substitutes, by way of mortgage/hypothecations/assignment of secured properties and Project assets and for amendment of the security documents and any other Financing Documents to include the assigns, transferees and novates of the lender; and

(b) Pass any other orders/directions that this Hon'ble Commission may deem fit and appropriate.”

3. The First Petitioner has submitted that for the purpose of part financing the Project, it had earlier availed financial assistance of Rs. 1050 crore from Yes Bank Limited and IndusInd Bank (previous lenders) for which a Facility Agreement dated 28.9.2019 was executed between the First Petitioner and previous lenders. In order to secure the said loan facilities, the First Petitioner had approached the Commission to seek approval for the creation of a security interest over Petitioner No. 1's assets in favour of the erstwhile Security Trustee i.e., IDBI Trusteeship Service Limited (IDBI) for the benefit of previous lenders. The Commission, *vide* its order dated 13.7.2018 in Petition No. 357/MP/2018, approved the creation of security interest over Petitioner No. 1's assets in favour of IDBI and granted liberty to the First Petitioner to approach the Commission, in the event of refinancing of loan in the future in accordance with law.

4. According to the First Petitioner, in order to refinance the Project at a more efficient interest rate, it has availed/is in the process of availing of financial assistance from the Second Petitioner i.e., Power Finance Corporation Limited (hereinafter referred to as 'the lender'), to Rs. 1317.86 crore, as a Rupee Term Loan as per the terms and

conditions contained in the sanction letter dated 15.12.2022 and the Facility Agreement dated 22.2.2023 entered into between the First Petitioner and the lender.

5. The First Petitioner has submitted that in terms of clause 11.2 of the Facility Agreement, the lender has the right to novate and/or transfer and/or assign and/or down sell all or any part of its available commitment without the prior approval or written intimation to the borrower/First Petitioner.

6. According to the First Petitioner, pursuant to the Facility Agreement, the secured obligations are secured by:

(a) A first charge by way of mortgage over all immovable properties (including over the freehold interest, leasehold interest or sub-leasehold interest of the Borrower in such properties immovable) together with all appurtenances thereon, both present and future;

(b) A first charge by way of hypothecation on all the Borrower's movable properties and assets, including plant and machinery, machinery spares, equipment, tools and accessories, furniture, fixtures, vehicles and all other movable assets wherever situated, both present and future;

(c) A first charge on all the Borrower'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 borrower, including the Trust and Retention Account and the sub-Account(s), the DSRA (for two quarters of principal and interest payment) or any account created for any reserve(s),, to be created and maintained (or any account in substitution thereof) that may be opened in accordance with the Trust and Retention Account Agreement and the Financing Documents, or any of the other Project Documents and all funds from time to time deposited therein, the Receivables and all Permitted Investments or other securities

representing all amount credited to the Trust and Retention Account, any letter of credit and other reserves of the borrower 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 borrower in the Project Documents (including but not limited to the memorandum of understanding (MOU), package/ construction contracts, O&M related agreements, service contracts, etc. as applicable, and including amendments or modifications to such Project Documents, if any) except the Transmission Service Agreement, duly acknowledged and consented to by the relevant counter parties to such Project Documents;

(ii) The rights, titles and interests of the Borrower in, to and under all the clearances (and shall include amendments or modifications to such clearances, if any);

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

(v) Guarantees and indemnities (and shall include amendments or modifications thereto, if any) provided by any Project participant;

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

7. The First Petitioner has submitted that it has agreed to create a security in terms of the Facility Agreement in favour of the lender by executing the security documents for creating, effecting, perfecting and maintaining the Security Interest, as required. The First

Petitioner has submitted that it shall be lawful for the lender and its representatives, upon breach or default on the part of the borrower, to enforce the Security Interest by entering into and taking possession of the assets including the entire plant/project or sell or transfer the assets over which the Security Interest has been created and henceforth, the First Petitioner shall take no action inconsistent with or prejudicial to the rights of the lender and its assigns, transferees and novates to quietly possess, use and enjoy the same and to receive the incomes, profits and benefits thereof without interruption or hindrance by the First Petitioner or by any person or persons whatsoever.

8. The First Petitioner has stated that Article 15.2.2 of the Transmission Service Agreement entered into between the First Petitioner and the beneficiaries of the Project provides that the First Petitioner is free to create any encumbrance over all or part of the receivables, Letter of Credit or other assets of the project in favour of the lenders or the representative of the lenders as security for amount payable under the Financing Agreements and any other amounts agreed by the parties.

9. The First Petitioner has submitted that in terms of Article 15.2.4 of the TSA, the Petitioner is required to take permission from this Commission prior to relinquishment or transfer of its rights and obligations in the TSA. The First Petitioner has stated that in view of the provisions of sub-sections (3) and (4) of Section 17 of the Electricity Act, 2003, the First Petitioner, as a licensee, cannot create a security interest over all the movable and immovable assets of the First Petitioner in favour of Security Trustee/Lender and for any subsequent transferees, assigns, novatees thereof and any refinancing lenders to the project, acting on behalf of and for the benefit of the lender pursuant to Facility Agreement and other security creating documents/Financial Agreements without approval of the Commission. Accordingly,

the Petitioners have 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 Facility Agreement and other Financing Agreements, etc.

Hearing Dated 20.12.2023

10. The Petition was called out for the hearing on 20.12.2023 after notice to the Respondents. During the course of the hearing, the learned counsel for the MSEDCL submitted that MSEDCL has already filed its reply and the Commission may consider the scope of Article 15.2.2 of the TSA and the extent of encumbrances permitted thereunder. Considering the submissions made by the learned counsel for the parties, the parties were permitted to file their respective written submissions, if any, within two weeks with a copy to the other side.

11. MSEDCL and MPPCL in their respective replies dated 12.12.2023 and 13.12.2023 have mainly submitted as under:

(a) The TSA does not allow the Petitioner to create encumbrance on (i) liens arising by operation of law in the ordinary course of the TSP carrying out the Project, (ii) Pledges of goods, the related documents of title and/or other related ordinary documents, arising or created in the ordinary course of the TSP carrying out the Project, (iii) Security arising out of retention of title provisions in relation to the goods acquired in the ordinary course of the TSP carrying out the Project.

(b) As per the Facility Agreement as well as the TSA, the 'security interest' is to be created by the Petitioner limited to the parameters as defined under Article 15.2.2 of the TSA for the benefit of the lenders in line with the Facility Agreement signed between the Petitioner and the lender. Accordingly, the encumbrance to be created by the Petitioner for the benefit of the lender shall be restricted to only receivables and other assets of the Project as mentioned in Article 15.2.2 of the TSA and may not be extended to other parameters of the Project.

(c) The prayer of the First Petitioner may be considered subject to prudence check of compliance in terms of Article 15.2.2 of the TSA.

12. The First Petitioner, in its written submissions, has mainly submitted as under:

(a) Article 15.2.2 of the TSA expressly allows the Petitioner to create encumbrance over all or part of the (a) receivables; (b) letter of credit; (c) the other assets of the Project, in favour of the Lenders or the Lenders' Representative. Article 15.2.2 of the TSA is not restricted to the creation of encumbrance over the receivables of the letter of credit but also includes other assets of the Project. Further, as per Article 1.2 of the TSA, the term 'encumbrance' includes mortgage, charge, pledge, lien or any other encumbrance securing any loan obligation. Therefore, in terms of Article 15.2.2 of the TSA, the First Petitioner is permitted to create encumbrance i.e., mortgage/charge/pledge/lien over the asset of the Project in favour of the lenders or its representatives. Additionally, Article 15.2.3 of the TSA also permits the First Petitioner to create security/charge in the ordinary course of the business. Therefore, all the securities sought to be created by the First Petitioner are required to be created in terms of the TSA.

(b) Although the term 'encumbrance' has been defined in Article 1.2 of the TSA to include mortgage, charge, pledge, lien or other encumbrance securing any obligation, without prejudice to the said definition, the word 'encumbrance' has been interpreted by the Hon'ble Supreme Court in a wide manner in the case of *Saraswati Devi (D) by L.Rs. v. Delhi Development Authority and Ors.* [reported as AIR 2013 SC 1717] wherein it has been held that the word 'encumbrance' includes a mortgage and the term 'encumbrance' in law has to be understood in the context of the provision under consideration, but ordinarily, its ambit and scope is wide.

(c) The Respondents are barred from raising objections regarding the creation of security interest in favour of the Lender/Lender's representative on account of the principles of *res judicata*. The Commission vide order dated 6.3.2019 had granted the approval to the First Petitioner and the previous Security Trustee, for the creation of security interest in favour of the previous Security Trustee in accordance with Article 15.2 of the TSA. The parties to the previous security interest Petition, which included the Respondents in the present Petition, have not challenged the

order dated 6.3.2019, and thus, the same has attained finality. Accordingly, said order is binding on the Petitioner and all the parties in the present Petition.

(d) The Commission has granted approval for the creation of security interest for similarly worded TSAs and similarly placed Transmission Service Providers in Petition No. 100/MP/2022 and in Petition No. 188/MP/2023, as per Article 15.2 of the TSA.

(e) In order to refinance the Project at a more efficient interest rate, the First Petitioner has availed/is in the process of availing of financial assistance from the Second Petitioner i.e., Power Finance Corporation Limited (PFC). The previous lenders, *vide* their No Dues Certificates, have certified that the previous loan facilities have been repaid in full, and IDBI, *vide* its No Objection Certificate dated 27 September 2022, has conveyed its no objection for the First Petitioner for filing Form CHG-4 for satisfaction of charge with its concerned Registrar of Companies. Therefore, the charge created earlier has already been satisfied, and the security created earlier has already been released. Therefore, the First Petitioner is entitled to seek the creation of a security interest over all the assets, including movable and immovable assets of the First Petitioner in favour of the lender and for its subsequent transferees, assigns, novates thereof acting for the benefit of the lender and any refinancing lenders to the Project in terms of Section 17(3) and 17(4) of the Act.

(f) In accordance with Article 15.2.4 of the TSA, neither the TSP nor any of the Long-Term Transmission Customers can relinquish or transfer its rights and obligations without the prior approval of this Commission.

Analysis and Decision

13. We have considered the submissions of Petitioner and Respondents and perused the documents on the record. The Petitioner has filed the present Petition under Sub-section (3) and Sub-section (4) of Section 17 of the Act seeking the creation of a security interest over the assets (immovable & moveable), accounts, project documents, and

current assets in favour of Power Finance Corporation Limited who has agreed to re-finance of Rs. 1317.86 crore to the First Petitioner.

14. The Petitioner has submitted that the Project has not achieved the Commercial Operation Date. After the grant of the transmission licence, the Petitioner approached the Commission by way of Petition No. 357/MP/2018 for the creation of security interest in favour of the Security Trustee, namely, IDBI Trusteeship Service Limited (prior Security Trustee) acting as Security Trustee for the benefits of the previous lenders, for the loan availed from the lenders of Rs.1050 crore. The Commission, in its order dated 6.3.2019, accorded in-principle approval allowing the First Petitioner to create a security interest in favour of the Security Trustee, namely, IDBI Trusteeship Service Limited.

15. The First Petitioner had subsequently approached the lender, namely, Power Finance Corporation Limited for refinancing the project assets and for outstanding loan. The lender has agreed to the same through its sanction letter dated 15.11.2022. According to the First Petitioner, as on 30.6.2023, a total amount of Rs.600 crore has been disbursed by the lender, and the same has been utilized by the First Petitioner for the construction of the Project.

16. The Respondents have submitted that the prayer of the First Petitioner may be considered subject to prudence check of compliance in terms of Article 15.2.2 of the TSA. We have considered the submissions of the Respondents. Article 15.2.2 of the Transmission Service Agreement (TSA) entered into between the First 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 amount payable under

the Financing Agreements and any other amounts agreed by the parties provided that:

“(a) The lenders or the representatives of the lenders on their behalf shall have entered into the Financing Agreements and agreed in writing to the provisions of this Agreement; and

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

17. As per Article 15.2.4 of the TSA, neither the TSP nor any of the Long-Term Transmission Customers can relinquish or transfer its rights and obligations, without the prior approval of the Commission. Therefore, the First Petitioner will comply with the provisions of the TSA including Article 15.2.2 of the TSA.

18. The lender (Power Finance Corporation Limited) has approved a rupee term loan amounting to Rs. 1317.86 crore to the First Petitioner, contingent upon the terms and circumstances outlined in the financing instruments. The First Petitioner and Second Petitioner have mutually agreed to enter into financing arrangements that will establish a charge on the assets of the First Petitioner. However, it will be done after receiving the approval of the Commission. As per the Facility Agreement dated 22.2.2023, the projected cost of the project is Rs. 1757.15 crore, which will be funded by the Promoter's contribution of Rs. 439.29 crore. The specific information regarding the sources and methods of obtaining funds is as follows:

Estimated Project Cost and Means of Finance (As on date of Financial Closure) and Original Financing plan agreed by the lender as per the Facility Agreement

Original Estimated Project Cost (as per the Agreement)	Rs in crore	Means of Finance (as per the Agreement)	Rs in crore
Hard Cost	1,538	Equity Share Capital	110

IEDC	82	Compulsorily Convertible Debentures	114
IDC	137	Loan/ Debenture from promoters, group companies	215
Contingency	-	Secured loan/ debt from External source	1,318
WC and DSRA		Others	-
Total	1,757	Total	1,757

19. The First Petitioner has submitted that the previous loan has been entirely repaid, and no previous loan is outstanding as on the date. In this regard, the First Petitioner has placed on record the copy of the "No Due Certificates" issued by the previous lenders (Yes Bank Limited and IndusInd Bank).

20. The transmission projects are projects that require a significant amount of capital expenditure since they are capital intensive. The funding for these initiatives comes from the loans. In order to reduce the amount of credit risk that the lenders are exposed to, it is a common practice for financial institutions and the banking industry to request adequate collateral from the borrower in order to back the loan. In the instant case, the lender, namely, Power Finance Corporation Limited, has agreed to provide a loan of Rs. 1317.86 crore to the First Petitioner for which the Facility Agreement dated 22.2.2023 has been executed for the creation of security over all the movable and immovable assets of the project. In accordance with Article 15.2.2 of the TSA, the Transmission Service Provider has been allowed to create encumbrance over all or part of the receivables, Letters of Credit or other assets of the project in favour of the lender or the lender's representatives as security for amounts payable under the Financing Agreements and any other amounts agreed by the parties.

21. Section 17 (3) and (4) of the Electricity Act, 2003 provides as under:

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

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

22. As per the above provision, a licensee is required to obtain approval of the Commission for assigning his licence or transfer its utility or any part thereof by way of sale, lease, exchange or otherwise and to enter into an agreement relating to any of these transactions. Regarding the formation of security for the benefit of banks, financial institutions, and non-banking financial organizations as security for the financial assistance that is provided by the lender(s), Power Finance Corporation Limited, in its capacity as a lender, needs to be given comfort for the purpose of creating security. We, therefore, accord in-principle approval allowing the First Petitioner to create a security interest in favour of Power Finance Corporation Limited for Rs. 1317.86 crore, pursuant to Facility Agreement, by way of hypothecation on Project assets by execution of unattested Deed of Hypothecation for the Project. The Petitioner is directed to place on record the copy of financing documents, namely, the Deed of Hypothecation, after execution.

23. This in-principle approval/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 lender or a 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 First Petitioner to the nominee of the lenders, the Commission shall evaluate such a nominee`s experience in the development, design, construction, operation and maintenance of the transmission

lines, and ability to execute the project and undertake transmission of electricity. The licensee, lenders, security trustee and the nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself of the circumstances necessitating such transfer. 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.”

24. 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 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. Lastly, financial documents and statements may be filed by the Petitioner as and when required by the Commission for any specific purpose.

25. With the above, Petition No. 271/MP/2023 stands disposed of.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(Jishnu Barua)
Chairperson