

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 267/MP/2021

Coram:

Shri P.K. Pujari, Chairperson

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 8th March, 2022

In the matter of

Petition seeking approval under Sections 17(3) and 17(4) of the Electricity Act, 2003, read with Article 15.3 of the Transmission Service Agreement dated 13.1.2016, Article 17.3 of the Supplementary Transmissions Service Agreement dated 3.7.2017 and Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009.

And

In the matter of

1. NRSS XXXVI Transmission Limited,

B-10, Essel House, Lawrence Road,
New Delhi-110 035.

2. PTC India Financial Services Limited,

7th Floor, Telephone Exchange Building,
8, Bikaji Cama Place,
New Delhi-110 066.

3. Resurgent Power Ventures Pte. Limited,

9, Raffles Place,
26-01 Republic Plaza,
Singapore-048 619.

.....Petitioners

Vs.

1. U.P Power Corporation Limited,

14th Floor, Shakti Bhawan Extension,
14 - Ashok Marg,
Lucknow- 226 001.

2. Punjab State Power Corporation Limited,

D-3, Shakti Vihar,
Patiala- 147 001.

3. Electricity wing of Engineering Department,

Union Territory of Chandigarh,
Electricity Operation Circle,
UT Secretariat Building, 5th floor,
Sector 9-D,
Chandigarh-160 009.

4. BSES Yamuna Power Limited,
2nd Floor, Shakti Kiran Bldg.,
Karkardooma,
New Delhi-110 092.

5. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
New Delhi-110 019

6. Tata Power Delhi Distribution Limited,
NDPL House, Hudson Lines, Kingsway Camp,
Delhi-110 009

7. New Delhi Municipal Council,
NDMC, 5th Floor, Palika Kendra,
New Delhi-110 001.

8. Himachal Pradesh State Electricity Board Limited,
Vidyut Bhawan,
Shimla-171 004.

9. Haryana Power Purchase Centre,
Shakti Bhavan Energy Exchange Room No. 446,
Top Floor, Sector - 6,
Panchkula – 134 109.

10. Power Development Department,
Government of Jammu and Kashmir,
Room No.1/27, Mini Block
Civil Secretariat,
Srinagar-190 009.

11. Uttarakhand Power Corporation Limited,
Urja Bhawan Kanwali Road,
Dehradun- 248 001.

12. Rajasthan Discoms Power Procurement Centre,
Shed No. 5/4, Vidyut Bhawan,
Janpath, Jyoti Nagar
Jaipur-302 005.

13. Central Transmission Utility of India Limited,
B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi- 110 016.

14. Essel Infraprojects Limited,
6th Floor, Plot No. 19,
Film City, Sector – 16,
Gautam Buddha Nagar, Noida,
Uttar Pradesh- 201 301.

.....**Respondents**

Parties present:

Shri Venkatesh, Advocate, Resurgent Power
Shri Ashutosh K. Srivastava, Advocate, Resurgent Power
Shri Neil Chatterjee, Advocate, Resurgent Power
Shri Jayant Bajaj, Advocate, Resurgent Power
Shri Randolph DSouza, Resurgent Power
Ms. Mandakini Ghosh, Advocate, PIFSL
Shri Vishal Goyal, Advocate, PIFSL
Ms. Shikha Jain, Advocate, PIFSL
Ms. Ritwika Nanda, Advocate, Essel Infra
Shri Suresh Gehani, ABPS

ORDER

The Petitioners, NRSS XXXVI Transmission Limited (in short 'NRTL'), its lender and Security Trustee, PTC India Financial Services Limited (in short, 'PIFSL') and Resurgent Power Ventures Pte. Limited (in short, 'RPVPL') (hereinafter collectively referred to as 'the Petitioners') have jointly filed the present Petition under Sub-sections (3) and (4) of Section 17 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Transmission Licence and other related matters) Regulations, 2009 (hereinafter referred to as 'the Transmission Licence Regulations') and Article 15.3 of the Transmission Service Agreement (in short, 'the TSA') dated 13.1.2016 and Supplementary TSA dated 3.7.2017 seeking prior approval of the Commission for transfer of the equity shareholding and management control of NRTL in favour of the nominee of the lender of NRTL, i.e. RPVPL. The Petitioners have made the following prayers:

“(a) Allow the present Petition;

(b) Allow the Lender to exercise the substitution right under Article 15.3.2 of the TSA and Article 17.3.2 of the Supplementary TSA;

(c) Grant approval for transfer of 100% shareholding/ any other securities held by Essel Infra or its affiliates (including that which is held under pledge by the Lender) in NRSS XXXVI Transmission Limited in favour of Resurgent Power Ventures Pte. Ltd. (Lender's Nominee) under Share Purchase Agreement;

(d) In the interim, issue directions to restrain the beneficiaries of the transmission system from taking any coercive actions under the TSA and Supplementary TSA including encashing of CPG, till the completion of the Project so that the transmission system can be expeditiously developed by Lender's Nominee....."

Background

2. NRTL is a fully owned subsidiary of Essel Infraprojects Limited (In short 'Essel Infra') which was selected as a successful bidder through the international tariff based competitive bidding process under Section 63 of the Act to establish the transmission system for "System Strengthening Scheme in Northern Region (NRSS-XXXVI) along with LILO of Sikar-Neemrana 400 KV D/C line at Babai (RRVPNL)" (hereinafter referred to as "the Transmission System" or "the Project") on Build, Own, Operate and Maintain (BOOM) basis and to provide transmission service to the Long Term Transmission Customers (LTTCs) of the Project.

3. NRTL was incorporated as a special purpose vehicle by the Bid Process Coordinator, REC Transmission Projects Company Limited (RECTPCL) as part of Tariff Based Competitive Bidding process for implementing the Project on BOOM basis. On 13.1.2016, Transmission Service Agreement (TSA) was executed between NRTL and LTTCs of the Project. Essel Infra participated in the competitive bidding process conducted by RECTPCL and upon emerging as the successful bidder, the Letter of Intent (LOI) was issued to Essel Infra on 28.3.2016. In accordance with the bidding documents, Essel Infra acquired 100% of the shareholding in NRTL by executing a Share Purchase Agreement with RECTPCL on 22.8.2016. The

Commission by its order dated 7.12.2016 in Petition No. 161/TL/2016 granted transmission licence to NRTL for inter-State transmission of electricity. As per the TSA dated 13.1.2016, the Transmission System comprised of six elements. Scheduled Commercial Operation Date (SCOD) for element 1 and element 2 of the Transmission System was 40 months from the effective date, for element 3 and element 5 of the Transmission System it was December 2016, whereas element 4 and element 6 were to be commissioned within 34 months from the effective date.

4. For the purpose of financing the Project, NRTL had requested lender, PIFSL to provide financial assistance to the extent of Rs.306 crore as Rupee Term Loan for construction, development and implementation of the Project on the terms and conditions set out in the Common Facility Agreement dated 7.11.2017 and other financing documents for which PIFSL had agreed to. Further, NRTL and PIFSL executed Security Trustee Agreement dated 7.11.2017 authorizing PIFSL to act as Security Trustee for the benefit of lender and its novates, assignees and transferees. NRTL had approached the Commission in Petition No. 266/MP/2017 for approval under Section 17(3) and Section 17(4) of the Act read with Article 15.2.2 of the TSA to create security interest over all movable and immovable assets of the Project in favour of PIFSL, acting for the benefit and on behalf of the lender. The Commission by its order dated 8.3.2018 in Petition No. 266/MP/2017 accorded in-principle approval allowing NRTL to create security interest in favour of PIFSL, acting as Security Trustee pursuant to Security Trustee Agreement by way of mortgage and/or hypothecation and/or assignment and/or substitution and/or charge, as the case may be, on assets of the Project by execution of indenture of mortgage for the Project. In the said order, the Commission observed that in case of default by the licensee/NRTL in debt repayment, the licensee, lender, security trustee nominee

may jointly approach the Commission for assignment of transmission licence to the nominee of lender and that specific prior approval of the Commission in this regard shall always be needed. Pursuant to aforesaid approval, NRTL entered into Indenture of Mortgage with PIFSL on 1.6.2018 creating a first charge in favour of PIFSL. It is submitted that total amount of debt disbursed to NRTL by PIFSL is Rs.206.92 crore out of the sanctioned loan of Rs.306 crore.

5. The Petitioners have submitted that the implementation of the Project, however, has been impeded due to delay in obtaining approvals, clearances, No Objection Certificate and various force majeure events faced by NRTL and that NRTL has already filed Petition in this regard before the Commission, which is pending for consideration. The Petitioners have submitted that due to continued conditions of force majeure, the Project has been subjected to significant time and cost overrun and NRTL has been unable to arrange additional financial resources including from Essel Infra to infuse additional capital. It has been further submitted that, on account of deteriorating financial condition of Essel Infra, there has been continuous default by NRTL in its debt repayment to its lender and, accordingly, the debt was classified as NPA by PIFSL. In view of the continuous defaults on interest as well as debt repayment, the lender, PIFSL decided to exercise 'Lender's Substitution Rights' as per Article 15.3 of the TSA. Accordingly, in order to revive NRTL and to complete the Project, the lender (PIFSL) appointed an Independent Consultant, namely, ABPS Infrastructure Advisory Private Limited (in short, 'ABPS Infra') for conducting a global competitive bidding process for finalizing its nominee in a transparent manner. ABPS Infra issued a single stage RfP on 17.11.2020 for selection of bidder to act as lender's nominee and acquire entire shareholding of NRTL and to execute and operate all works associated with the Project under the

TSA. Pursuant to the detailed evaluation of technical and financial bids received in response to the RfP, RPVPL emerged as the successful bidder and was issued Letter of Intent (LoI) on 11.11.2021.

6. In light of the above, the Petitioners have filed the present Petition under Sub-section (3) and Sub-section (4) of Section 17 of the Act read with Regulation 12 of the Transmission Licence Regulations, Article 15.3 of the TSA dated 13.1.2016 and Article 17.3 of the Supplementary TSA dated 3.7.2017 seeking prior approval of transfer of 100% shareholding/ any other securities held by Essel Infra or its affiliate in NRTL in favour of the lender - PIFSL's nominee i.e. RPVPL.

Hearing dated 11.1.2022

7. The matter was heard on 11.1.2022 and notices were issued to the Respondents to file their replies. However, no reply has been filed by the Respondents despite notice.

Hearing dated 24.2.2022

8. The matter was heard on 24.2.2022 through video conferencing. During the course of hearing, learned counsel for the Petitioner, RPVPL reiterated the submissions made in the Petition and submitted that since the lender's nominee would undertake implementation of the Project upon the approval of the Commission, it is imperative that a reasonable protection is accorded to such nominee, RPVPL to undertake implementation works and commission the Project post acquisition of shareholding. In this regard, learned counsel placed reliance on the Commission's order dated 7.2.2021 in Petition No. 334/MP/2020 in the case of Warora Kurnool Transmission Limited v. TANGEDCO and Others.

Analysis and Decision

9. We have considered the submissions made by the Petitioners and perused documents available on record. The Petitioners have filed the present Petition under Sub-section (3) and Sub-section (4) of Section 17 of the Act read with Article 15.3 of the TSA and Article 17.3 of the Supplementary Agreement seeking prior approval of the Commission for transfer of equity shareholding and management control of NRTL in favour of nominee of lender i.e. RPVPL.

10. Section 17 of the Act provides as under:

“17. Licensee not to do certain things: (1) No licensee shall, without prior approval of the Appropriate Commission,

(a) undertake any transaction to acquire by purchase or takeover or otherwise, the utility of any other licensee; or

(b) merge his utility with the utility of any other licensee:

Provided that nothing contained in this sub-section shall apply if the utility of the licensee is situate in a State other than the State in which the utility referred to in clause (a) or clause (b) is situate.

(2) Every licensee shall, before obtaining the approval under sub-section (1), give not less than one month's notice to every other licensee who transmits or distributes, electricity in the area of such licensee who applies for such approval.

(3) No licensee shall at 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.”

11. As per clause (1) of Section 17 of the Act, a licensee cannot acquire the utility of any other licensee nor merge its utility with the utility of any other licensee without the prior approval of the Appropriate Commission. Sub-section (3) of Section 17 of

the Act provides that no licensee shall transfer its utility by sale, lease, exchange or otherwise and assign its licence without the prior approval of the Appropriate Commission. Sub-section (4) of Section 17 further states that any agreement relating to any transaction in terms of sub-section (1), i.e. for acquisition and merger of the utility and in terms of sub-section (2) i.e. transfer of utility or assignment of licence, without obtaining the prior approval of the Appropriate Commission shall be void.

12. Article 15 of the TSA provides as under:

“15.3 Substitution Rights of the Lenders

15.3.1 The TSP would need to operate and maintain the Project under the provisions of the Transmission License granted by the Appropriate Commission and the provisions of this Agreement and cannot assign the Transmission License or transfer the Project or part thereof to any person by sale, lease, exchange or otherwise, without the prior approval of the Appropriate Commission.

15.3.2 However, in the case of default by the TSP in debt repayments, the Appropriate Commission may, on an application from the Lenders, assign the Transmission License to the nominee of the Lenders subject to the fulfilment of the qualification requirements and provisions of the Central Electricity Regulatory Commission (Procedure, terms and Conditions for grant of Transmission License and other related matters) Regulations, 2006 or as amended from time to time.

13. Under Article 15.3.1 of the TSA, NRTL as the TSP is required to operate and maintain the project under the provisions of the Transmission Licence and the TSA and cannot assign the transmission licence or transfer the Project or part thereof to any person by sale, lease, exchange or otherwise without prior approval of the Commission. This provision is *pari materia* with provisions of Sub-section (3) of Section 17 of the Act which provides that “*no licensee shall at 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*”. Article 15.3.2 of the TSA carves out an exception to Article 15.3.1 and provides that in case of default on the part of TSP in debt repayments, on an application from the lenders, the Commission may assign the transmission licence to the nominee of the lenders if

the said nominee fulfills the qualification requirements and provisions of the Transmission Licence Regulations.

14. For the purpose of construction of the Project and raising funds, NRTL had entered into Facility Agreement dated 7.11.2017 with PIFSL, whereby PIFSL as the sole lender agreed to provide financial assistance to the extent of Rs.306 crore (Rs.286 crore as senior debt facility and Rs.20 crore as subordinate debt facility) against the total Project cost of Rs.408 crore. Pursuant thereto, NRTL and PIFSL entered into Security Trustee Agreement authorizing PIFSL to act as Security Trustee for the benefit of rupee lender/ secured parties. Further, Essel Infra, NRTL and PIFSL executed Deed of Pledge in order to secure the obligations under the Facility Agreement and other financing documents by pledging shares of NRTL held by Essel Infra. Currently, 99.99% of the issued and paid up shares of NRTL are pledged with PIFSL. Total amount of debt disbursed to NRTL by PIFSL is Rs.206.92 crore out of the sanctioned amount of Rs.306 crore.

15. NRTL had approached the Commission through Petition No. 266/MP/2017 under Sub-sections (3) and (4) of Section 17 of the Act read with Article 15.2.2 of the TSA and Article 17.2.2 of the Supplementary TSA seeking approval for creating security interest over all its movable and immovable assets, TSA, transmission licence and all project documents, cash flows, receivables and bank accounts, etc. in favour of PIFSL. The Commission vide order dated 8.3.2018 while according in-principle approval to NRTL to create security interest in favour of PIFSL had observed as under:

"19.We are satisfied that PTC India Financial Services Limited as Security Trustee needs to be given comfort for creation of security for the benefit of banks/financial institutions/non-banking financial companies as security for the financial assistance provided by the lender. We, therefore, accord in principle approval allowing the First Petitioner to create security interest over the immovable

and movable assets, intangible and current assets of the project, cash flows, receivables, bank accounts, TSA, clearances, approvals and other project documents/clearances including but not limited to any amendments, supplements to the existing project documents and the transmission licence in favour of PTC India Financial Services Limited, presently acting as Security Trustee pursuant to Security Trustee Agreement and Common Facility Agreement subject to compliance of the provisions of the Article 18.2 of the TSA.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 Security Trustee unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee. The Representative of the First Petitioner during the hearing submitted that the Petitioner company is a separate legal entity and has its own books of account and balance sheet. We direct that the First Petitioner shall continue to maintain its own books of accounts and balance sheet. Before agreeing to transfer the licence and the assets of the First Petitioner to the nominee of Security Trustee, the Commission shall 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 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."

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 the nominee, approve the assignment of the licence to a nominee of the lender 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.

16. Thus, in the aforesaid order, the Commission, while according in-principle approval to the licensee to create security interest over its movable and immovable assets, etc. in favour of PIFSL had clarified that the transmission licence granted by the Commission to the licensee and its underlying assets cannot be assigned in favour of the nominee of the Security Trustee unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee.

Further, the Commission also observed that in case of default by the licensee in debt repayment, the Commission may approve the assignment of licence to a nominee of the lender on a joint application made by the licensee, lender, security trustee and the nominee of the lender subject to the proper due diligence of the process.

17. Accordingly, the Petitioners have approached this Commission in terms of the above provisions and as per liberty granted by the Commission vide order dated 8.3.2018 in Petition No. 266/MP/2017, upon NRTL having defaulted in its debt repayments and consequently, PIFSL having exercised its right to substitute under the TSA. According to the Petitioners, owing to the various force majeure events being faced, the Project has resulted in significant time and cost overrun and NRTL had been unable to arrange additional financial resources including from its sponsor - Essel Infra to infuse additional capital and to implement the Project.

18. In order to substantiate the default in debt obligations by NRTL, the Petitioners have placed on record the e-mails issued by the lender to NRTL indicating the overdue in terms of the principal and interest amounts and requesting the immediate clearance of the dues. As is evident from one of the e-mails, NRTL had failed to clear outstanding amount of approximately Rs.13.37 crore as on July 10, 2020.

19. The Petitioners have placed on record concurrence of Essel Infra for initiating process for appointment of new nominee vide Board of Director Resolution dated 16.6.2020. In the said Resolution, it has been acknowledged that owing to significant delay in the Project, the valuation of the Project has deteriorated and in order to give a fair value to incoming promoter, Essel Infra is ready to forego its entire investment in NRTL to any new sponsor/ entity. On the above basis, NRTL vide its letter dated

21.9.2020, granted 'No Objection' for initiating process for substitution of nominee/ investor who can complete the Project. In the said letter, it has been clearly conveyed that owing to financial stress, Essel Infra is finding it difficult to infuse further equity into NRTL and in order to find an amicable solution in the best interest of the Project, PIFSL may evaluate various options including substitution of its nominee as per the provisions of the TSA to complete the Project. The relevant extract of the said letter is reproduced as under:

"...The subject Transmission Project was acquired by EIL through Tariff Based Competitive Bidding (TBCB) process and is under implementation with PTC India Financial Services as sole Lender.

However, owing to financial stress in Essel Infraprojects Limited (EIL), the parent Company is finding it difficult to infuse further equity into NRSS XXXVI Project. Under these circumstances to find an amicable solution and also in the best interest of project, we request PTC India Financial Services to evaluate various options including substitution of its Nominee as per the provisions of Transmission Service Agreement (TSA) to complete the subject Transmission Project.

We have also shared EIL Board resolution indicating our intention to forego equity infused into this Project. The copy of Board resolution dated 16th June 2020 is enclosed for ready reference.

In view of the foregoing, you may treat this letter as No Objection letter for initiating process for substitution of Nominee/Investor who can complete the project and relieve Essel Infraprojects Limited from all its liabilities."

20. Hence, in view the continuous default in the service of debt obligations by NRTL and the said debt being classified as NPA, the lender PIFSL decided to exercise its right to substitute Essel Infra with its nominee and for that purpose decided to conduct a global competitive bidding process for selection of lender's nominee who will acquire 100% shareholding and any other securities held by Essel Infra or its affiliate in NRTL and thereby, undertake implementation of the remaining part of the Project.

21. It is pertinent to note that the Commission has already considered the change in ownership by way of transfer of equity shareholding under Section 17(3) of the Act

read with Article 15.3.2 of the TSA in its order dated 27.1.2021 in Petition No.71/MP/2020 (Warora Kurnool Transmission Limited v. TANGEDCO and Ors.). The Commission in the said order permitted transfer of entire shareholding of Warora Kurnool Transmission Limited in transmission licensee, Adani Transmission Limited under Section 17(3) of the Act. The relevant extract of the said order dated 27.1.2021 is reproduced as under:

“35. We have examined the submissions of the parties. Respondents have referred to provisions of Article 15.3.2 of the TSA in arguing that only ‘assignment of licence’ or ‘transfer of utility’ is allowed under the TSA. In our view, strict reading of the term ‘assignment of licence’ under Article 15.3.2 of the TSA as proposed by the Respondents may put restriction on lenders to exercise their right of substitution only by way of assignment of transmission licence and not by way of transfer of shares to its nominee, which cannot be the intent of the said Article.

36. The term ‘assignment of the licence’ used in Article 15.3.2 of the TSA for substitution of TSP cannot be read in a narrow and pedantic manner. The Hon’ble Supreme Court in its judgment in the case of Union of India vs. M/s. D.N. Revri & Co. and [(1961) 3 SCR 1020 Ors.12] has held that the contract has to be read to give efficacy to the contract rather than to invalidate it. The relevant portion of the said judgment is extracted as under:

“7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation...”

37. Accordingly, the meaning of Article 15.3.2 of the TSA must not be thwarted by narrow, pedantic and legalistic interpretation. We cannot ignore the objective with which parties entered into the relevant provisions of the TSA, which was, to allow change of ownership as provided under Article 15.3.2 of the TSA. Even on the pedestal of ‘Officious Bystander Test’, it goes without saying that the Article 15.3.2 of the TSA is intended to transfer the ownership of the licensee to lender’s nominee. Further, as decided in issue No. 1 above, the exercise of substitution rights by lenders is not against any specific stipulation in the contract including equity lock-in commitment specified in Article 18 of the TSA. Therefore, Article 15.3.2 of the TSA ought not to be read in a restrictive manner to impede its implementation. Consequently, it must be the prerogative of the lenders to change the ownership of the licensee either through assignment of licence or by transfer of shareholding. In light of the above, we do not find merit in the submission of the Respondents to restrict change in ownership only through ‘assignment of licence’.

38. Moreover, Article 15.3.2 of the PPA cannot be read in isolation. We note that under Article 15.2.2 of the TSA, TSP has been allowed to create any encumbrances over all or part of the receivables, letter of credit or other assets of the Project in

favour of the lenders as security amounts payable under the 'Financing Agreements'. The relevant extract of Article 15.2.2 of the TSA is 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 Lender's Representative on their behalf, as security for amounts payable "under the Financing Agreement and any other amounts agreed by the Parties"

39. Therefore, in our view, the provision of Article 15.3 of the TSA does not come in the way of the lenders in seeking substitution of Essel Infra with ATL. We also note that security interest has been created for the benefit of the lenders by way of pledging of shares and as per Article 16.2 of the Facility Agreement (entered into between WKTL and its lenders), in the event of default in debt repayments, lenders are, inter-alia, entitled to enforce their rights under security documents. Contention of the Respondents is, therefore, rejected.

.....

42. BESCO has contended that Section 17(3) of the Act deals with different modes of assignment/ transfer of the licence or its utility by a licensee. Section 17(3) of the Act allows transfer of utility by sale, lease, exchange or otherwise with the approval of the Commission as under:

"(3) No licensee shall at 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."

43. BESCO has argued that 'or otherwise' in the Section 17(3) of the Act does not include transfer of shareholding. It has not explained why such an interpretation needs to be given to the phrase 'or otherwise'. In our view, the terms 'transfer of utility' and 'otherwise' have broad connotations which may include the transfer of the management of the licensee through 100% transfer of its shareholding as in the instant case of transfer of the shareholding by the lenders to their nominee by exercising their right of substitution. The Act has clearly envisaged role of the Commission in giving meaning to the phrase 'or otherwise' and that is the reason why any assignment or transfer of utility in any manner cannot be done without prior approval of the Commission.

44. It is pertinent to mention that the Commission, while granting in-principle approval for creation of security interest over all movable and immovable assets of the project in favour of IDBI Trusteeship Services Limited acting for the benefit and on behalf of the lender, had specifically directed that in case of default in debt repayment, a joint application shall be made by the licensee, lenders, security trustee and nominee for assignment of the licence to the nominee of the lenders. The lenders have now approached for transfer of 100% share in WKTL to their nominee ATL which has been selected through a transparent process of bidding. WKTL is the transmission licensee and transfer of 100% of its shareholding to ATL means transfer of the management and control of WKTL from Essel Infra to ATL which has the same effect as assignment of licence to nominee of the lenders.

46. In view of the above, we are of the view that transfer of 100% shareholding of Essel Infra in WKTL by the lenders to their nominee ATL is permissible under Section 17(3) of the Act read with Article 15.3.2 of the TSA and Regulation 12 of the Transmission Licence Regulations."

22. Thus, in the aforesaid order, the Commission has already taken a considered view that the change in ownership of licensee by way of transfer of shareholdings to the nominee of lender is permissible under Section 17(3) of the Act read with Article 15.3.2 of the TSA and Regulation 12 of the Transmission Licence Regulations.

23. As regards the procedure adopted by the lender for selecting its nominee, the lender, PIFSL had appointed an Independent Consultant, ABPS Infra for conducting a global competitive bidding process for finalizing the nominee in a transparent manner. Accordingly, on 17.11.2020, ABPS Infra issued a single RfP for selection of bidder to act as the nominee of lender to acquire shareholding of NRTL and to execute and operate all works associated with the Project under the TSA. As regards the technical requirement, RfP prescribed that the bidder is required to have experience in development of projects in last five years with aggregate capex of Rs.500 crore and single project capex of Rs.100 crore and experience in development, design, construction and O&M of EHV transmission lines. As regards the financial requirement, the RfP prescribed net worth of Rs.250 crore during last three years.

24. In response to RfP, three bidders, namely, (i) Adani Transmission Limited, (ii) consortium of Indigrid 1 Limited and Techno Electric & Engineering Co. Ltd. and (iii) Resurgent Power Ventures Pte. Limited submitted their bids. Based on detailed evaluation of technical bids, all bidders qualified and their financial bids were opened on 6.4.2021. Upon evaluation of the financial bids, Resurgent Power Ventures Pte. Limited emerged as the successful bidder and, accordingly, the Letter of Intent (LOI) was issued to the successful bidder i.e. RVPVPL on 11.11.2021.

25. The Commission in its order dated 8.3.2018 in Petition No. 266/MP/2017 had observed that before agreeing to transfer the licence or the assets of the licensee to the nominee of the lender, the Commission shall evaluate such nominee's experience in the development, design, construction, operation and maintenance of transmission line and ability to execute the Project and to undertake transmission of electricity. As regards RPVPL's experience, it has been submitted that RPVPL and its affiliate have considerable experience in developing and operating infrastructure projects over the years and have demonstrated strong track record of turnaround of stressed assets. RPVPL is co-sponsored by Tata Power Company Limited (in short, 'Tata Power') through its wholly owned subsidiary Tata Power International Pte. Limited with 26.04% stake and ICICI Bank Limited with 9.95% stake. In addition, sovereign wealth funds, namely, Kuwait Investment Authority and Oman Investment Authority also own 33.11% and 30.90% stake respectively in RPVPL.

26. According to the Petitioners, RPVPL through its wholly owned subsidiary Renascent Power Ventures Pvt. Ltd. owns 75.01% stake in Prayagraj Power Generation Company Ltd. which owns and operates 1980 MW supercritical thermal power plant located in the State of Uttar Pradesh, acquired under a lender led competitive stressed asset resolution process. The said plant consists of power evacuation system at 765 kV and 400 kV levels, through 765/400 kV switchyard. Further, it has been submitted that RPVPL's affiliate, Tata Power is the largest integrated power company with significant international presence. As on 30.9.2021, Tata Power has an installed generation capacity of 13,068 MW in India and has presence in all segments of power sector including transmission. Tata Power has considerable experience in development, design, Construction and Operation & Management of EHV transmission lines for transmission of electricity and has

operational transmission lines of 3,539 ckt km. Hence, in our view, RPVPL through its affiliate Tata Power, possesses the necessary qualification and expertise to carry out the business of transmission.

27. In light of the above, the Commission allows transfer of shareholding of NRTL from Essel Infra to RPVPL under Article 15.3.2 of the TSA read with Section 17(3) of the Act subject to the following conditions:

- (a) On transfer of entire shareholdings of Essel Infra in NRTL to RPVPL, NRTL shall become fully owned subsidiary of RPVPL. It is directed that RPVPL shall ensure that such transfer does not contravene any provisions of the applicable laws.
- (b) Since after the transfer, NRTL shall become wholly owned subsidiary of RPVPL, the transmission licence held by NRTL shall not be assigned or transferred in any manner in favour of RPVPL without approval of the Commission.
- (c) RPVPL shall ensure that NRTL complies with all its obligations under the various Agreements in force and Agreements to be entered including the obligations towards its lenders and LTTCs.
- (d) RPVPL shall not divest any of its interest in NRTL or otherwise part with this company without the prior approval of this Commission.
- (e) As committed by RPVPL, there shall be no change in the transmission charges being paid/to be paid by the beneficiaries of NRTL pursuant to this process which shall continue to be governed as per the TSA.

28. The Petitioners have submitted that since the lender's nominee would undertake the Project, it is imperative that a reasonable protection is accorded to RPVPL to undertake the implementation works and commission the Project post acquisition of the shareholding. The Petitioners have submitted that this would not only be in the interest of the Project proponent and lender but is also in overall

interest of all the beneficiaries of the Project. Therefore, they have requested that in the interim, direction may be issued to restrain the beneficiaries of the transmission system from taking any coercive actions under the TSA and supplementary TSA including encashing of CPG (Contract Performance Guarantee) till completion of the Project so that the transmission system can be expeditiously developed by the nominee, RPVPL.

29. We have considered the submissions made by the Petitioners. We note that NRTL has filed Petition seeking extension of scheduled commercial date of the Project on account of occurrence of various force majeure events, which is pending at diary stage being Diary No. 575 of 2020 since NRTL has not rectified the defects pointed out by the Registry of the Commission so far. Hence, in our view, it would be more appropriate to consider such reliefs under the aforesaid Petition, which would enable the Commission to look into the current status of the Project, anticipated COD of the Project as per RPVPL and the force majeure events being faced by the licensee, etc.

30. In light of the above discussions and findings, the Petition No. 267/MP/2021 is disposed of.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson