

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 292/2010

Coram:

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri S. Jayaraman, Member**
- 3. Shri V.S.Verma, Member**
- 4. Shri M.Deena Dayalan, Member**

Date of Hearing: 20.1.2011

Date of order: 17.2.2011

In the matter of:

Application for approval under Section 17 (3) of Electricity Act, 2003, for creating security in favour of Security Agent pursuant of Security agent agreement, by way of (a) Mortgage on all immovable assets, (b) Hypothecation of all movable assets, (c) assignments of all project documents, clearance, notification, Govt. approvals, orders etc and (d) Pledge of share of the company to the tune of 51% for the benefit of lenders/lenders agent/security agent to the project through execution of (i) Indenture of Mortgage, (ii) Deed of Hypothecation and (iii) Deed of pledge, for the project associated with Parbati-II (HEP) and Koldam (HEP) Transmission System.

And

In the matter of

1. Parbati Koldam Transmission Co. Ltd., New Delhi
2. Power Finance Corporation Ltd., New Delhi

..... **Petitioners**

Vs

- 1 BSES Rajdhani Power Ltd., New Delhi
- 2 BSES Yamuna Power Limited, New Delhi
- 3 Jaipur Vidyut Vitaran Nigam Ltd, Jaipur
- 4 Ajmer Vidyut Vitaran Nigam Ltd., Jaipur
- 5 Haryana Power Purchase Centre, Panchkula
- 6 Jodhpur Vidyut Vitaran Nigam Ltd, Jaipur
- 7 Uttar Pradesh Power Corporation Ltd, Lucknow
- 8 Punjab State Electricity Board, Patiala
- 9 North Central Railway, Allahabad
- 10 Chandigarh Administration, Chandigarh
- 11 Himachal Pradesh State Electricity Board, Shimla
- 12 Uttarakhand Power Corporation Ltd, Dehradun
- 13 Power Development Deptt., Govt. of Jammu and Kashmir, Srinagar

Respondents



The following was present:

1. Shri S.K Deb, PKTCL
2. Shri S.Bhattacharjee, PKTCL
3. Shri Bushan Rastogi, PKTCL
4. Shri Lokendra Singh, PKTCL
5. Shri Arup Samanta, PKTCL

ORDER

The first petitioner herein, Parbati Koldam Transmission Co. Ltd. has been granted transmission licence under Section 14 of the Electricity Act, 2003 (the Act), to transmit electricity as a transmission licensee and for that purpose to undertake the business of establishing, commissioning, operation and maintenance of 400 kV transmission lines for evacuation of power from Parbati-II Hydroelectric Project (Parbati-II HEP) and Koldam Hydroelectric Project (Koldam HEP) in State of Himachal Pradesh for its onward transmission to the beneficiary States in the Northern Region, the details of which are specified in the schedule attached to the licence issued on 15.9.2008. In the present application, the petitioners have made following prayers to:

- (a) Approve the creation of security in favour of Security Agent pursuant to Security Agent Agreement, by way of (a) Mortgage on all immovable assets (b) Hypothecation of all movable assets, (c) assignments of all project documents, clearance, notification, Govt. approvals, orders etc and (d) Pledge of share of the company to the tune of 51% for the benefit of lenders/lenders agent/security



agent to the project through execution of (i) Indenture of Mortgage, (ii) Deed of Hypothecation and (iii) Deed of pledge for the project.

(b) Pass such other relief as Hon`ble Commission deems fit and appropriate under the circumstances of the case and in the interest of justice"

2. According to the petitioners, request has been made for long-term debt through consortium of financial institutions consisting of Power Finance Corporation Ltd (PFC) as the lead member with Rural Electrification Corporation (REC) as the other member. The lenders have agreed to make available financial assistance for an aggregate principal amount not exceeding ₹771,18,00,000/- for the purpose of part financing the construction, development and implementation of the project and on the terms and conditions set out in the `Common Loan Agreement`, `Inter Creditor Agreement`, `Lenders Agent Agreement`, `Security Agent Agreement` `Borrower`s Deed of Undertaking` and `Promoter`s Deed of Undertaking` (hereinafter referred to as "Financing Agreements"). For this purpose, the first petitioner and the lenders have PFC as Security Agent has agreed to act as trustee for the lenders and hold the security to be created pursuant to the Financing Agreements in accordance with terms and conditions thereof for the benefit of the lenders based on Security Trustee Agreement dated 11.8.2010 entered into by the petitioners and lenders. It has been stated that the proposed indenture of mortgage, deed of Hypothecation and Pledge of mortgage have been settled and initialed between the first petitioner and



Security Agent. The first petitioner has proposed to agree under the above documents that it shall be lawful for the Security Agent or lenders to enter into and take possession of the mortgaged premises along with all intangibles and any future assets under the project comprised in indenture of mortgage, Deed of Hypothecation and Deed of pledge, and thenceforth the first petitioner shall not take any action inconsistent with or prejudicial to the right of Security Agent on behalf of lenders quietly to possess, use and enjoy the same and to receive the income, profits and benefits thereof without any interruption or hindrance by it or by any person or persons whatsoever.

3. The petitioners have submitted that in view of the provisions of sub-section (3) and sub-section (4) of Section 17 of the Act, the first petitioner, as a licensee cannot assign the licence or transfer its utility or any part thereof to any person or enter into an agreement relating to any of these transactions without approval of the Commission. Accordingly, the present petition has been filed seeking prior approval of the Commission for creating security in favour of Security Agent pursuant to Security Agent Agreement, by way of mortgage on facility together with all other amount whatsoever stipulated in the Financing Agreements through execution of indenture of mortgage for the project.

4. It has been further submitted that Share Holders Agreement, Implementation agreement and Operation Interface Agreement signed between the first petitioner and Power Grid Corporation of India Limited and Power Transmission Agreement signed between the first petitioner and beneficiaries of the project provide that the first petitioner is free to create any encumbrance over all or part of the payment security mechanism or the other assets of the project in favour of the lenders or the representatives of the lenders as security for;

(a) Amount payable under the Financing Agreement; and

(b) Any other amounts agreed by the parties:

Provided that,

- (i) The lenders or the representatives of the lenders shall have entered into the Financing Agreements; and
- (ii) Any encumbrance granted by the petitioners shall contain provisions pursuant to which the lenders or the representatives of the lenders agree unconditionally with the petitioner to release such encumbrances upon payment, to the lenders, of all amounts due under the Financing Agreements.

5. It has also been submitted that the Bulk Power Transmission Agreement (BPTA) has been entered into by the First petitioner with the



beneficiaries of the project. As per clause 9.2 of BPTA, the beneficiaries of the project have also allowed to create any encumbrance over all or part of the Payment Security Mechanism or the other assets of the project in favour of the lenders or lender's representative as security for:

- (i) amounts payable under the Financing Agreements; and
- (ii) any other amounts agreed by the parties:

Provided that:

- (a) the lenders or the lender's representative shall have entered into the Financing Agreements; and
- (b) Any encumbrance granted by PKTCL shall contain provisions pursuant to which the lenders or the lender's representative agrees unconditionally with PKTCL to release such encumbrances upon payment by PKTCL to the lenders of all amounts due under the Financing Agreements.

6. The petition was heard after notice to all the parties. None was present on behalf of the respondents. Uttar Pradesh Power Corporation Limited (UPPCL) has filed its objections.

7. UPPCL in its reply filed vide affidavit dated 18.1.2011 has objected to the grant of approval under Section 17 (3) of the Act to the petitioner's for following reasons:

(a) NTPC, NHPC and PGCIL as well as UPRVUNL render service to the beneficiaries by way of generating electricity and transmission thereof. Though they take loans from the banks and financial institutions, these parties have not come before the Commission for approval of loan agreements. In order to ensure security of payment, the borrower and lender should execute agreement regarding LC and Escrow arrangement. In addition to this, the provisions of Sections 19, 20 and 21 of the Act clearly safeguard the payment security in respect of the lender since ultimately the amounts received after the sale of the utility will be paid commensurately to the lender;

(b) Certain clauses of the Mortgage Agreement, Deed of Hypothecation and Deed of pledge are not consistent with the clauses of BPTA, terms and conditions of transmission licence and different sections of the Act; and

(c) After the event of default in payment of dues by the borrower, the lender will take over the entire movable and immovable properties of the borrower, but the mortgagee will not be liable to operate

and maintain the transmission line since the mortgagee is not a licensee.

8. We have considered the objections of UPPCL. Sub-sections 17 (3) and (4) of the Act clearly require a licensee to seek prior approval of the Commission for assigning licence or transfer its utility or any part thereof by way of sale, lease, exchange or otherwise. Since the first petitioner for the purpose of securing loan for the project is creating security in favour of the Security Agent by way of (a) Mortgage on all immovable assets; (b) Hypothecation of all movable assets, (c) assignments of all project documents, clearance etc and (d) Pledge of share of the company, it requires approval of the Commission under Section 17(3) and (4) of the Act. Moreover, the beneficiaries in clause 9 (2) of the BPTA have allowed the first petitioner to create any encumbrance over all or part of the payment security mechanism or the other assets of the projects in favour of the lenders or lenders representative as security for amount payable under the Financing Agreement.

9. The transmission projects are capital intensive projects requiring huge capital investment. These projects are financed through loans for which the recourse is against the project. Therefore, it is essential that to enable the licensee to avail the loan facility to set up the transmission project, the licensee should be able to create security over the project assets, project documents



and project licenses and approvals. In the event there is default under the financing documents, the lenders can then enforce their security by substituting the licensee by their nominee. However, it would be necessary at that point of time for the Commission to verify the credentials of such nominee of the lenders to substitute the original licensee and to take over the project because the Commission will have to be satisfied about such nominee's capabilities (financial, technical and past experience) to set up and operate the transmission project. We are thus satisfied that the Security Trustee need to be given comfort by way of mortgage. We, therefore, accord our in principle approval allowing the applicant to create security in favour of Security Agent pursuant to Security Agent Agreement by way of mortgage on project assets by execution of indenture of mortgage for the project. We, however, make it clear that the transmission licence granted by the Commission to the first petitioner cannot be assigned in favour of the nominee of the Security Agent unless prior approval of the Commission has been obtained at the time of creating rights in favour of such nominee. Before agreeing to transfer of licence and the assets of the first petitioner to the nominee of Security Agent, the Commission has to 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. The licensee, lenders, security agent 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 accords 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 Agent and the nominee, approve the assignment of the licence to a nominee of the lenders. 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, finance documents and statements may be filed by the petitioner as and when required by the Commission for any specific purpose.

10. With the above, Petition No. 292/2010 stands disposed of.

Sd/-

(M.Deena Dayalan)
Member

Sd/-

(V.S.Verma)
Member

Sd/-

(S.Jayaraman)
Member

Sd/-

(Dr. Pramod Deo)
Chairperson

