

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 153/MP/2022

Coram:

Shri I.S.Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 31st October, 2022

In the matter of:

Petition for approval for creation of security interest under Section 17(3) & Section 17(4) of Electricity Act, 2003 over Petitioner No. 1's Assets in favour of Petitioner No. 2 (including its assignees, transferees, novates) for the purpose of Petitioner No.1's Transmission Project.

And

In the matter of

1. Khargone Transmission Limited,
F-1, The Mira Corporate Suites 1 & 2 Ishwar Nagar,
Okhla Crossing, Mathura Road,
New Delhi-110 065.

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

..... **Petitioners**

Vs

1. Madhya Pradesh Power Management Company Limited,
M-13, Green Park Main,
New Delhi-110016

2. Chhattisgarh State Power Distribution Company Limited,
4th Floor, Vidyut Seva Bhawan,
Daganiya, Raipur,
Chhattisgarh-492013

3. Gujarat Urja Vikas Nigam Limited,
Vidyut Bhawan, Race Course,
Vadodara-390007

4. **Maharashtra State Electricity Distribution Company Limited,**
Prakashgad, 5th Floor, Bandra (East),
Mumbai-400051

5. **Electricity Department, Govt. of Goa,**
66 kV Road, Amla,
Near Secretariat, Silvassa-396230

6. **DNH Power Distribution Corporation Limited,**
66 kV, Amla Road,
Silvassa-396230

7. **Electricity Department, Daman and Diu,**
Vidyut Bhavan, Kachigam Road,
Daman-396215

8. **Central Transmission Utility of India Limited**
Plot No. 2, Sector – 29,
Gurgaon – 122 001

9. **REC Power Development and Consultancy Limited**
Core-4, Scope Complex, Lodhi Road,
New Delhi – 110 003

.....Respondents

Parties Present:

Ms. Mandakini Ghosh, Advocate, KTL
Shri Aditya Singh, Advocate, MPPMCL
Shri Anup Jain, Advocate, MSEDCL
Shri Akshay Goel, Advocate, MSEDCL

ORDER

The First Petitioner herein, Khargone Transmission Limited, has been granted a transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as "the Act") to transmit electricity as a transmission licensee and for that purpose to undertake the business of establishing transmission system for “Transmission System Strengthening in WR associated with Khargone TPP (1320 MW)” on ‘Build, Own, Operate and Maintain’ (BOOM) basis, the details of which are specified in the schedule attached to the licence issued vide order dated 17.11.2016.

2. Khargone Transmission Limited and Catalyst Trusteeship Limited have jointly filed the present Petition for creation of security interest overall assets including the movable and immovable assets, accounts, projects documents, etc. of the First Petitioner in favour of Catalyst Trusteeship Limited (Second Petitioner) acting as Debenture Trustee pursuant to the Debenture Trust Deed and other relevant financing documents by way of mortgage/hypothecation/assignment of mortgaged properties and on project assets for the benefit of the lenders to the project. The Petitioners have made the following prayers:

“(a) Approve the creation of Security Interest, overall assets including the movable and immovable assets, accounts, Project documents etc. of Petitioner No 1 and to the extent as mentioned in paras 4 and 5 above, in favour of Petitioner No. 2, Debenture Trustee (acting on behalf of the Debenture Holders) and for their subsequent transferees, assigns, novatees and substitutes thereof and any refinancing lenders to the Project, pursuant to deed of hypothecation and power of attorney in relation thereto, mortgage documents and other security creating documents/ Debenture Documents and for future refinancing transactions also, by way of mortgage/hypothecation/assignment of Secured Assets and Project assets and for amendment of the security documents and any other Debenture Documents to include the assigns, transferees and novatees of the Debenture Trustee (acting on behalf of the Debenture Holders).

(b) Pass any other order/ directions that the Commission may deem fit and appropriate under the circumstances.”

3. The First Petitioner has submitted that for the purposes of raising finances for the Project during the construction period, First Petitioner requested the lenders, namely L&T Infrastructure Finance Company Ltd. and L&T Finance Ltd. to sanction financial assistance of Rs.1070 crore as rupee term loan. The First Petitioner, thereafter, approached the Commission vide Petition No. 106/MP/2017 for approval under Section 17 (3) and (4) of the Act to create security in favour of SBICAP Trustee Company

Limited acting as the Security Trustee for the benefit of the lenders. The Commission in its order dated 13.7.2017 had accorded the in-principle approval for creation of security in favour of SBICAP Trustee Company Limited.

4. However, for the purpose of part financing the implementation of the Project, the First Petitioner has now issued 12000 senior, rated, unlisted, secured, redeemable, non-convertible debentures having face value of Rs. ten lakh each, of the aggregate nominal value of Rs. 1200 crore to Aditya Birla Finance Limited, Aseem Infra Finance Limited and NIIF Infrastructure Finance Limited (hereinafter collectively referred to as 'Debenture Holders') on the terms and conditions contained in the Debenture Trust Deed and Debenture Trustee Agreement dated 2.3.2022 executed between the First Petitioner and Second Petitioner, Catalyst Trusteeship Limited. Subsequently, on the request of the First Petitioner, Catalyst Trusteeship Limited agreed to act as Debenture Trustee for the Debenture Holders including their assigns, transferees, novates ('Debenture Trustee')

5. The Petitioners have submitted that under the terms Debenture Trust Deed, the secured obligations about the Debentures shall be secured, *inter alia*, by:

(a) a first ranking exclusive charge by way of hypothecation in favour of Second Petitioner of all First Petitioner's movables including machinery, spares, tools and accessories, furniture, fixtures, vehicles, present & future in relation to the Project;

(b) a first ranking charge by way of mortgage in favour of Second Petitioner on all of Second Petitioner's immovable properties including but not limited to

civil structures, towers and cables, office buildings, present & future, including right of way/ land, if any for the Project;

(c) a first ranking charge by way of hypothecation on all intangible assets of the First Petitioner including but not limited to goodwill, uncalled capital, present & future in relation to the Project;

(d) a first ranking charge by way of assignment or creation of security interest, present & future, of all the rights, title, interest, benefits, claims and demands whatsoever of the First Petitioner in the Project Documents and Clearances;

(e) a first ranking charge on the trust and retention accounts including the monies lying thereunder, reserves and any other bank accounts of the First Petitioner in relation to the Project, by way of hypothecation wherever maintained, present & future in relation to the Project;

(f) a first ranking charge by way of hypothecation on all book debts, operating cash flows, receivables, commissions, revenues of whatsoever nature and wherever arising, of the First Petitioner, present & future in relation to the Project;

(g) Pledge of 51% equity shares and preference shares of the First Petitioner;

(h) Non-disposal undertaking in relation to the balance 49% of the equity shares and preference shares of the First Petitioner; and

(i) promoter deed of hypothecation.

6. The First Petitioner has submitted it has agreed to create security to the extent stated in paragraph 5 above in favor of the Second Petitioner pursuant to the deed of hypothecation and power of attorney in relation thereto, mortgage documents and other security/ financing documents, by way of mortgage/hypothecation/assignment in accordance with the deed of hypothecation. The First Petitioner has also agreed that it

shall be lawful for the Debenture Holders, upon enforcement of security interest, to enter into and take possession of the properties over which security interest has been created in terms of the Debenture documents and henceforth the First Petitioner shall not take action inconsistent with or prejudicial to the right of the Debenture Holders and its assigns, transferees and novates to quietly possess, use and enjoy the same and to receive the income, profits and benefits thereof without interruption or hindrance by the First Petitioner or any person or persons whosoever.

7. The First Petitioner has further submitted that 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 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, provided that:

(i) 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

(ii) Any encumbrance granted by the First Petitioner in accordance with Article 15.2.2 shall contain provisions pursuant to which the lenders or the representative of the lenders on their behalf agrees unconditionally with the First Petitioner to release such encumbrances upon payment by the First Petitioner to the lenders, of all amounts due under the Financing Agreements.

8. The First Petitioner has submitted that in terms of Article 15.2.4 of the TSA, the First Petitioner is required to take permission from this Commission prior to assignment

of its rights, benefits, interests 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 Act, the First Petitioner, as a licensee cannot create security interest over all the movable and immovable assets of the First Petitioner in favour of Debenture Trustee/Debenture Holders and for any subsequent transferees, assigns, novates thereof and any refinancing lenders to the project, acting on behalf of and for the benefit of the Debenture Holders and their assigns, transferees and novatees pursuant to Deed of hypothecation and power of attorney in relation thereof mortgage documents and other security creating documents/debenture documents and for future refinancing transactions also, by way of mortgage/hypothecation/assignment of secured properties and projects assets.

9. Reply to the Petition has been filed by the Respondents, Madhya Pradesh Power Management Company Limited (MPPMCL) and Maharashtra State Electricity Distribution Company Limited (MSEDCL) and the Petitioner has also filed its rejoinder to the said replies.

10. MSEDCL, in its reply dated 12.7.2022, has mainly submitted as under:

(a) TSA only provides the Petitioner to create encumbrance over all or part of the receivables, Letter of Credit or the other assets of the Project in favor of the Lenders. The TSA, however, 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, and (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) The encumbrance to be created by the Petitioner for the benefit of the lenders 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 as claimed in the Petition.

(c) As per the provision of TSA, any encumbrance granted by the Petitioner to the lenders shall be released by the lenders unconditionally upon payment of all the amounts due under the Financing Agreement by the Petitioner. Even in case of default of the Petitioner in debt payments, the Commission on the application made by lenders assigned the transmission license to the nominee of the lenders subject to the fulfilment of the provisions of the Regulations. Thus, the lenders are fully protected, and safeguard of the lenders is already taken care in the agreement. Any deviation from the TSA may not be allowed.

11. MPPMCL, in its reply dated 26.7.2022, has mainly submitted as under:

(a) As per the TSA, First Petitioner is required to create encumbrance over all or part of the receivables, Letter of Credit or the other assets of the Project in favour of the Lenders. Therefore, the encumbrance to be created by the Petitioner for the benefit of the lenders 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 as claimed in the Petition by the First Petitioner.

(b) The First Petitioner has not provided any details as to why such a charge on the Assets needs to be created in favour of the Second Petitioner when the scenario is totally covered in terms of Regulation 12 of the Transmission Licence Regulations. Creation of a Security Interest at the present stage is not warranted since the entire case is already covered under Regulation 12 of the Transmission Licence Regulations.

(c) The contention raised by the Petitioner regarding Goodwill, Project Documents and Clearances is totally in variance with provisions of the TSA. The encumbrance to be created by the First Petitioner for the benefit of the lenders shall be restricted to only receivables and other assets of the Project as mentioned in Article 15.2.2 of the TSA and ought not be extended to other parameters of the Project

(d) Reliance placed by the First Petitioner on the order of the Commission is misplaced since at the time of passing of the order in Petition No. 106/MP/2017, the question regarding inclusion of items in the relevant clause of the TSA was not under consideration. In the present case, the First Petitioner is including items which are beyond the scope of the relevant clause of the TSA.

Rejoinder to the reply of MSEDCL and MPPMCL

12. The Petitioner in its rejoinders dated 12.8.2022 to the reply of MSEDCL and MPPMCL has submitted as under:

(a) In terms of Article 15.2.2 of the TSA, First Petitioner is permitted to create encumbrance over all or on part of the receivables, Letter of Credit or other assets of the Project in favour of the Debenture Trustee, as security for amounts payable under the financing agreements. Article 15.2.4 of the TSA further permits the First Petitioner to transfer its rights and obligations under the TSA, with the prior approval of the Commission.

(b) First Petitioner has approached for creation of security interest in respect of *inter alia* a first-ranking charge by way of hypothecation on all intangible assets of the First Petitioner including but not limited to goodwill, uncalled capital, present & future in relation to the Project and a first ranking charge by way of assignment or creation of security interest, present & future, of all the rights, title, interest, benefits, claims and demands whatsoever of the First Petitioner in the Project Documents; and Clearances, in favour of the Debenture Trustee acting

for the benefit of the Debenture Holders, in terms of the Debenture Trust Deed and the Debenture Documents, Therefore, the same is not in variance with the provisions of the TSA.

(c) In project financing transactions (including for financing of transmission projects) it is a standard condition imposed by lenders/debenture holders, wherein rights of the borrowers/ licensees under the project documents, clearances and insurance policies, etc. are required to be assigned/ charged to the lenders/debenture holders of the project. The same has also been acknowledged by the Commission in several matters including in the matter of *WRSS XXI (A) Transco Limited v. Adani Green Energy Limited & Ors.*, wherein approval of the Commission was sought by the licensee for securing facility inter alia by a first charge by way of mortgage/hypothecation/charge/pledge/ assignment of secured properties and project assets in favour of the security trustee, present and future under all the project documents.

Hearing dated 27.9.2022

13. During the course of hearing, the Commission observed that creation of security interest over the share capital did not appear to be in consonance with the Act or TSA and directed the Petitioner to clarify how it is permissible under the Act or Regulations or TSA. Further, MSEDCL was directed to provide a copy of the order of Maharashtra Electricity Regulatory Commission (MERC) as referred to during the course of the hearing and the Petitioners was directed to file its brief submissions (not exceeding five pages) addressing the concerns/contentions of the Commission and Respondents including various stipulations/ conditions as referred to by the Respondent, MSEDCL.

14. MSEDCL, in its additional written submissions dated 10.10.2022, has submitted as under:

(a) Article 15.2.2. of the TSA lays down the limited parameters within the four corners of which any encumbrance can be created by the Petitioner. However, the Petitioner is creating security on the parameters, namely, (i) charge by way of hypothecation of movables, machineries, tools, accessories, furniture & fixtures, etc; (ii) Mortgage of immovable properties including right of way if any; (iii) hypothecation of all intangible assets, (iv) creation of charge on security interest, present or future, benefits, demands & claims if any; (v) charge on accounts reserves whether present or future; (vi) charge by way of hypothecation upon book debts, receivables, revenues if any; (vii) pledge of 51% shares along with promoter deed of hypothecation.

(b) The term “other assets” contained in Clause 15.2.2 of the TSA cannot be read in a manner to cover every possible asset and has to be read in a limited manner, *ejusdem generis* the “receivables” and “Letter of Credit” already stipulated thereunder. As such, the vast array of assets being sought to be encumbered by the Petitioner falls beyond the scope of the explicit contract between the parties.

(c) The security in the nature of pledge of shares and promoter deed by the Petitioner has never been allowed by this Commission, even on the purported precedents being relied upon by the Petitioner.

(d) As per Clause 15.3.2 of the TSA, the Commission has been conferred with a discretion to determine the facts and circumstances at the time of occurrence of default, if any, by the Petitioner and only upon such determination, decide on allowing certain benefits to the lenders of the Petitioner. However, if the present Petition is allowed, such discretion of this Commission will be superseded by an absolute right in favour of the lenders of the Petitioner for such benefits. Hence, the encumbrance sought to be created vide the present Petition is beyond the letter and spirit of the TSA.

(e) MERC vide its order dated 24.8.2022 in Case No. 30 of 2022 in a similar petition for creation of security under an identical TSA, while partly allowing the

said petition, imposed certain conditions in the interest of protecting the rights of all parties involved. Therefore, the same conditions out to be imposed on the Petitioner and its lenders so as to protect the rights of the MSEDCL as well as the other parties involved in the matter.

15. The Petitioner, in its written submissions dated 11.10.2022 reiterated the submissions made in the Petition and rejoinder and has mainly submitted as under:

(a) By virtue of *inter alia* the provisions of the Article 15.2.2 and Article 15.2.3 of the TSA, First Petitioner is entitled to create encumbrance/ security interest over the Project and all assets of the Project in favour of the Debenture Trustee acting for the benefit of the Debenture Holders, with prior approval of the Commission. Accordingly, the First Petitioner is good in law to approach this Commission for seeking the above permission.

(c) 'Other assets of the Project' in Article 15.2.2 needs to be read in a restricted manner only to the extent of receivables and letter of credit is incorrect. It is noteworthy that this Commission has in various orders, namely order dated 8.3.2022 in Petition No. 152/MP/2022, order dated 24.6.2022 in Petition No. 99/MP/2022, order dated 18.6.2022 in Petition No. 100/MP/2022, order dated 23.10.2021 in Petition No. 184/MP/2021 permitted the Petitioners in these Petitions for creation of similar security packages in favour of lenders/ debenture holders.

(d) The Commission in Petition No. 184/MP/2021 wherein pledge of securities issued by the licensee to third party pledgors is forming part of the security package, the Commission has also not highlighted or indicated any restriction on creation of third-party pledge over securities issued by the licensee and passed the order *inter alia* with respect to creation of security over the movable and immovable project assets of the licensee.

(e) The provisions of Article 15.2.3 of the TSA shall not be relevant or have any impact on the proposed security package as the said article provides for

exceptions to the restriction on creation of encumbrances in Article 15.2.1 of the TSA in certain instances as indicated above.

(f) With respect to creation of pledge over the shares of the First Petitioner ("Shares"), there is no restriction on the shareholders of the First Petitioner ("Third Party Pledgor") under either the Act or the TSA against creation of pledge over the shares of the First Petitioner. In this regard, it is noteworthy that the entire restriction with respect to creation of encumbrance/ charge/ security and/ or assignment under the Act and the TSA is applicable only to the licensee i.e., the First Petitioner in the present case. The said restriction does not apply to any Third Party Pledgor providing security in favour of the Debenture Trustee acting for the benefit of the Debenture Holders in the form of pledge. Accordingly, the creation of pledge of Shares by the Third Party Pledgor doesn't require prior approval of the Appropriate Commission.

(g) In the present Petition, the First Petitioner is not seeking approval for creation of pledge over the shares of the First Petitioner.

Analysis and Decision

16. The Petitioners have approached this Commission seeking permission to create security interest in respect of *inter alia* its (i) movable assets in relation to the Project, (ii) immovable properties in relation to the Project, intangible assets in relation to the Project, (iii) rights, title, interest and benefit, etc. in the Project Documents/ Clearances, (iv) trust and retention account in relation to the Project, (v) book debts, operating cash flows, receivables, commissions and revenues, etc. in relation to the Project, in favour of the Debenture Trustee acting for the benefit of the Debenture Holders, in terms of the Debenture Trust Deed and the Debenture Documents executed. Before going into the

merits of the case, we are first dealing with the objections of the Respondents in succeeding paragraphs.

17. The first objection of the Respondents MSEDCL and MPPMCL is that right of lenders is already protected under Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 ('Transmission Licence Regulations'), which provides that in case of default by the licensee in debt repayment, the Commission may on an application made by lenders assign the licence to the nominee of lenders and hence, creation of security interest at present stage is not warranted since the entire case is covered under the Transmission Licence Regulations.

18. We have considered the submissions of the Respondents and the Petitioner. Regulation 12 of the Transmission Licence Regulations provides that "in case of default by the licensee in debt repayment, the Commission may, on an application made by the lenders, assign the licence to the nominee of the lenders. However, the present case has been filed by the Petitioner seeking permission to create security interest in respect of *inter alia* its (i) movable assets in relation to the Project, (ii) immovable properties in relation to the Project, intangible assets in relation to the Project, (iii) rights, title, interest, benefit, etc. in the Project Documents/ Clearances, (iv) trust and retention account in relation to the Project, (v) book debts, operating cash flows, receivables, commissions, revenues, etc. in relation to the Project, in favour of the Debenture Trustee acting for the benefit of the Debenture Holders, in terms of the Debenture Trust Deed and the Debenture Documents executed therein. Since the lenders have not

invoked Regulation 12 of the Trading Licence Regulations in the present Petition, the reliance of the Respondents on Regulation 12 is not correct.

19. Further, it may be noted that Regulation 12 of the Transmission Licence Regulations is only an enabling provision for lenders of licensee seeking to assign the transmission licence in favour of their nominee in case of default by the licensee. However, this cannot be construed to mean that in view of such enabling provision the lenders or the debenture holders in this case may not be required to safeguard their interest by creation of security interest over the assets of the licensee for the loan/debt amount. Even the provisions of the TSA clearly provide for creation of encumbrance(s) in favour of the lenders or their representative as security for amounts payable under the Financing Agreements. Therefore, the contention of the Respondents that by virtue of Regulation 12 of the Transmission Licence Regulations, a creation of security interest may not require at this stage is, in our view, misplaced and contrary to the standard business practice(s) at large and thus, deserves to be rejected.

20. The Second objection of the Respondents is that the creation of security interest over the goodwill, project documents, and clearances as sought by the First Petitioner is totally in variance with the provisions of TSA which, at Article 15.2.2, provides that encumbrance to be created by the First Petitioner for the benefits of lenders shall be restricted to only receivable and other assets of the project which ought not to be extended to other parameters of the project as claimed and contended by the Petitioner No.1 as it would render the Article 15.2.3 meaningless.

21. We have considered the submissions of the parties. Articles 15.2.1 & 15.2.2 provides as under:

“15.2.1 Neither Party shall create or permit to subsist any encumbrance over all or any of its rights and benefits under this Agreement.

15.2.2 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 Lender’s Representative on their behalf, as security for amounts payable under the Financing Agreements and any other amounts agreed by the Parties.

Provided that:

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

ii. Any encumbrance granted by 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 TSP to the Lenders of all amount due under the Financing Agreements.”

Further, Article 15.2.3 provides as under:

“15.2.3 Article 15.2.1 does not apply to:

a. liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of the TSP carrying out the Project;

b. pledges of goods, the related documents of title and / or other related documents, arising or created in the ordinary course of the TSP carrying out the Project; or

c. security arising out of retention of title provisions in relation to goods acquired in the ordinary course of the TSP carrying out the Project.

22. In our opinion, the scope of Article 15.2.3 carved out as exclusion is clearly defined. It excludes (a) the creation of encumbrance over liens arising by operation of law, (b) pledges of goods including the related documents of titles/other related documents, and (c) security arising out of retention of title provisions in relation to goods, all the three conditions have been qualified with text ‘in the ordinary course’ of carrying out the project. It is noticed that since the Petitioner has not sought creation of

encumbrance on the aforesaid items, the Respondents' apprehensions in this regard are unfounded.

23. Third objection of MSEDCL is that the expression "other asset" of the project has to be read in context of receivable and letter of credit and not independently as sought by the First Petitioner to include therein various elements/ parameters which are not allowed in TSA. In similar case, MERC vide its order dated 24.8.2022 in Case No. 30 of 2022 has stipulated certain conditions while allowing the licensee to create security interest. Therefore, the Commission may also consider specifying such conditions while permitting the First Petitioner to create the security interest. The Petitioner has submitted that reliance placed by MSEDCL upon the order of MERC is not applicable to the present case and this Commission is not bound by the orders of the MERC.

24. We have considered the submissions of MSEDCL and the Petitioner. The relevant extract of the order of MERC as quoted by MSEDCL in its additional submission is reproduced hereunder:

"1. Case No. 30 of 2022 is partly allowed.

2. Creation of Security Interest by way of hypothecation/mortgage/charge/pledge/assignment etc., over assets of Kharghar Vikhroli Transmission Ltd., including the movable and immovable assets, Project accounts, Project documents (including assignment of transmission licence) etc. of Kharghar Vikhroli Transmission Ltd. in favour of Respondent No. 9 Catalyst Trusteeship Ltd./Security Trustee is allowed to secure Kharghar Vikhroli Transmission Ltd.'s obligations towards the existing Lenders under the Financing Documents subject to the following conditions:

A. On account of the proposed financing arrangement, there shall not be any additional claim on account of change in law or other additional burden on the beneficiaries.

B. Security granted by Kharghar Vikhroli Transmission Ltd. shall be ring fenced to the obligation under the facilities for which KVTL is acting as a borrower.

C. The Transmission Licence of Kharghar Vikhroli Transmission Ltd., the underlying assets, Project accounts, Project documents etc. cannot be assigned in favour of the nominee of the Security Trustee/Lenders unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee.

D. Lenders have to comply with the first proviso to clause 15.2.2 of the Transmission Service Agreement.

E. Kharghar Vikhroli Transmission Ltd. shall ensure the compliance of the clause 18.2 of the TSA relating to Equity Lock In period.

F. Kharghar Vikhroli Transmission Ltd. shall retain the operational control over Transmission assets.

3. Kharghar Vikhroli Transmission Ltd. shall ensure adherence to all the obligations under the Security Trustee Agreement and the Facility Agreement in timely manner to avoid any default towards its lenders. Kharghar Vikhroli Transmission Ltd. shall keep informed the Long-Term Transmission Customers on six monthly basis, about its fulfillment of the payment obligations to its lenders vis-à-vis the timelines and other requirement as provided in the financing agreements.” [Emphasis Supplied]

25. It is noticed that except condition ‘B’, all other conditions laid by MERC are relating to compliance of the provisions of TSA, Security Trustee Agreement and Facility Agreement. While Condition ‘B’ is not applicable in the present case, all the other conditions are equally applicable in the present matter and are already stipulated in the TSA. For instance, the definition of “Financing Agreements” itself specifies that such agreements shall not in any manner increase the liabilities of the LTTCs. Similarly, Article 15.3.1 also restricts the assignment of transmission licence or transfer of project or part thereof to any person by sale, lease, exchange or otherwise without prior approval of the Commission. The Petitioner is bound to comply with such terms of the TSA and provisions of Transmission Licence Regulations and Section 17 of the Act. Needless to add, there shall not be an additional burden in terms of an increase in tariff on account of the creation of encumbrance.

26. With regard to creation of pledge over the shares of the First Petitioner, the First Petitioner vide its written submissions dated 11.10.2022 has submitted that in the instant Petition, the First Petitioner is not seeking approval for creation of pledge over the shares of the First Petitioner. Since the First Petitioner has waived its prayer for approval of pledge over its shares, the prayer regarding creation of pledge over the shares has become infructuous.

27. In addition, pertinently, the present proceedings shall not amend the discovered tariff adopted by the Commission under Section 63 of the Act. Creation of security interest in favour of lenders would not in any manner adversely affect the tariff discovered through competitive bidding process and the interest of beneficiaries/LTTC of the project would remain protected.

28. Thus, the creation the security interest over all assets including the movable and immovable assets, etc. of the First Petitioner in favour of the Debenture Holders would not prejudice any interest or benefits of the beneficiaries of the First Petitioner or in any way weaken the obligations of the licensee under the transmission licence and project documents. Therefore, the contrary contentions of the Respondents are not tenable.

Merits of the case

29. After grant of a licence, the First Petitioner approached the Commission by way of Petition No. 106/MP/2017 for creation of security interest for an amount of Rs. 1070 crore in favour of the Security Trustee, namely SBICAP Trustee Company Limited in favour of lenders. Approval was accorded vide order dated 13.7.2017.

30. The original financing plan agreed upon by the previous lenders (L&T Infrastructure Finance Company Ltd. and L&T Finance Ltd.) as per Common Loan Agreement is as follows:

Original Financing plan agreed upon by the lenders as per Common Loan Agreement			
Original Estimated Project cost (as per agreement)	Rs. (in crore)	Means of Finance (as per agreement)	Rs. (in crore)
Hard Cost	1335.00	Equity share capital / Share Premium	75.55
IEDC	327.00	Loan/debenture from promoters, group companies	386.45
		Compulsorily Convertible Debentures from Promoter	
		Secured loan / debt from External source	1200.00
Total	1662.00	Total	1662.00

31. The details of Debenture Holders (fresh financial plan) are as follows:

Lender-wise details (Rs. in crore)			
Sr. No.	Debenture Holders Name	Sanctioned loan (as per loan agreement)	Actual loan as of 15th Feb, 2022
1.	Aseem Infra Finance Limited	525	525
2.	NIIF Infrastructure Finance Limited	450	450
3.	Aditya Birla Finance Limited	225	225
	Total	1200	1200

32. To part finance the implementation of the Project, the First Petitioner has issued 12000 seniors, rated, unlisted, secured, redeemable, non-convertible debenture having face value of INR 10,00,000/- each, of the aggregate nominal value of Rs. 1200 crore. A total of Rs. 1200 crore are payable to the Debenture Holders i.e. Aditya Birla Finance

Limited (ABFL), Aseem Infra Finance Limited (AIFL) and NIIF Infrastructure Finance Limited (NIIF IFL) on the terms and conditions contained in the debenture Trust Deed dated 2.3.2022, based on the terms and conditions laid out in the Debenture Trust Deed and Debenture Trustee Agreement dated 2.3.2022 executed between the First Petitioner and Second Petitioner, Catalyst Trusteeship Limited. The First Petitioner had approached Catalyst Trusteeship Limited to act as the Debenture Trustee for the benefit of the Debenture Holders. Catalyst Trusteeship Limited had agreed to act as the Debenture Trustee for the Debenture Holders on the terms and conditions agreed in the Debenture Trustee Agreement.

33. The Petitioners has submitted that the First Petitioner has paid the entire amount of Rs.1070 crore to the previous leaders, namely L&T Infrastructure Finance Company Limited and L& T Finance Limited and said lenders have issued No Dues Certificate (NOC) to the First Petitioner copy of which has been placed on record.

34. The transmission projects are capital-intensive projects requiring huge capital investment. These projects are financed through equity of the project developer and loans by the financial institutions and issuance of debentures which is a form of a loan. It is a normal practice followed by financial institution/banking industries to ask for sufficient security from the borrower to back the loan in order to mitigate the credit risk of the lenders. In the instant case, the First Petitioner have appointed the Second Petitioner viz Catalyst Trusteeship Limited as Debenture Trustee for creation of security over all the movable and immovable assets of the project. Accordingly, Debenture Trustee Appointment Agreement and Debenture Trust Deed dated

2.3.2022 have been executed for a loan of Rs. 1200 crore the First Petitioner issued 120000 non-convertible debentures of a face value of Rs.10 lakh each. In accordance with Article 15.2 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 lenders or the lender's representatives, as security for amounts payable under the Financing Agreements and any other amounts agreed by the parties.

35. Section 17 (3) and (4) of the Act 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."

As per the above provision, a licensee is required to obtain prior 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.

36. The creation of a charge in specific property gives the charge-holder a right to recover a certain sum of money from the value of the property charged and to that exact extent reduces the interest of the creator of the charge in the property. A charge, therefore, is a transfer of an interest in property in the sense that an interest which has existed in the creator or the charge passes to the holder of the charge and creates an interest almost the same as an interest created by a simple mortgage.

37. The First Petitioner has approached for approval for creation of security interest in favour of Catalyst Trusteeship Limited as Debenture Trustee. In our view, Catalyst Trusteeship Limited as Debenture Trustee needs to be given comfort for creation of security for the benefit of the debenture holders/banks/financial institutions/non-banking financial companies as security for the financial assistance provided by them. We, therefore, accord approval allowing the First Petitioner to create security in favour of Catalyst Trusteeship Limited, presently acting as Debenture Trustee according to Debenture Trust Deed by way of mortgage on Project assets including movable and immovable assets, Accounts, Project documents, etc., as mentioned in paragraph 5 (a) to (f) above, by execution of Debenture Trust Deed and other debenture and refinancing documents for the project for an amount not exceeding Rs. 1200 crore subject to the following conditions:

- (a) The First Petitioner shall not dilute its equity holding;
- (b) The First Petitioner shall ensure the compliance of the Article 18.2 of the TSA relating to equity-lock-in period;
- (c) The First Petitioner shall not deviate from the proposed financing for the equity lock in commitment as provided in Article 18.2.4 of the TSA; and
- (d) The First Petitioner shall suitably modify the Debenture Trustee Agreement and Debenture Trust Deed to exclude clause (g) and clause (h) of paragraph 5 above

38. It is, however, made clear that the transmission licence granted by the Commission to the First Petitioner and the underlying assets cannot be assigned in favour of the nominee of the Debenture Trustee unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee. Before agreeing to the assignment of the licence and the assets of the First Petitioner to the nominee of Debenture Trustee, the Commission shall evaluate such 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, debenture trustee or its nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself about the circumstances necessitating such transfer. This decision of ours is in accordance with Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 which reads as under:

“12. Assignment of Licence In case of default by the licensee in debt repayment, the Commission may, on an application made by the lenders, assign the licence to a nominee of the lenders.”

Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lender, Debenture Trustee or its nominee, approve the assignment of the licence to a nominee of the lender(s) subject to the proper due diligence of the process. Therefore, specific prior approval of the Commission shall be necessary for assigning the licence to the

Debenture Trustee or its nominee and transfer of any assets to them. Lastly, finance documents and statements shall be filed by the Petitioner as and when required by the Commission for any specific purpose.

39. This approval is issued in supersession of earlier approval including approval dated 13.7.2017 in Petition No. 106/MP/2017 under Section 17 (3) and (4) of the Act to the First Petitioner.

40. The Petition No. 153/MP/2022 is disposed of in terms of the above.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S.Jha)
Member